EQUISTAR

Equistar Chemicals, LP
1221 McKinney, Ste. 700
Houston, Texas 77010

Mark A. Waite
Senior Counsel, Litigation
BOARD CERTIFIED-CIVIL TRIAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION
713-309-4986 Phone
713-309-4631 Fax

August 9, 2012

VIA EMAIL: jstocks@centralillaw.com
AND U.S. MAIL

Jerrold H. Stocks, Esq.
FEATHERSTUN, GAUMER, POSTLEWAIT,
STOCKS, FLYNN & HUBBARD
225 North Water Street, Suite 200
Decatur, IL 62523

RE: Mason Manufacturing, Inc.
Rectifier replacement can project, Equistar's Tuscola, Illinois facility

Dear Mr. Stocks:

This letter is a follow-up to our telephone conversation today and responds to your letter of August 3, 2012. As I stated in our call, I serve as in-house legal counsel for Equistar Chemicals, LP ("Equistar") and will be the point of contact for Equistar in this matter.

For the reasons stated below, Equistar does not agree with the contentions in your letter that Mason Manufacturing, Inc. ("Mason") is owed money on the above-referenced project or that it has a valid lien against Equistar's facility. This is because the work, services and final delivered rectifier cans fabricated by Mason (collectively the "Work") was deficient and in breach of the parties' agreement, as explained in more detail below. Equistar has incurred, and is incurring, substantial costs in the correction of the Work, which goes well beyond Mason's final invoices of $80,833. For the reasons detailed below, Equistar respectfully rejects Mason's demand for payment, and additionally demands that Mason reimburse all costs incurred (and to be incurred) by Equistar in correcting Mason's deficient Work. If Mason does not agree, Equistar may have no choice except to proceed with formal legal action.

The Project

The Project at issue involved Mason's design and fabrication of replacement cans for Equistar's rectifier column at its Tuscola, Illinois facility. In general terms, Equistar's rectifier

column is a tall cylindrical column with various internal components such as trays. The column itself is made up of multiple "cans", which serve as the round shell sections of the tall column. These cans are assembled one on top of the other vertically and capped by a top head. The column and its components operate by taking in various feedstock streams and distilling those streams to create refined chemical products. The rectifier column has operated successfully as an integral part of Equistar's Tuscola facility for many years. The cans being provided by Mason were simply replacing those already in operation. Once designed and fabricated by Mason, the cans would be installed by another contractor in the field.

Mason's work was performed pursuant to a Purchase Order dated April 8, 2011. For convenience, a copy of the Purchase Order is attached as Exhibit A to this letter. The Purchase Order delivery date was December 12, 2011 or sooner, which was based on an estimate of 26-27 weeks of fabrication and delivery time after approval drawings. The total amount to be paid to Mason was $582,097.01. A later Purchase Order for $44,920 was issued to cover the costs of attached platforms and ladders, though it is not at issue here.

Mason's Performance

Mason began its work after issuance of the Purchase Order. On or about June 24, 2011 Mason issued its shop drawings for the cans, and Mason then issued various revisions of those drawings. A copy of the revised shop drawing issued by Mason and approved by Equistar on October 3, 2011 is attached as Exhibit B. The shop drawing shows an interior diameter ("ID") of 112 ¾ inches (or, stated in 16th inches, 112 12/16 inches) for the cans. The specifications for the cans as depicted in Mason's approved shop drawings were critical, as the cans form a column in which trays move up and down in a friction fit arrangement allowing for proper distillation of the feedstock.

The first cans were delivered to Equistar on or about March 27, 2012. Unfortunately, the cans were not fabricated according to the specifications of the approved shop drawings. The cans as constructed had IDs totaling only 112 7/16 inches, and thus were 5/16 inches (over ¼ of an inch) too small. A photograph of the measurement of one can is attached as Exhibit C. The result of this deficiency is that the interior trays will not fit and cannot be put into service, thus rendering the column unable to operate. There is no dispute that the cans were fabricated too small. In fact, after the issue was discovered Mason acknowledged that corrections would be needed for the trays to fit (though Mason disclaimed responsibility). There were other problems with the cans, including poor weldment fusions, though the biggest issue was the size defect.

Mason's performance has put Equistar in a difficult position. Equistar has had to develop a corrective solution, and faced the prospect of re-ordering all new cans or, alternatively, all new trays. Equistar met and communicated multiple times with Mason, but

unfortunately Mason denied all responsibility and stated that it would provide assistance only if Equistar bore all costs, including time and materials for Mason's work. Equistar was not willing then, and is not willing today, to pay Mason for Mason to correct its own defective work. Mason's efforts to blame Equistar for the problems are not acceptable. Mason has yet to explain why its delivered cans were consistently nearly ¼" smaller in diameter than what its shop drawings depicted they would be.

The Corrective Efforts Moving Forward

As a result of Mason's defective work, the Project is substantially behind schedule. Moreover, Equistar has had to go to great efforts to find a corrective solution other than ordering all new cans or trays. It has done so by finding a service provider which will be able to re-work the defective Mason cans so the existing trays will fit and the cans will have proper weldment fusions. The details of that re-work are being finalized now. The cost is expected to be approximately $254,000. Equistar will look to Mason for full reimbursement of those costs. Additionally, Equistar continues to accrue costs for scaffolding and other rental due to the delay of the Project, which currently total approximately $30,300. Equistar will look to Mason for reimbursement of these costs.

Your letter asked that Equistar preserve all documents, data, *etc.* relating to this dispute. Equistar has no problem doing that. In light of the issues involved in this matter and Mason's position that it is not responsible, we request that Mason do the same by preserving all documents, agreements, design drawings, data, emails, texts or other communications, photographs or videotapes, and all other documents, data or information relating to its Work.

Your letter also asked that Equistar preserve the cans and other as delivered by Mason. Mason has never previously asked that this be done, and it is not reasonable to do so now. Equistar is not willing to further delay the correction of the cans and, in turn, further delay their installation or the operation of the refurbished column. Mason has had ample opportunity to observe, inspect, photograph or otherwise analyze the cans and its work. If Mason would like to observe the cans again please contact me immediately to coordinate it and we will make every accommodation possible which does not impact the progress, safety and effectiveness of the corrective work. From our phone call, I understand that you will check with your client on this issue today.

Demand for Reimbursement of Costs

Equistar hereby demands that Mason reimburse it for all costs incurred as a result of Mason's defective work. This includes the costs of correction of the cans and the cost impact of continued rental of scaffolding and other materials. The amount withheld on Mason's last invoices ($80,833) would be credited against these costs.

The Purchase Order supports Equistar's claims. Among other things, Mason agreed in the Purchase Order that its services would be performed in a good and workmanlike way, and in accordance with specifications and drawings which it furnished to Equistar, and which were approved by Equistar (*see, e.g.*, Article 19). Mason also agreed that it would repair or replace all defects in material, design or workmanship, and if it failed to do so, Equistar would have the right to correct them and be reimbursed by Mason for its costs of correction (*see, e.g.*, Article 22). These are straightforward and standard provisions, and Equistar seeks only to recover its legitimate and recoverable damages.

Given that the costs of correction are being finalized now, we are willing to reach an agreement that the final costs will be paid by Mason once confirmed and incurred. However, if Mason continues to contest its responsibility for this matter, we may have no choice except to pursue legal action. If forced to pursue legal action, Equistar will seek recovery of all damages it has incurred, including these costs of correction, plus all reasonable and necessary attorneys' fees and costs which may be recoverable pursuant to the Purchase Order and applicable Texas law (TEXAS CIVIL PRACTICES & REMEDIES CODE §38.001).

I look forward to hearing from you as soon as possible and hope that we are able to resolve this important issue.

Sincerely,

Mark A. Waite
Senior Counsel, Litigation

EXHIBIT A

lyondellbasell

Purchase order

PO number/date Version
4401268930 / 04/08/2011 2
Contact person/Telephone
CAROL LESCHEWSKI/815-942-7345

Our Faxnumber
713-495-4950

MASON MFG INC
1645 NORTH RAILROAD AVE
DECATUR IL 62524-3577

Fax 217-422-2704

Your supplier number
48313

Please deliver to:
Equistar Chemicals, LP
625 East U.S. Highway 36
Tuscola IL 61953

Terms of delivery: FOB PP & ADD
Terms of payment: Net 30 Days (After Invoice Date)
Currency: USD

CHANGE ORDER TO ADD MONEY. EMAILED TO TY MASON

QUOTE PER EMAIL DATED 5/18/11...B & C.

CHANGE ORDER TO CORRECT TEXT OF ORDER.

Purchase order emailed to Ty Mason at ty@masonmfg.com

Pricing per quotation #11-04-02

Please sign all pages to acknowledge receipt of the order, agreement to pricing stated on the order and adherence to Lyondell/Equistars Terms and Conditions. No other copy of this purchase order will be sent.

Signed Vendor Acceptance copy and all communications should be sent to address above, Attention: Purchasing Department

By _____ By _____
Supplier valid without signature from our company

SEND INVOICE TO:
Email: disbursements.invoices@lyondellbasell.com, or
EQUISTAR CHEMICALS, LP
P.O. Box 3448
Houston, Texas 77253-3448

PO and line item number must appear on all invoices, packages, shipping papers and correspondence. Include packing list in each package.

Disbursements Vendor Line: Houston 713-652-7480 or Toll Free 877-652-7480. Faxed invoices are accepted at 713-495-4947.

IMPORTANT - Please provide written confirmation of your acceptance to these Terms and Conditions. If written objection to any of such terms has not been received by Buyer within the earlier of five business days of your receipt of this Purchase Order or your shipment of the goods or performance of the service, you will be deemed to have Accepted these Terms and Conditions.

MASON MFG INC
1645 NORTH RAILROAD AVE
DECATUR IL 62524-3577

Fax 217-422-2704

PO number/date
4401268930 / 04/08/2011

IMPORTANT Although your signature is required, you will be deemed to have Accepted these Terms and Conditions if written objection to any of such terms has not been received by us within the earlier of five business days of your receipt of this Purchase Order, or your shipment of the goods or performance of the services.

Item	Material	Description		
	Qty.	Unit	Price per unit	Net value

00001 TO1213 RectifierReplacement Can Sections

1.000 Serv. Unit

Delivery date: 12/12/2011

Your order acknowledgement: conf email 4/11/11

TO1213 Rectifier Replacement Can Sections

SERVICES SCOPE OF WORK TEMPLATE - GENERAL SERVICES

GENERAL INFORMATION
Field Contact Name and Phone Number:
Brian Spencer 217-253-1534
John Morris 217-253-1246
Plant / Site and Area / Location: LyondellBasell Industries Tuscola Plant (TCO)

Start Date: Start Date: Receipt of purchase order
Complete/Delivered to site - December 12, 2011 or sooner

SCOPE OF WORK
Onsite Work Required (No)
Offsite Work Required (Yes)

Detailed (Narrative) Description of Work to Be Performed:
Provide labor and material for the Following:
Engineering Contact: Jimmy Nugent 217-253-1251

Sections #8 through #15 and Top Head

NOTE: BODY FLANGES ARE SA-105 CARBON STEEL WITH SA-240-304/L SS MACHINED LINER.

One # (1) # 1/2" minimum thick x 113-1/2# OD ASME F&D top head complete with internal angles, bolting flange and nozzle #A#. The top head is to be fabricated with an SA-105 carbon steel body flange, SA-240, SA-182 and SA-312 type 304/304L dual certified stainless plate, pipe and flanges.

Signed Vendor Acceptance copy and all communications should be sent to address above, Attention: Purchasing Department

SEND INVOICE TO:
Email: disbursements.invoices@lyondellbasell.com, or
EQUISTAR CHEMICALS, LP
P.O. Box 3448
Houston, Texas 77253-3448

By _____ By _____
Supplier valid without signature from our company

PO and line item number must appear on all invoices, packages, shipping papers and correspondence. Include packing list in each package.

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Fax 217-422-2704

Item	Material Qty.	Unit	Description Price per unit	Net value

One # (1) # 3/8# thick x 4#-11-15/16# overall length shell section complete with internal angles, bolting flanges and nozzles #F,F1,H,L,Q,Q1,R,S#. Section #15 is to be fabricated with SA-105 carbon steel body flanges, SA-240, SA-182 and SA-312 type 304/304L dual certified stainless plate, pipe and flanges.

Seven (7) # 3/8# thick x 6#-11-15/16# overall length shell sections complete with internal angles, bolting flanges and all nozzles #D, D1,2,3,E,E1,G,G1,L,M, M1,2,3,4,N,N1,2,Q,Q1,2,3# found in Sections #8 through #14. Sections #8 through #14 are to be fabricated with SA-105 carbon steel body flanges, SA-240, SA-182 and SA-312 type 304/304L dual certified stainless plate, pipe and flanges.

Price(Lot)##########..$ 458700

Estimated delivery: (26-27) weeks after approval drawings.

GENERAL CLARIFICATIONS AND EXCEPTIONS:

1) Our prices are based on Equistar Chemical#s proposed replacement thicknesses and US Industrial Chemical Co. drawing #5V-3824 Rev. 1, dated 2-20-63. Code stamping is included in our prices. Note: copper lining internal lining is not included in our price.
2) All nozzles are offered as 150# RF weld neck nozzles. Nozzle necks are to be fabricated from schedule 40 SA-312 welded pipe.
3) Carbon steel Body Flanges are to be abrasive blasted and prime painted.
4) (1) - set of replacement SA-193/194 studs/nuts have been included in our price.
   Operating gaskets have been included in price, and will ship loose(garlock gylon 3504).
5) Our price does not include labor or materials for field assembly or for the purchase and installation of internals.

SUGGESTED PRICING STRATEGY -

Start Date: Receipt of purchase order
Complete/Delivered to site - December 12, 2011 or sooner

Gross Price	582,097.01	USD	1 SU	582,097.01
Net incl. Discou	582,097.01	USD	1 SU	582,097.01

the item contains the following service:

1	ESN# 20% DRAWING APPR 108,458 DOL	20% upon submittal of app drawings 1.00 USD / 1		108,458.00
2	ESN# 30% REC OF MAT 162,687 DOL	30% upon receipt of major materal 1.00 USD / 1		162,687.00

Signed Vendor Acceptance copy and all communications should be sent to address above, Attention: Purchasing Department

SEND INVOICE TO:
Email: disbursements.invoices@lyondellbasell.com, or
EQUISTAR CHEMICALS, LP
P.O. Box 3448
Houston, Texas 77253-3448

By _____ By _____
Supplier valid without signature from our company

PO and line item number must appear on all invoices, packages, shipping papers and correspondence. Include packing list in each package.

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MASON MFG INC
1645 NORTH RAILROAD AVE
DECATUR IL 62524-3577

Fax 217-422-2704

PO number/date
4401268930 / 04/08/2011

Item	Material Qty.	Unit	Description Price per unit	Net value
3	ESN# 20% COMP BODY FLG 108,458	20% upon comp of body flg mach. DOL	1.00 USD / 1	108,458.00
4	ESN# 30% UPON COMP. 202,494	30% upon completion DOL	1.00 USD / 1	202,494.00

estimated value of unplanned services: 0.01

00002 CO - Chg (17) body flanges to lap-joints

1.000 Serv. Unit

Delivery date: 06/08/2011

Your order acknowledgement: conf email 6/14/11

Change (17) body flanges from slip-on w/ liners to lap joint w/ stub ends. Reference meeting notes 5/18/2011.

Gross Price	0.01	USD	1 SU	0.01
Net incl. Discou	0.01	USD	1 SU	0.01

the item contains the following service:

estimated value of unplanned services: 0.01

00003 CO - Add LyondellBasell Engr Standards

1.000 Serv. Unit

Delivery date: 06/08/2011

Your order acknowledgement: conf email 6/14/11

Add LyondellBasell Engineering Standards to our scope (with exceptions).Reference meeting notes 5/18/2011.

Gross Price	0.01	USD	1 SU	0.01
Net incl. Discou	0.01	USD	1 SU	0.01

the item contains the following service:

estimated value of unplanned services: 0.01

Total net value excl. tax USD **582,097.03**

Signed Vendor Acceptance copy and all communications should be sent to address above, Attention: Purchasing Department

By _____ By _____

Supplier valid without signature from our company

PO and line item number must appear on all invoices, packages, shipping papers and correspondence. Include packing list in each package.

SEND INVOICE TO:
Email: disbursements.invoices@lyondellbasell.com, or
EQUISTAR CHEMICALS, LP
P.O. Box 3448
Houston, Texas 77253-3448

Disbursements Vendor Line: Houston 713-652-7480 or Toll Free 877-652-7480. Faxed invoices are accepted at 713-485-4947.

IMPORTANT - Please provide written confirmation of your acceptance to these Terms and Conditions. If written objection to any of such terms has not been received by Buyer within the earlier of five business days of your receipt of this Purchase Order or your shipment of the goods or performance of the service, you will be deemed to have Accepted these Terms and Conditions.

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DECATUR IL 62524-3577

Fax 217-422-2704

ONSITE / OFFSITE SERVICES PURCHASE ORDER TERMS AND CONDITIONS

PARTIES - The purchaser of goods and/or services will be referred to as "Buyer" and the supplier of goods and/or services under this "Purchase Order" will be referred to as "Seller". Seller and Buyer shall individually be referred to as a "Party" and collectively as the "Parties".

Article 1 - Acceptance: The Purchase Order for the purchase of goods or performance of services by Buyer from Seller and these General Terms and Conditions, which are incorporated into and made a part of such Purchase Order, are collectively referred to as the "Contract". No confirming orders, or other documentation, written or oral, by Seller modifies, alters, or changes the express written terms of this Contract. If any additional or different terms are proposed by Seller while accepting this Contract, including strikeouts of language, such additional or different terms will be considered as a proposal by Seller for a modification of this Contract and will be effective only if expressly accepted in writing by Buyer. The return of an acceptance copy signed by Seller, shipping of any of the goods, or performance of any of the services constitutes acceptance by Seller of this Contract.

Article 2 - Assignments or Subcontracts: Seller will not assign or subcontract this Contract in whole or in part without Buyer's prior written consent. The term "Subcontractor" includes all material-men, suppliers, and subcontractors of any tier who have entered into a contract, expressed or implied, with Seller to perform a portion of the services or supply of the goods under this Contract. If a Subcontractor is used by Seller, Seller agrees to pay such Subcontractor and provide Buyer with a completed bill paid affidavit and waiver of liens from the Subcontractor, indicating that the Subcontractor has been paid by Seller. The Waiver of Lien form can be obtained from Buyer's internet site:
www.lyondellbasell.com/contactandsupport/SupplierInformation.

Article 3 - Change Orders, Invoicing and Payment: In no event shall Seller commit or incur total expenditures in excess of the amount specified in this Contract unless prior written authorization is received from Buyer. If while Seller is performing services under this Contract it appears that the cost will exceed the purchase price or budget estimate set forth in the Contract, then Seller shall: (i) promptly notify Buyer, and (ii) await authorization via a Change Order to this Contract. The Parties agree that if Seller performs additional or changed services without first obtaining a Change Order, Seller shall not be entitled to reimbursement from Buyer for such additional or changed work. Invoices shall be submitted in accordance with the instructions provided on Buyer's Internet site: www.lyondellbasell.com/contactandsupport/SupplierInformation. All payments shall be sent to Seller via electronic funds transfer ("EFT"). Should Buyer dispute the accuracy or amount of any invoice, Buyer may withhold payment of the disputed amount of the invoice without penalty or interest and will promptly notify Seller specifying the reasons therefore. In the event of such dispute, an audit shall be conducted by Buyer in order to arrive at the amount mutually determined and agreed to by both Parties. Seller shall continue to be obligated to perform its work, services, and other obligations under this Contract pending resolution of any dispute.

Article 4 - Time of Delivery of Performance: (a) Time is of the essence. Buyer reserves the right to cancel this Contract or any part of it and reject delivery of goods or performance of services if: (1) Seller has not delivered the goods, or started, or completed performance of the services by the time specified in this Contract (or within a reasonable time if not otherwise specified); or (2) Seller's delivery of goods or performance of services is not in accordance with the Contract specifications. Seller shall be liable to Buyer for all loss or damage sustained by Buyer as a result of Seller's delay or failure, with the exception of delays caused by Buyer or delays beyond Seller's reasonable control. Buyer will not be required to notify Seller of Seller's default or otherwise put Seller in default; (b) This Contract or any portion thereof is subject to cancellation by either Party upon thirty (30) calendar day's written notice in the event the other Party fails to comply with its material obligations under this Contract; (c) Buyer shall have the right to terminate this Contract or any portion of it, for any reason and at any time during the term this Contract by giving prior written notice to Seller. Upon exercising such right to terminate, Buyer's sole liability to Seller shall be to compensate Seller for the reasonable value of the services performed or goods actually delivered as of the date of termination.

Article 5 - Entire Agreement; Change Notice: No change to any of the terms and conditions of this Contract will be effective unless both Seller and Buyer have agreed to the change by amending this Contract in writing. Any changes to this Contract must be approved by a written change order to the Contract (e.g. price increase). Seller shall not be entitled to reimbursement by Buyer for any price or schedule changes which have not been agreed to in writing. Regardless of any previous oral or written communication, the written terms of this Contract constitute the entire agreement between Seller and Buyer.

Article 6 - Compliance: Seller represents and warrants that all goods which Seller will deliver and services which Seller will perform under this Contract will be accomplished in compliance with all applicable standards, codes, specifications; and federal, state, and local laws, rules and regulations.

Article 7 - Seller's Indemnity to Buyer: Seller agrees that Seller will assume Buyer's defense and indemnify and hold Buyer harmless for any costs, damages (including damage to property or the environment), injuries (including injury to, illness, or death of persons), liabilities, claims, settlements, demands, lawsuits, penalties, interest, taxes, or liens which Buyer may incur, be found liable for,

MASON MFG INC
1645 NORTH RAILROAD AVE
DECATUR IL 62524-3577

Fax 217-422-2704

or is required to pay (collectively called "Claims"), which arise out of or are related to Seller or Seller's Subcontractor's furnishing goods or providing services to Buyer under this Contract. THIS PROVISION WILL REQUIRE SELLER TO INDEMNIFY AND DEFEND BUYER FOR CLAIMS CAUSED BY BUYER'S OR ITS EMPLOYEES' NEGLIGENCE WHEN SUCH CLAIMS ARISE OUT OF THE JOINT OR CONCURRENT NEGLIGENCE OF: (1) SELLER AND SELLER'S EMPLOYEES (INCLUDING SELLER'S SUBCONTRACTORS AND THEIR EMPLOYEES), AND (2) BUYER AND ITS EMPLOYEES. HOWEVER, SELLER WILL NOT BE REQUIRED TO INDEMNIFY BUYER: (1) IF THE CLAIM IS THE RESULT OF BUYER OR BUYER'S EMPLOYEE'S SOLE NEGLIGENCE, (2) FOR THE PORTION OF ANY CLAIM WHICH IS CAUSED BY BUYER OR BUYER'S EMPLOYEE'S GROSS NEGLIGENCE OR WILLFUL MISCONDUCT, OR (3) FOR THE PORTION OF ANY CLAIM WHICH IS CAUSED BY A THIRD PARTY OTHER THAN SELLER'S EMPLOYEES OR SELLER'S SUBCONTRACTORS OR THEIR EMPLOYEES. This indemnity is separate from Seller's insurance, and Seller will be responsible even if Seller's insurance carrier denies coverage.

Article 8 - Patents, Trade Secrets, Copyrights and Confidential Information: (a) Seller agrees to indemnify, hold harmless, and defend Buyer and any of Buyer's parents, subsidiaries, or affiliates from any suit, claim, or demand alleging infringement of any patent or copyright, or the appropriation of any confidential information or trade secrets in the United States, in the country of source, and in the country of destination, based upon the performance of the services or the sale or use of goods supplied under this Contract. Seller agrees to keep confidential and not to disclose to others or to use in any way to Buyer's detriment, confidential business, or technical information that Buyer may have discussed in conjunction with the negotiation or performance of this Contract, or that Seller may be exposed to as a result of entering Buyer's property to deliver goods or perform services under this Contract. Notwithstanding restrictive legends to the contrary, no confidentiality obligations will be imposed on Buyer by acceptance of materials supplied by Seller; (b) Title to all plans and specifications and technical data, including but not limited to: drawings, flow diagrams, layout details and specifications, computer programs and their contents furnished to Seller and/or Seller's Subcontractors by Buyer or developed by Seller and/or Seller's Subcontractors at Buyer's request or direction or as a result of this Contract will belong to and become Buyer's property.

Article 9 - Taxes: (a) Seller shall be responsible for any and all Taxes, duties, levies or charges imposed on Seller by any governmental authorities for all services provided under this Contract. Buyer shall be responsible and pay for any and all Taxes, duties, levies and charges imposed on Buyer by any governmental authorities for all purchases made under this Contract. As used in this Contract, the term "Tax" or "Taxes" shall mean any and all income, profits, payroll, employment, gross receipts, severance, property, transportation, sales, use, excise, franchise, value-added, withholding, wealth, welfare, disability, stamp, occupation, or other similar taxes imposed by any governmental entity (whether national, local, municipal or otherwise) or tax authorities (whether national, local, municipal or otherwise), together with any interest, penalties, or additions with respect thereto; (b) Notwithstanding the provisions in subparagraph (a) above, in the event that Buyer submits a sales tax exemption certificate or direct pay exemption certificate to Seller, Seller shall not include any sales, use, transfer, or similar taxes imposed by any taxing authorities in the United States on any of its invoices to Buyer. With respect to the taxing jurisdictions where Buyer does not claim exemption from tax, Seller shall include any applicable sales, use, transfer, or similar taxes in all of its invoices to Buyer as a separate charge on each invoice. Buyer's sales tax exemption certificates, when applicable, may be obtained from Buyer's Internet site: www.lyondellbasell.com/contactandsupport/SupplierInformation.

Article 10 - Governing Law: This Contract will be governed by the laws of the state of Texas without regard to its choice of law provisions. However, prior to and after filing any lawsuit, Seller and Buyer agree to make a good faith effort to resolve disputes through settlement or through use of a neutral third party mediator. Seller and Buyer agree that any litigation involving this Contract will be brought exclusively in federal or state courts located in Harris County, Texas and Seller and Buyer waive the right to file or defend an action elsewhere.

Article 11 - Audit: Seller agrees to maintain all of Seller's records relating to the quantity, quality, price, cost of, and payment for the goods sold or the services performed under this Contract and allow Buyer to inspect, copy, and audit those records during normal business hours for a period of up to seven (7) years following Seller's delivery of the goods or performance of the services.

Article 12 - Conflict of Interest: Seller agrees that neither Seller nor any of Seller's employees, Subcontractors and their employees, directors, or agents will give to or receive from Buyer, or its employees or agents, any gifts or entertainment of significant value or any commission, fee or rebate in connection with this Contract. In addition, neither Seller nor any of Seller's directors or employees will enter into any business arrangement with any of Buyer's employees or agents who are not acting as Buyer's representative, without giving Buyer prior written notification.

Article 13 - Insurance: (a) Seller will maintain, in effect, the following types and amounts of insurance with insurance companies satisfactory to Buyer: (1) Workers' Compensation with Employers' Liability with limits of not less than $1,000,000 for each accident; (2) Commercial General Liability insurance, including contractual liability insuring the indemnity agreement set forth in this Contract and products-completed operations coverage with limits of not less than $1,000,000 for property damage, bodily injury, sickness or death, in any one occurrence, (3) Automobile Liability insurance with limits of not less than $1,000,000 applicable to property damage, bodily injury, sickness or death in any one occurrence; and (4) Umbrella Liability Insurance in the amount of $5,000,000 covering the risks and in excess of the limits set forth in (1), (2), and (3) above; (b) Prior to commencing services, Seller shall furnish certificates of

insurance to Buyer evidencing the insurance required herein. Each certificate shall provide sixty (60) calendar days prior written notice shall be given to Buyer, in the event of cancellation or material change of insurance coverage or endorsements required hereunder. Each certificate shall identify the amount of self-insured retention or deductible for each of the required coverage if the amount of the retention or deductible exceeds 10% of the required limit or $100,000, whichever is less. In the event of a loss related to the products or services provided under this Contract, if Buyer intends to file a claim as an additional insured under Seller's insurance policy, Seller shall provide true copies of the actual policies within thirty (30) calendar days of notification of the loss; (c) All certificates must contain reference to the following endorsements: All policies shall be endorsed to provide that underwriter's and insurance companies of Seller shall not have any right of subrogation against Buyer, its members, subsidiaries, and affiliated companies or against their respective agents, employees, officers, invitees, servants, contractors, subcontractors, underwriters, and insurance companies. This requirement is not applicable for Workers' Compensation in monopolistic state fund states. Buyer, its members, partners, subsidiaries, and affiliated companies and their respective employees, officers, and agents shall be named as an additional insured in each of Seller's policies except Workers' Compensation; however, such extension of coverage shall be limited to this Contract and shall not apply with respect to any obligations, if any, for which Buyer has specifically agreed to indemnify Seller.

Article 14 - Waiver of Mechanic's Liens: To the extent Seller has received payment from Buyer, Seller agrees that it will not file and agrees to waive any right it may have to file a mechanic's or material-men's lien against Buyer or any of Buyer's facilities for any labor or material which Seller has furnished as part of the performance of its obligations under this Contract. In the event any such lien is filed by Seller or one of Seller's Subcontractors who has furnished labor or material, Seller will at Seller's own expense take steps to promptly remove the lien by bond or otherwise. Seller further agrees to indemnify and hold Buyer harmless for any loss or damage which Buyer may suffer or incur as a result of Seller's failure to comply with this provision.

Article 15 - Services Provided in Buyer's Facilities: When performing Work at Buyer's facility, Seller agrees to comply with the most current version of Buyer's "Rules for Contractors ("Rules")" located on Buyer's Internet site: http://www.lyondellbasell.com/contactandsupport/SupplierInformation. Seller shall confirm that it has accessed, reviewed, and understands the Rules by signing and returning the Contractor Acceptance Form page at the end of the Rules and sending it back to Buyer's Purchasing Representative, not later than ten (10) calendar days following execution of this Contract. In the event Seller is unable to access the Rules on the website within ten (10) calendar days following execution of this Contract, Seller shall notify Buyer's Purchasing Representative and Buyer will promptly provide Seller with a hard copy of the Rules. In the event Seller fails to notify Buyer of its inability to access the Rules within ten (10) calendar days following execution of this Contract, Seller shall be deemed to have received, reviewed and understood the Rules.

Article 16 - Safety: If services to be performed require that Seller enter Buyer's facility, Seller agrees that Seller will perform the services in a safe and prudent manner in accordance with Buyer's site specific plant requirements. Seller agrees to comply with such plant requirements while performing services at or making deliveries at Buyer's facilities. Seller will be solely responsible for notifying and training Seller's employees, Subcontractors, and agents with respect to Buyer's plant requirements, the Rules and all applicable laws and regulations. Seller will cause Seller's employees, agents and Subcontractors (and their employees) to wear all personal protective equipment required by applicable law, Buyer's area work permits, site specific plant requirements, or the Rules. If Buyer notifies Seller that Seller is not in compliance with the terms of this provision, Seller will immediately make all reasonable efforts to correct the non-complying condition. If Seller fails to do so, Buyer has the right to require Seller to stop performance of all or any part of the services. Seller will not be entitled to an extension of time to complete performance of the services or to any compensation for additional costs incurred, damages suffered, or for the work time lost during the suspension.

Article 17 - Security: In the interest of homeland security and to help ensure the safety and security of all persons working at Buyer's facility, the Parties agree that Seller and/or Subcontractors shall perform background checks of each of its employees who are to perform services at Buyer's facility to ensure they meet the criteria set forth in the Background Check Instructions provided in the Rules.

Article 18 - Statutory Permits: Seller agrees to obtain and maintain all required federal, state, and local permits and licenses required for performance of the services at Seller's sole cost and expense.

Article 19 - Performance: If services to be performed require that Seller enter Buyer's facility, Seller acknowledges that Seller has inspected or has been given the opportunity to inspect the premises upon which Seller will perform the services in order to become familiar with all applicable site conditions. Seller agrees to (1) perform all services in a good, workmanlike, efficient, and safe manner; (2) supply all necessary labor, materials, tools, and equipment, (3) conform to all required governmental and accepted industry standards of engineering, construction, and safety, (4) comply with Buyer's plant specific requirements and the Rules, and (5) perform the services in accordance with the specifications and drawings which Buyer has provided to Seller or which Seller has furnished and Buyer has approved. Seller agrees that Seller will be fully responsible to Buyer for the errors, acts, and omissions of Seller's employees and Seller's Subcontractors (and their employees) assisting Seller in performing the services, as if such errors, acts, and omissions were committed by Seller. Seller agrees that all supervisory and craft personnel will have the skills, licenses, and training necessary for performance of the services as required by governmental regulation, industry standards, and Buyer's Rules.

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Article 20 - Independent Seller: Seller is an independent contractor in all respects with regard to the performance of the services. Seller, Seller's employees, or Subcontractors performing the services will not be considered for any purpose to be Buyer's employees, agents, or representatives. Buyer is interested in the results of the services and will not direct or control the manner or method in which Seller performs the services.

Article 21 - Hazardous Materials: If services to be performed require that Seller enter Buyer's facility, Seller acknowledges that Seller understands the performance of the service may involve or may expose persons performing such services to materials, substances, pollutants, or contaminants which could be hazardous to human health and/or the environment ("Hazardous Materials"). Seller acknowledges that Seller has considerable experience working in and around refineries and chemical facilities and that Seller is generally aware of the types of materials and substances used or contained in such facilities, including Hazardous Materials, and the risk which they pose to human health or the environment. Buyer has made or will make available to Seller for review, Material Safety Data Sheets ("MSDS") for those substances and materials which Seller's personnel may be exposed to while performing services in Buyer's facility. Seller agrees that Seller will ensure that Seller's employees and Seller's Subcontractors familiarize themselves with the information contained in such MSDS.

Article 22 - Warranty: Seller warrants that all services will be performed in a good and workmanlike manner, in compliance with all applicable laws and in accordance with the latest recognized industry standards as practiced by companies performing similar services. Seller warrants that the services will be free from defects in workmanship and will be performed in accordance with the plans and specifications which Buyer has furnished to Seller or which Seller has furnished and Buyer has approved. While Seller is performing the services and through the one (1) year period following Seller's completion of the services (the "Warranty Period"), Seller will repair or replace at Seller's sole cost and expense all defects in material, design or workmanship which Buyer notifies Seller about during the Warranty Period. If Seller fails to correct such defects within a reasonable time, Buyer will have the right to correct them and Seller agrees to reimburse Buyer for Buyer's out of pocket cost to correct the defects. Seller agrees to pass on all warranties of Seller's vendors to Buyer, but this will not relieve Seller of any warranty Seller has separately given to Buyer.

Article 23 - Completion and Waiver of Liens: Upon completion of the services and Buyer's final inspection and approval of the services, Seller will submit Seller's invoice for final payment for the services and will attach all required guarantees, permits, and certificates, plus a Waiver of Lien certifying that Seller and Seller's Subcontractors have been paid for all labor and materials furnished as part of the services. All required documentation, such as Waiver of Lien should be submitted to the Purchasing Representative listed in this Contract. Buyer will not be obligated to make final payment to Seller for performance of the services until all the above conditions have been met.

Article 24 - Anti-Corruption: Seller or Buyer shall not pay or give, offer or promise to pay or give, authorize the payment or giving of any money, fee, commission, remuneration or other thing of value to or for the benefit of any Government Official in order to influence an act or decision of the Government Official in his, her or its official capacity, cause the Government Official to act or fail to act in violation of his or her lawful duty, or cause the Government Official to influence an act or decision of a governmental authority, for the purpose of assisting either Party in obtaining or retaining business or for the purpose of securing an improper advantage, or in violation of applicable law, including without limitation the Foreign Corrupt Practices Act and any other anti-corruption laws, applicable to either Party their directors, officers, employees, consultants or agents. In the event of a violation of this Article, either Party will have the right to terminate the Contract immediately upon written notice and require, without prejudice to other remedies which either Party may have under the Contract or applicable law. "Government Official" means an official of government, an official of a government instrumentality, an official of a public international organization, a candidate for political office, an official of a political party, and an employee of an organization which is owned in whole or in part or controlled by a government, government instrumentality or public international organization.

TERMS APPLICABLE TO THE PURCHASE OF GOODS

Article 25 - Delivery: Title and risk of loss to the goods purchased will pass from Seller to Buyer in accordance with the applicable INCOTERMS set forth in the Purchase Order section of this Contract. Seller warrants that Seller has good and clear title to the goods delivered. If the risk of loss passes to Buyer at the shipping point and if Seller fails to ship in the manner or route directed by Buyer, Seller agrees to reimburse Buyer for any loss, delay or damage which Buyer suffers.

Article 26 - Quality: Seller warrants that the goods which Seller delivers will be new, of good quality, and conform to the description stated in the Contract. Seller agrees to promptly repair or replace any defective goods that Buyer has notified Seller about within earlier of eighteen (18) months following the date of delivery or twelve (12) months following the date of installation. If Seller fails to promptly repair or replace the defective goods, Seller agrees that Buyer will be entitled to repair or replace them. In such case Seller agrees to reimburse Buyer for Buyer's cost to repair or replace the defective goods. Buyer will be entitled to inspect all goods before, upon or within a reasonable time after delivery. **No substitution of any goods will be made without Buyer's written approval. Buyer reserves the right to reject goods which have been reworked.**

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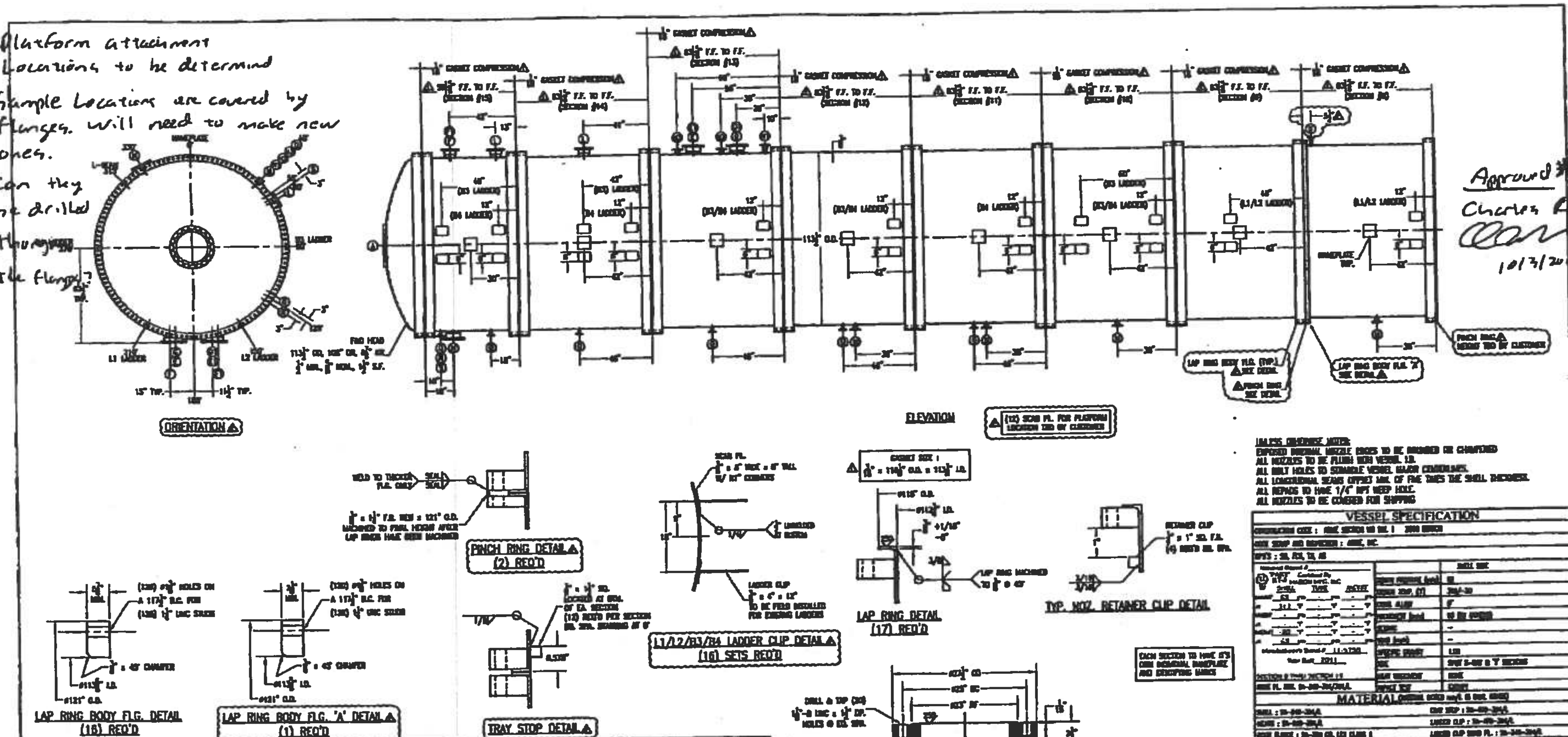
Article 27 - Price Warranty: Seller warrants that the prices for the goods sold to Buyer under this Contract are not less favorable than those currently extended to any other customer for the same or like goods in equal or less quantities. In the event Seller reduces Seller's price for such goods during the term of this Contract, Seller agrees to reduce the prices of the goods purchased by Buyer accordingly.

Article 28 - Material Identification Requirements: Seller shall label, tag, stamp, or otherwise identify each unit of all goods sold to Buyer under this Contract with the following minimum information: Buyer's Purchase Order number; Buyer's Purchase Order line item number; Buyer's SAP Material Master (catalog) number; a short description of the goods; and the quantity of the goods included in the tagged unit. Additionally, Seller shall label, tag, stamp, or otherwise identify each unit of all goods with any additional equipment or project-specific information specified by Buyer in this Contract. Buyer reserves the right to reject goods not completely identified as specified in this article and to return such goods to Seller at Seller's cost.

EXHIBIT B



FITTING SCHEDULE

MARK	QTY	SERVICE	SIZE	RATING	TYPE	FLG. MAT'L	NECK SCH.	NECK WALL	NECK MAT'L	REPAD WIDTH x THK.	REPAD MAT'L	PROJ. O.S.	PROJ. I.S.	WELD DETAIL		WELD SIZE A	WELD SIZE B	WELD SIZE C
A	1	VAPOR OUTLET	30"	150#	PAD FLG.	–	–	–	SA-240-304/L	–	–	–	–	2	–	3/8"	–	–
E	2	FEED	8"	150#	R.F.W.N.	SA-182-304/L	STD	–	SA-312-304/L	2" x 3/8"	SA-240-304/L	DWG	–	8	6	3/8"	–	5/16"
F	2	REFLUX	6"	150#	R.F.W.N.	SA-182-304/L	STD	–	SA-312-304/L	–	–	DWG	–	2	6	3/8"	–	–
G	2	SPARE	8"	150#	R.F.W.N.	SA-182-304/L	STD	–	SA-312-304/L	2" x 3/8"	SA-240-304/L	DWG	–	8	6	3/8"	–	5/16"
H	1	RELIEF	8"	150#	R.F.W.N.	SA-182-304/L	STD	–	SA-312-304/L	2" x 3/8"	SA-240-304/L	5-1/2"	–	8	6	3/8"	–	5/16"
L	2	OUTLET	6"	150#	R.F.W.N.	SA-182-304/L	STD	–	SA-312-304/L	–	–	5-1/2"	–	2	6	3/8"	–	–
M	16	LIQUID SAMPLE	2"	150#	R.F.W.N.	SA-182-304/L	80s	–	SA-312-304/L	–	–	5-1/2"	–	2	6	1/4"	–	–
N1	1	OUTLET	2"	150#	R.F.W.N.	SA-182-304/L	80s	–	SA-312-304/L	–	–	5-1/2"	–	2	6	1/4"	–	–
N2	1	OUTLET	2"	150#	R.F.W.N.	SA-182-304/L	80s	–	SA-312-304/L	–	–	5-1/2"	–	2	6	1/4"	–	–
N3	1	OUTLET	2"	150#	R.F.W.N.	SA-182-304/L	80s	–	SA-312-304/L	–	–	5-1/2"	–	2	6	1/4"	–	–
Q	6	THERMO	1"	150#	R.F.W.N.	SA-182-304/L	80s	–	SA-312-304/L	–	–	5-1/2"	–	2	6	3/16"	–	–
R	1	THERMO	1"	150#	R.F.W.N.	SA-182-304/L	80s	–	SA-312-304/L	–	–	5-1/2"	–	2	6	3/16"	–	–
S	1	MANOMETER	1"	150#	R.F.W.N.	SA-182-304/L	80s	–	SA-312-304/L	–	–	5-1/2"	–	2	6	3/16"	–	–
B	16	DRAWOFF	1-1/4"	150#	R.F.W.N.	SA-182-304/L	80s	–	SA-312-304/L	–	–	5-1/2"	–	2	6	1/4"	–	–

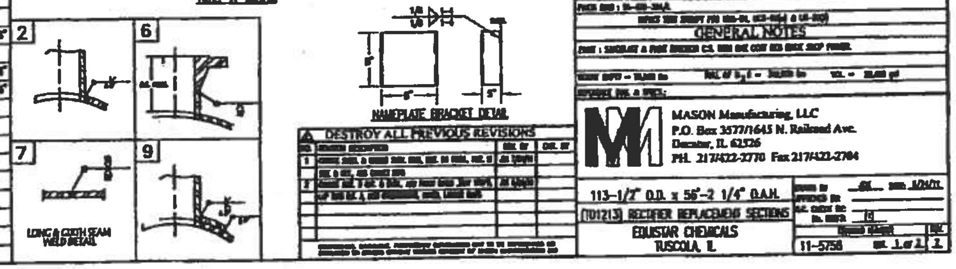
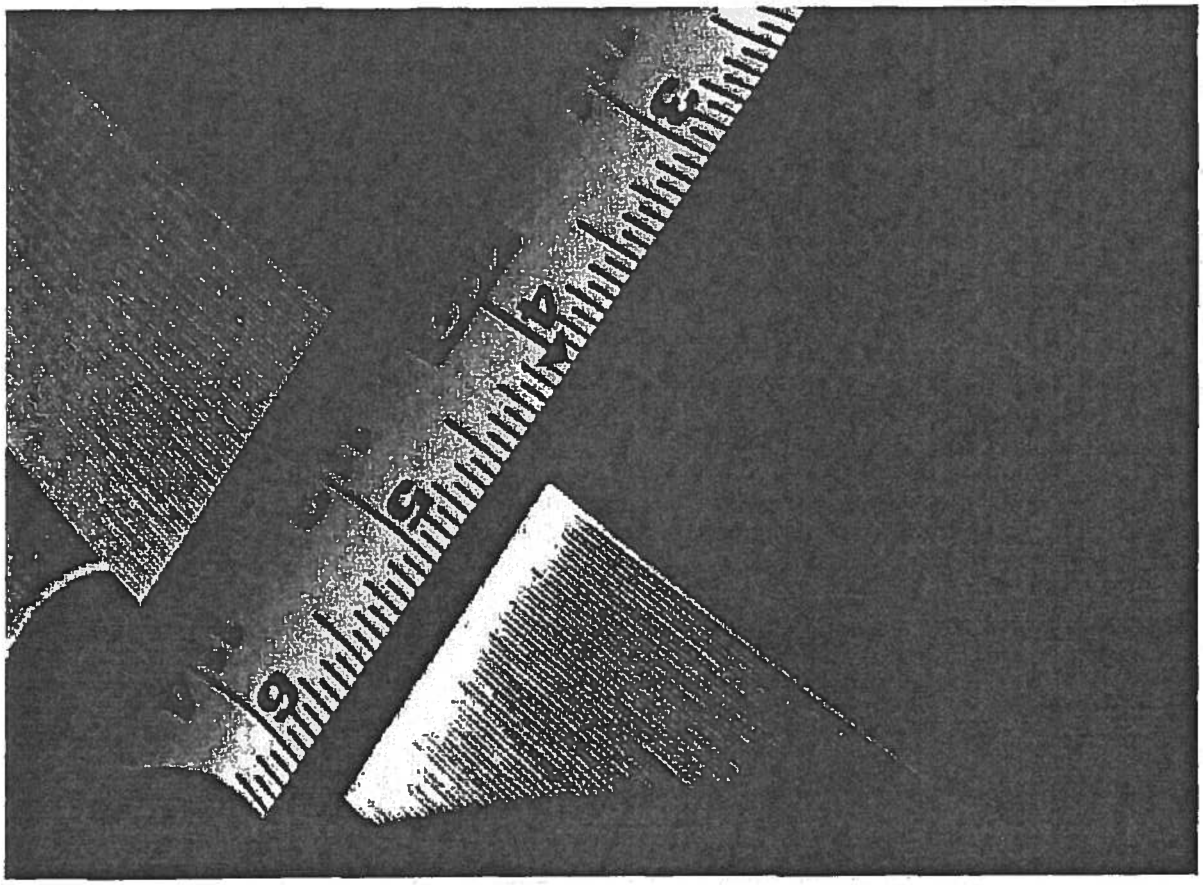


EXHIBIT C



Summary of Facts for Equistar/Mason Problem

Equistar and Mason entered into a binding contract, in which Mason agreed to deliver eight (8) replacement cans (the "Cans") to Equistar for use in a distillation tower at Equistar's Tuscola, Illinois petrochemical facility. The Contract stated that the cylindrical Cans would have an interior diameter ("I.D.") of 112 3/4 inches. Mason failed to comply with this requirement. The Cans manufactured and delivered by Mason all had I.D.'s less than 112 3/4 inches. Because the Cans did not comply with the contractual specifications, Equistar could not utilize the Cans and was forced to have them repaired at considerable expense.

Despite these facts. Mason denies its liability under the Contract, arguing, principally, that it was "excused" from manufacturing the I.D. of the Cans to 112 3/4 inches because of "tolerances." The Contract and Approved Drawing are clear with respect to tolerances of the I.D. of the Cans: there are none. As Mason knew all along, the I.D. of the Cans was of critical importance to the functionality of the Cans—a fact that was communicated to Mason at the beginning of the project, More importantly, the contract documents made clear that there was no applicable "tolerance" for the ID. While Mason included tolerances for various other dimensions of the Cans, the ID. had no such tolerance. As such, Mason was required to manufacture the Cans in accordance with its stated measurements. Mason (the manufacturer) contractually agreed to provide Equistar (its customer) with goods that met a specific specification—i.e., Cans that had an LD. of 112 3/4 inches. Mason failed to perform its contractual obligations and caused Equistar damages.

55 F.3d 1093 (1995)

AMICA MUTUAL INSURANCE COMPANY, Plaintiff-Counter-Defendant, Cross-Defendant-Appellee,

v.

Donna MOAK, Individually and as Independent Executrix of The Estate of David Moak and a/n/f of Blake Moak, Et Al., Defendants,

Donna Moak, Individually and as Independent Executrix of The Estate of David Moak and a/n/f of Blake Moak, Defendant-Counter-Plaintiff, Cross-Plaintiff-Appellant,

Jayson Moak, Joel Moak, Jerome Moak, Dorothy Moffett and Blake Moak, Defendants-Appellees.

No. 94-20479.

United States Court of Appeals, Fifth Circuit.

June 28, 1995.

1094 *1094 Melvin L. Smith, Jr., Karen S. Cook, Domingue & Smith, Houston, TX, for appellant.

Joel C. Thompson, Berry & Thompson, Houston, TX, for Jerome Moak and Dorothy Moffett.

Robert L. LeBoeuf, LeBoeuf, Wittenmyer, Underwood & Williams, Angleton, TX, for Jayson Moak and Joel Moak.

Kenneth M. Slack, Bellaire, TX, for Blake Moak.

Amanda S. Hilty, Chalker, Bair & Associates, Houston, TX, for Amica.

Before JONES, DUHÉ and STEWART, Circuit Judges.

EDITH H. JONES, Circuit Judge:

This case arises out of an automobile accident that killed David Moak (David). In probate court, David's estate and family members divided one million dollars in insurance proceeds deposited by the negligent driver's insurance company. At issue in this case is an additional five hundred thousand dollars in underinsured motorist proceeds deposited into the court registry by David's insurer. Interpreting the policy to cover all of David's immediate family, the magistrate judge held that principles of collateral estoppel applied and the parties were entitled to recover damages in the same proportion as in the probate court. We affirm the magistrate judge's interpretation of the policy, but reverse the finding that the apportionment of damages in the probate court collaterally estops further litigation on that issue.

BACKGROUND

On May 8, 1992, David was killed when his car was struck by a truck driven by David Bohuslav while in the course and scope of his employment for Bohuslav Trucking, Inc. David was survived by his wife Donna, their son Blake, his sons from a previous marriage Jayson and Joel, and his parents Dorothy and Jerome. Each of the survivors brought a wrongful death action against Bohuslav and his trucking company in probate court.

Because Truck Insurance Exchange (TIE), Bohuslav's insurer, was unable to settle the lawsuits, it filed an interpleader action in the federal court and deposited the one million dollars in policy proceeds into the registry of the court. The claimants reached an
1095 agreement for the division of the proceeds and submitted the agreement to the probate *1095 court. The probate judge, however, rejected the proposed distribution and, after hearing evidence, suggested his own apportionment, which the parties approved and the interpleader court adopted.

In addition to the Bohuslav insurance coverage, David and Donna had purchased five hundred thousand dollars worth of uninsured/underinsured motorist coverage from Amica Mutual Insurance Company (Amica). Prior to the distribution of the Bohuslav proceeds, Amica also filed an interpleader action against all of the claimants and deposited its proceeds into the

registry of the court. Aware of the additional Amica proceeds, the claimants did not include any reference to the Amica proceeds in the Bohuslav settlement.[1]

In this case, all claimants brought summary judgment motions asserting their rights to the Amica proceeds. Donna contended that she, and possibly Blake,[2] were the only individuals entitled to the Amica money because the others were not "covered persons" under the policy. The other claimants argued in their motions that they were "covered persons" under the policy and that principles of collateral estoppel entitled them to recover in the same proportion as in the earlier Bohuslav case. The magistrate judge denied Donna's motion and granted summary judgment in favor of the other claimants. Donna now appeals.

DISCUSSION

Insurance policies are contracts and are governed by the principles of interpretation applicable to contracts. *Barnett v. Aetna Life Ins. Co.*, 723 S.W.2d 663, 665 (Tex.1987). State law rules of construction govern in diversity cases. *Ideal Mut. Ins. Co. v. Last Days Evangelical Ass'n, Inc.*, 783 F.2d 1234, 1238 (5th Cir.1986). The court's role in determining whether to grant summary judgment in a case involving the construction of an insurance policy is to determine whether there is ambiguity in the applicable terms of the policy. *Yancey v. Floyd West & Co.*, 755 S.W.2d 914, 917 (Tex.Ct.App. 1988, writ denied). When the terms of an insurance policy are unambiguous, a court may not vary those terms. *Royal Indem. Co. v. Marshall*, 388 S.W.2d 176, 181 (Tex. 1965). We review determinations of law de novo. We agree with the magistrate judge that the terms of the policy are not ambiguous.

The key provision of the policy reads:

> INSURING AGREEMENT:
>
> We will pay damages which a covered person is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of bodily injury sustained by a covered person, or property damage, caused by an accident.
>
> The policy also includes the following definition:
>
> 'Covered Person' as used in this part means:
>
> 1. You or any family member;[3]
>
> 2. Any other person occupying your covered auto;
>
> 3. Any person for damages that person is entitled to recover because of bodily injury to which this coverage applies sustained by a person described in 1. or 2. above.

Blake, Jayson, Joel, Dorothy, and Jerome are "covered persons" as defined in category 3. Under the Texas wrongful death statute, they are persons entitled to recover damages because of bodily injury sustained by David, who is a person described in category 1.[4] *1096 Blake is also a "covered person" under category 1., because he was a resident of David's household at the time of the accident. Donna's arguments to the contrary are unconvincing.

1096

The crux of Donna's argument is that the definition of "covered persons" is exclusionary in nature acting as a limitation on persons covered. She contends that any blood relative not included in category 1. is forever excluded and thus cannot be a "covered person" under any other category. The plain language of the policy belies such a strained reading. An individual need only be included in one of the three categories to achieve "covered person" status. Donna cites *Liberty Mut. Ins. Co. v. Am. Ins. Co.*, 556 S.W.2d 242, 244 (Tex.1977), as support for the proposition that the other claimants are excluded from coverage. However, her reliance on *Liberty* is misplaced because, unlike *Liberty*, the definition of "covered person" here at issue is not an exclusion or limitation of liability, but a recitation of those who are included under the policy. The Amica policy at issue contains within the Uninsured Motorist portion of the policy separate sections entitled "Exclusions" and "Limit of Liability," neither of which excludes or limits in any way coverage of the other claimants.

Donna next argues that no one other than David sustained a "bodily injury" because loss of consortium and mental anguish are not "bodily injuries" under Texas law. *See McGovern v. Williams*, 741 S.W.2d 373, 374-75 (Tex.1987). However, this contention is

without consequence because the language of the policy does not require the other claimants to have suffered bodily injury. The policy only requires them to be entitled to damages because of bodily injury sustained by a person described in category 1. or 2. Since David is described in category 1. and the bodily injury to David entitles them to recover damages under Texas wrongful death law, under the policy it is irrelevant that they themselves did not sustain bodily injury.

Donna next contends that the language in the policy agreeing to transfer a named insured's interest in the policy upon death to that person's spouse evidences that only she is entitled to the proceeds. However, this provision does not mention or suggest in any way that it pertains to distribution of the proceeds. It is merely the mechanism to change the named insured upon death of an insured. This contention has no merit.

Donna also argues that category 3. applies only to providers of emergency services, i.e., doctors, hospitals, ambulances, etc. As authority, Donna cites *Government Employees Ins. Co. v. United States*, 376 F.2d 836, 837 (4th Cir.1967). This case is not inconsistent with our holding, rather it supports our view that category 3. has broad application.

Therefore, because Jayson, Joel, Donna, Jerome, and Blake are entitled to recover damages for wrongful death as a result of the bodily injury sustained by David in the accident, they are "covered persons" under the policy.[5] Our holding comports with the purpose underlying uninsured/underinsured motorist protection as declared by the Texas Supreme Court:

> By purchasing this coverage along with basic liability coverage, the insured has expressed an intent not only to protect others from his or her own negligence but also to protect that person's own family and guests from the negligence of others.

Stracener v. United Serv. Auto Ass'n, 777 S.W.2d 378, 384 (Tex.1989).

As each of the claimants is a "covered person" under the Amica policy, it is yet to be resolved who gets how much of the proceeds. Each of the claimants except Donna contends that the apportionment proposed by the probate court and adopted by the district court in the Bohuslav case is binding upon this case.

1097 In determining the preclusive effect of a prior state court judgment, federal *1097 courts must apply the law of the state from which the judgment emerged. *J.M. Muniz, Inc. v. Mercantile Texas Credit Corp.*, 833 F.2d 541, 543 (5th Cir.1987). Under Texas law, "[f]or the doctrine [of collateral estoppel] to apply, a party must establish that (1) the facts sought to be litigated in the second action were fully and fairly litigated in the prior action, (2) those facts were essential to the judgment in the first case, and (3) the parties were cast as adversaries in the first action." *Id.* at 544 (citing *Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816, 818 (Tex. 1984)).

In the prior action, filed in the probate court against the tortfeasor Bohuslav, the claimants reached an agreed judgment dividing the proceeds of the Bohuslav policy. The probate judge rejected the apportionment and conducted an evidentiary hearing. After this hearing, the claimants agreed to a revised apportionment which was approved by the probate judge and then implemented in the insurer's interpleader action.

The magistrate judge held that this chain of events collaterally estops Donna from relitigating the amount of damages each claimant is entitled to recover under the Amica policy. We disagree. The issue to be decided in this case is how much money each claimant is entitled to collect on the Amica policy. Under the single satisfaction rule, a plaintiff is only entitled to recover the amount of damages proven. *See Stewart Title Guaranty Co. v. Sterling*, 822 S.W.2d 1, 7 (Tex.1991). Therefore, before the Amica proceeds can be distributed by the court, each claimant must establish the amount of his or her damages. This issue was not actually litigated or necessary to the agreed judgment in the prior proceeding.[6]

CONCLUSION

We AFFIRM the magistrate's judge's legal determination that Jayson, Joel, Dorothy, Jerome, and Blake are "covered persons" under the Amica policy. We REVERSE the court's holding that collateral estoppel obviates the need for each claimant to prove his or her damages and precludes further litigation on the issue of damages. Therefore, we REMAND this case for further proceedings consistent herewith.

AFFIRMED in Part, REVERSED and REMANDED in Part.

[1] In fact, the record reveals that Donna's agreement to settle the Bohuslav case was contingent upon her right to demand payment from Amica.

[2] Donna and Blake entered into a stipulation prior the summary judgment motions postponing any determinations as to which of them were entitled to proceeds from the Amica policy.

[3] The policy provides:

'Family member' means a person who is a resident of your household and related to you by blood, marriage or adoption. This definition includes a ward or foster child who is a resident of your household, and also includes your spouse even when not a resident of your household during a period of separation in contemplation of divorce.

[4] "An action to recover damages [for wrongful death] is for the exclusive benefit of the surviving spouse, children, and parents of the deceased." Tex.Civ.Prac. & Rem.Code § 71.004.

[5] We place no reliance on the affidavit of Richard S. Geiger submitted by Amica offering an interpretation of the language of the policy and of Texas case law. The interpretation of a contract is a question of law for the court. Any reliance on this "expert" opinion by the court below was misplaced.

[6] To illustrate, the money interpled in the Bohuslav case was a one million dollar pie that was sliced into different size pieces and served to the claimants. However, had the pie been fifty percent larger (including the Amica proceeds), there is no indication that the pie would have been sliced in exactly the same proportion. Absent an indication in the judgment that the Bohuslav proceeds were distributed in direct proportion to the amount of damages suffered by each claimant, we cannot conclude that the issue in this case was fully litigated or necessary to the prior judgment. For example, we are unable to determine whether the $37,500 received by David's mother Dorothy under the agreed judgment fully compensated her for her damages. If so, Dorothy would not be entitled to any further proceeds from the Amica policy.

650 S.W.2d 391 (1983)

Mac L. COKER, Jr., Petitioner,

v.

Frances Kincaid COKER, Respondent.

No. C-1728.

Supreme Court of Texas.

May 4, 1983.
Rehearing Denied June 8, 1983.

392 *392 Akin, Gump, Strauss, Hauer & Feld, Emil Lippe, Jr. and Ruth Abboud Cross, Dallas, for petitioner.

Neal & McBeath, Bill Neal and Marc McBeath, Vernon, for respondent.

BARROW, Justice.

This suit was brought by Frances Kincaid Coker (Frances) against her former husband, Mac L. Coker, Jr. (Mac), on a property settlement agreement incorporated into their divorce decree. The decree awarded Frances a real estate commission previously earned by Mac from the sale of certain ranch property. The seller of the property was to pay the commission in seven annual installments as payments were made by the purchaser. After Frances received payments totaling $14,317.16, the purchaser defaulted and no further commissions were receivable. The question presented here is whether Mac agreed to pay Frances a minimum of $25,000 or whether Frances was assigned all of Mac's interest in the commissions to be paid by the seller in this particular transaction.

Both parties asserted that the property settlement agreement was unambiguous and each moved for a favorable summary judgment. The trial court construed the agreement as one of guaranty and rendered summary judgment that Frances recover the sum of $10,682.84 from Mac. The court of appeals affirmed in an unpublished opinion. Tex.R.Civ.P. 452. We reverse the judgments of the courts below and remand the cause to the trial court.

The parties were divorced on September 24, 1971 after being married about ten years. They had accumulated community property consisting of a 1969 Buick automobile, two Dallas Cowboy seat options, unpaid real estate commissions earned by Mac while employed as a broker for the real estate firm of Majors & Majors and certain personal effects. The parties entered into a property settlement agreement which was approved by the trial court and incorporated into the divorce decree. The decree provides in relevant part:

> IT IS THEREFORE FURTHER ORDERED, ADJUDGED AND DECREED that Petitioner Frances Kincaid Coker have and she hereby is awarded as her sole and separate property one 1969 Buick automobile, Serial No. XXXXXXXXXXXX, all household goods and personal possessions now in her possession or located at her place of residence, one Texas Stadium Bond along with season ticket sold in connection therewith, *and those certain commissions and accounts receivable heretofore earned by husband during his employment with the firm of Majors and Majors in connection with the sale of the "Jinkens Ranch property in Tarrant County, Texas";* that Respondent have and he hereby is awarded as his sole and separate property one Texas Stadium Bond along with season ticket sold in connection therewith, all personal effects in his possession and those certain commissions or accounts receivable owing to him from Majors and Majors being the monthly commissions on leases negotiated while Respondent was in the employment of Majors and Majors. (emphasis added).

The property settlement agreement provides in part:

> 5. Wife shall receive as her sole and separate property, free and clear of any claim, right or title of husband, the following described property: one 1969 Buick automobile, serial no. XXXXXXXXXXXX, all household goods and personal possessions now in the wife's possession or located at her place of residence, (except that the husband shall receive one bedroom suite now located in Crowell, Texas), and one Texas Stadium bond, free of all indebtedness, along with the season ticket sold in connection therewith. *The wife shall further have* as her sole

393 and separate property, free and clear *393 of all claim, right or title asserted by husband, *that certain right, commission or account receivable heretofore earned by husband during his employment with the firm of Majors & Majors in connection with the sale of the "Jinkens ranch property in Tarrant County, Texas,"* such future commission or account receivable being in the approximate sum of $25,000.00.

....

8. Husband represents and warrants to the wife that, to the best of his knowledge, approximately $25,000.00 remains due and owing to him as his portion of commissions earned in connection with the sale of the "Jinkens property in Tarrant County, Texas," and he hereby guarantees to wife that she will receive the said sum of $25,000.00, from Majors & Majors, or from any other payor of such commissions receivable. *Such commission is payable to her as payments are made by purchasers to sellers,* and will normally be received by her through the office of Majors & Majors. In the event, for any reason she fails to receive such installments of commission exactly as husband would have prior to his assignment of his rights thereto to wife, *husband agrees to pay to wife in Dallas County, Texas all such sums of money, which she has failed to receive, up to the guaranteed sum of $25,000.00.* (emphasis added).

The parties thereby agreed that Mac would keep his rights to the monthly commissions earned on leases he had negotiated and Frances would be assigned the commission earned by Mac from the sale of the "Jinkens ranch property in Tarrant County." Prior to the divorce, Mac had participated in the sale of the Jinkens ranch whereby he would receive 40% of the sales commission payable by the seller to Majors & Majors over a seven year period contingent on the annual payments being made by the purchaser. In 1976, however, the purchaser defaulted and according to the terms of the sales contract, the seller was not required to continue payments of the commission. Therefore, Mac's rights in the commission were terminated.

Frances admitted that she had received all the commission payable to Mac prior to default, but she contends that under the property settlement agreement she was to receive a minimum of $25,000. The trial court and the court of appeals agreed with Frances. We must attempt to construe this contract and determine the intent of the parties as shown by the written instruments.

In construing a written contract, the primary concern of the court is to ascertain the true intentions of the parties as expressed in the instrument. R & P Enterprises v. LaGuarta, Gavrel & Kirk, Inc., 596 S.W.2d 517, 518 (Tex.1980); *City of Pinehurst v. Spooner Addition Water Co.*, 432 S.W.2d 515, 518 (Tex.1968). To achieve this objective, courts should examine and consider *the entire writing* in an effort to harmonize and give effect to *all the provisions* of the contract so that none will be rendered meaningless. Universal C.I.T. Credit Corp. v. Daniel, 150 Tex. 513, 243 S.W.2d 154, 158 (1951). No single provision taken alone will be given controlling effect; rather, all the provisions must be considered with reference to the whole instrument. Myers v. Gulf Coast Minerals Management Corp., 361 S.W.2d 193, 196 (Tex.1962); *Citizens Nat'l Bank in Abilene v. Texas & P. Ry. Co.*, 136 Tex. 333, 150 S.W.2d 1003, 1006 (1941). In harmonizing these provisions, terms stated earlier in an agreement must be favored over subsequent terms. *Ogden v. Dickinson State Bank,* 26 Tex.Sup.Ct.J. 200, 202 (Jan. 26, 1983).

If the written instrument is so worded that it can be given a certain or definite legal meaning or interpretation, then it is not ambiguous and the court will construe the contract as a matter of law. Universal C.I.T. Credit Corp., 243 S.W.2d at 157; R & P Enterprises, 596 S.W.2d at 519. A contract, however, is ambiguous when its meaning is uncertain and doubtful or it is reasonably
394 susceptible to more than one meaning. Skelly Oil Co. v. Archer, 163 Tex. *394 336, 356 S.W.2d 774, 778 (1962). Whether a contract is ambiguous is a question of law for the court to decide by looking at the contract as a whole in light of the circumstances present when the contract was entered. R & P Enterprises, 596 S.W.2d at 518. When a contract contains an ambiguity, the granting of a motion for summary judgment is improper because the interpretation of the instrument becomes a fact issue. *See* Harris v. Rowe, 593 S.W.2d 303, 306 (Tex.1980).

The court of appeals determined that Mac had absolutely guaranteed the payment of $25,000 to Frances. Although the court of appeals recognized that the liability of a guarantor is generally measured by the liability of the principal, it held that paragraph 8 of the settlement agreement created a broader obligation than the commission sales agreement. This interpretation conflicts with paragraph 5 of the agreement and the language used in the divorce decree.

According to the rules of construction, paragraph 8 must be considered along with paragraph 5 and the underlying circumstances to ascertain the true intention of the parties. *See* City of Pinehurst, 432 S.W.2d at 518, 519. The court of appeals failed to fully consider paragraph 5 of the agreement which clearly states that Mac only assigned that "certain right, commission

or account receivable heretofore earned by husband." Also, the language of the divorce decree supports an interpretation only assigning Mac's interest in the commission.

When the language in paragraph 8 is considered alone and particularly the last sentence thereof, the meaning is unclear. The provision could be construed as a guarantee by Mac that Frances would receive $25,000 or merely a promise that he would not interfere with the payments made by Majors & Majors to her after they received the commission from the seller. If we construe the agreement as a contract of guaranty, any uncertainty must be resolved in favor of Mac as guarantor.[1] Even if we conclude the rules of guaranty do not apply, we could not say with certainty that Mac promised to pay Frances $25,000 regardless of the payment of the commission. Such an interpretation would render the provisions in the divorce decree and paragraph 5 relating to the assignment of the commission surplusage. Courts must favor an interpretation that affords some consequence to each part of the instrument so that none of the provisions will be rendered meaningless. *See Odgen*, 26 Tex.Sup.Ct.J. at 202; *Portland Gasoline Co. v. Superior Marketing Co.*, 150 Tex. 533, 243 S.W.2d 823, 824 (1951).

The divorce decree and paragraph 5 state what interest is assigned to Frances. Unless paragraph 8 is construed to merely set out the manner in which Frances would receive the annual payments, this paragraph conflicts with paragraph 5 and the divorce decree. This conflict creates an ambiguity as to the intent of the parties as expressed in the written agreement and the decree.

The court of appeals held the provisions of the property settlement agreement unambiguously required Mac to pay Frances $25,000 regardless of whether the commissions were in fact paid by the purchaser. This construction conflicts with paragraph 5 as well as the divorce decree. Therefore, this agreement is ambiguous and the trial court erred in granting summary judgment.
395 The trier of fact must resolve the ambiguity *395 by determining the true intent of the parties. *Trinity Universal Ins. Co. v. Ponsford Bros.*, 423 S.W.2d 571, 575 (Tex.1968).

We reverse the judgments of the courts below and remand the cause to the trial court.

SPEARS, J., dissents in which POPE, C.J., and RAY and ROBERTSON, JJ., join.

SPEARS, Justice, dissenting.

I respectfully dissent.

I do not believe that the property settlement agreement entered into by the Cokers is ambiguous. If a written instrument can be given a definite interpretation, it is not ambiguous and the court will construe the contract as a matter of law. *R & P Enterprises v. La Guarta, Gavrel & Kirk, Inc.*, 596 S.W.2d 517, 518 (Tex.1980).

The majority correctly states that the primary objective in the interpretation of contracts is to give effect to the intentions of the parties as expressed in the instrument. *R & P Enterprises v. La Guarta, Gavrel & Kirk, Inc.*, 596 S.W.2d at 518; *Citizens National Bank in Abilene v. Texas & P. Ry. Co.*, 136 Tex. 333, 150 S.W.2d 1003, 1006 (1944). Also, the court must consider the entire instrument so that none of the provisions will be rendered meaningless. *R & P Enterprises*, 596 S.W.2d at 519; *Myers v. Gulf Coast Minerals Management Corp.*, 361 S.W.2d 193, 196 (Tex.1962).

By applying these rules of construction and looking at the contract as a whole, we see the clear, unambiguous meaning of the words used. It is obvious to me that Frances was to receive a minimum of $25,000. The divorce decree awarded her "those certain commissions and accounts receivable *heretofore earned* by husband ...." (emphasis added). Paragraph five of the property settlement provides that Frances shall have as her separate property "that certain right, commission or account receivable *heretofore earned* by husband ...." (emphasis added).

In the first sentence of paragraph eight, Mac unconditionally represented and warranted that the "Jinkins property" commission was due and owing to him. He then assigned the commission to Frances and "guaranteed" receipt by her of $25,000. While it is true that the payments of the commission were due only so long as payments on the purchase of the property were made, and upon default no commission would be paid, this limitation is not incorporated in nor alluded to in the agreement setting forth his obligation to pay his wife the $25,000. In fact, the agreement is quite to the contrary.

The third sentence of paragraph eight provides:

> "In the event, *for any reason* she fails to receive such installments of commission *exactly as Husband would have prior to this assignment* of his rights thereto to Wife, Husband agrees to pay Wife in Dallas County, Texas all such sums of money, which she has failed to receive, *up to the guaranteed sum* of $25,000.00." (emphasis added).

When this statement is construed with the other provisions of the agreement it is clear that Mac *guaranteed* that Frances would receive $25,000 regardless of what might happen to the commission. The sentence is a directional provision indicating when and how she is to receive the payments. No other provision in the contract pointed to by the majority negates this guarantee; rather, all other provisions are consistent with it. Mac "warranted" the commission was due him and he "guaranteed" the sum of $25,000 would be paid to his ex-wife. In other words, Mac guaranteed that Frances would receive approximately $25,000 from Majors & Majors or any other payor. He further promised that if she failed to receive these payments as he would have prior to assignment directly from the third party payors, he would pay the balance up to $25,000.

Mac's guarantee is unqualified and expresses no other condition for its enforceability than default of performance by the principal obligor. It should be treated, therefore, as the guaranty of payment that it is. An unconditional guaranty for payment becomes a
396 primary obligation upon *396 default. *See* Ferguson v. McCarrell, 588 S.W.2d 895 (Tex.1979); Universal Metal & Machinery, Inc. v. Bohart, 539 S.W.2d 874, 877 (Tex.1976).

The majority curiously finds ambiguity in the words "guarantee," "for any reason," "agrees to pay wife," "all such sums of money which she failed to receive," and "up to the guaranteed sum of $25,000." No draftsman could have made it any plainer. The finding of an ambiguity in this language, which is neither negated nor qualified elsewhere in the contract, expressly or impliedly, is without justification.

I would, therefore, affirm the judgment of the court of appeals, and hold that Mac agreed to pay Frances the $25,000, and that she is entitled to recover the balance of $10,682.84 from him.

POPE, C.J., and RAY and ROBERTSON, JJ., join in this dissent.

[1] A guarantor is entitled to have his agreement strictly construed so that it is limited to his undertakings, and it will not be extended by construction or implication. Reece v. First State Bank of Denton, 566 S.W.2d 296, 297 (Tex.1978); McKnight v. Virginia Mirror Co., 463 S.W.2d 428, 430 (Tex.1971); Southwest Savings Association v. Dunagan, 392 S.W.2d 761, 766 (Tex.Civ.App. — Dallas 1965, writ ref'd n.r.e.). Where uncertainty exists as to the meaning of a contract of guaranty, its terms should be given a construction which is most favorable to the guarantor. Commerce Savings Assoc. v. GGE Management Co., 539 S.W.2d 71, 78 (Tex.Civ.App. — Houston [1st Dist.] 1976) *modified and affirmed with per curiam*, 543 S.W.2d 862 (Tex.1976); Walter E. Heller & Co. v. Allen, 412 S.W.2d 712, 721 (Tex.Civ.App. — Tyler 1967, writ ref'd n.r.e.).

957 F.2d 196 (1992)

D.E.W., INC., Plaintiff-Appellee,

v.

LOCAL 93, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, et al., Defendants-Appellants.

No. 91-5519.

United States Court of Appeals, Fifth Circuit.

April 3, 1992.
Rehearing Denied April 30, 1992.

197 *197 Stephen Edward Price, Freedman & Hull, P.C., Houston, Tex., for Local 93 Intern. Union of North America, et al.

Terry S. Bickerton, Arthur C. Nicholson, III, Thomas R. Giltner, Cox & Smith, Inc., San Antonio, Tex., for D.E.W., Inc.

Before WILLIAMS, DUHÉ, and EMILIO M. GARZA, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

Plaintiff/appellee, D.E.W., Inc. ("D.E.W."), a San Antonio general contractor in the construction business, brought suit against the Southern Texas Laborers' District Council Health & Welfare Trust Fund, the Laborers' National Pension Fund, and the Southern Texas Laborers' District Council Training Program (the "Laborers' Funds" or "Funds"), multi-employer trust funds administered by defendant American Benefit Plan Administrators, Inc. (Administrators), as well as Local Union 93 and the Laborers' International Union of North America. D.E.W. sought a declaratory judgment under 28 U.S.C. § 1337 as a federal question involving the application of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* (ERISA). The judgment was sought as to liability under an adoption agreement. The parties agree that the employer was required to make contributions to the Laborers' Funds for its union employees. D.E.W. asserts, however, that it had no obligation under the agreement to contribute for
198 its non-union employees. The district court agreed with D.E.W. and *198 granted a summary judgment motion, ruling that D.E.W. was not legally obligated to make benefit contributions to the enumerated Funds for its non-union laborers. In its final judgment, the district court also awarded D.E.W. its reasonable attorneys' fees, costs, and interest.[1] We reverse and grant summary judgment in favor of the Laborers' Funds.

I. FACTS AND PRIOR PROCEEDINGS

On September 27, 1984, D.E.W. entered into an adoption agreement[2] with the Laborers' Funds under which D.E.W. undertook to make contributions to the Funds[3] based on each hour the covered employees worked. D.E.W. made the contractually obligated contributions only on behalf of its union employees to the Laborers' Funds. An audit was conducted of D.E.W.'s payroll records by the Administrators as to its contributions to the adopted Funds. The audit resulted in the Administrators making a demand on D.E.W. for $124,683.28 for contributions they concluded were owed to the Laborers' Funds for D.E.W.'s nonunion employees. D.E.W. disputed the demand, claiming that it was not required to contribute benefit payments to the Laborers' Funds for its non-union employees.[4] It brought this suit for a declaratory judgment to that effect. After the civil action was filed, the Funds filed an amended answer and counterclaim asserting that, pursuant to the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.*, and the Labor Management Relations Act of 1947 (LMRA), 29 U.S.C. § 185 *et seq.*, D.E.W. had breached the agreements by D.E.W. to pay contributions to the Funds on behalf of all of its laborers. After D.E.W. and the appellants submitted a joint pretrial order, including several stipulations, both parties filed summary judgment motions. The district court granted D.E.W.'s motion, concluding that the adoption agreement was unambiguous and a reading of the agreement compelled only one reasonable construction — that the contributions to the Laborers' Funds were due only for union workers and that the defendants take nothing on their counterclaim. The court subsequently entered a final judgment awarding D.E.W. $32,169.29 as its reasonable attorneys' fees, plus costs, and interest.

II. DISCUSSION

On appeal, the Laborers' Funds raise one definitive issue: whether the district court erred in granting summary judgment and entering final judgment in favor of D.E.W.? According to the Funds, by entering into the adoption agreement D.E.W. agreed to
199 adopt the terms of the Multi-Employer Union Trust Fund Agreements and agreed to make contributions to the *199 Laborers' Funds for its employees, regardless of union affiliation.

We review a summary judgment de novo, applying the same standard as the district court. NL Indus., Inc. v. GHR Energy Corp., 940 F.2d 957, 963 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 873, 116 L.Ed.2d 778 (1992). In reviewing a grant of summary judgment, this Court must determine if there are any genuine issues of fact material to the resolution of the case in dispute, and if not, whether under the undisputed facts the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56. Bozé v. Branstetter, 912 F.2d 801, 804 (5th Cir.1990) (per curiam). A mere scintilla of evidence is insufficient to avoid summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986). We must view the evidence and draw all inferences, however, in the light most favorable to the non-moving party.

The parties are in agreement that there is no genuine issue as to any material fact regarding D.E.W.'s contractual obligations to make contributions to the Laborers' Funds. According to the parties, the adoption agreement is unambiguous. Both parties contend that no genuine issue exists, and both parties assert that the adoption agreement is unambiguous. Yet, the interpretations of the contract by the parties result in diametrically opposed conclusions as to the obligation to contribute for nonunion laborers.

The Funds counterclaimed against D.E.W. under, inter alia, section 301(a) of LMRA, 29 U.S.C. § 185(a). United Paperworkers Int'l Union, AFL-CIO, CLC v. Champion Int'l Corp., 908 F.2d 1252, 1255-56 (5th Cir.1990). Federal substantive law governs the interpretation and enforcement of contracts under section 301(a). Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 455, 77 S.Ct. 912, 917, 1 L.Ed.2d 972 (1957). In interpreting a labor contract, "'traditional rules for contractual interpretation are applied as long as their application is consistent with federal labor policies.'" United Paperworkers Int'l Union, 908 F.2d at 1256 (citations omitted).

The construction of the adoption agreement, and the interpretation of its language, is pivotal in this case. The interpretation of this adoption agreement, as with any contract, is a question of law. *Id.* The determination of whether a contract is ambiguous is also a question of law. Richland Plantation Co. v. Justiss-Mears Oil Co., 671 F.2d 154, 156 (5th Cir.1982). A contract is not ambiguous merely because the parties disagree upon the correct interpretation or upon whether it is reasonably open to just one interpretation. REO Indus., Inc. v. Natural Gas Pipeline Co. of America, 932 F.2d 447, 453 (5th Cir.1991) (footnotes omitted). The mere disagreement of the parties upon the meanings of contract terms will not transform the issue of law into an issue of fact. General Wholesale Beer Co. v. Theodore Hamm Co., 567 F.2d 311, 313 (5th Cir.1978). If the written instrument is so worded that it can be given a certain or definite legal meaning or interpretation, then it is not ambiguous, and this Court will construe the contract as a matter of law. Of course, if the contract is ambiguous, summary judgment is deemed inappropriate because its interpretation becomes a question of fact. Fireman's Fund Ins. Co. v. Murchison, 937 F.2d 204, 207 (5th Cir.1991).

Two sections of the adoption agreement, sections 1 and 3, control the critical inquiry in this case: whether D.E.W. is obligated to make contributions on behalf of nonunion member employees?

> (1) Adopting of Trust Funds:
>
> (a) Effective as of September 27, 1984, the undersigned Employer adopts the *Southern Texas Laborers' District Council Health & Welfare Trust Fund* for all those employees (the "employees"): (i) who are members of a participating Local Union of the Laborers' International Union of North America, or (ii) who have their wage rate and working conditions established by the collective bargaining agreement negotiated by the Association and the
> 200 Local Union which established this Fund; it agrees to make contributions on behalf of its employees; *200 and it agrees to be bound by all the terms, provisions, limitations, and conditions of the Welfare Fund.
>
> (b) Effective as of September 27, 1984, the undersigned Employer adopts the *Laborers' National Pension Fund* for its employees; it agrees to make contributions on behalf of its employees; and it agrees to be bound by all the terms, provisions, limitations and conditions of the Pension Fund.
>
> (c) Effective as of September 27, 1984, the undersigned Employer hereby adopts the *Southern Laborers' District Council Training Program* for its employees; it agrees to make contributions on behalf of its employees; and it agrees to be bound by all the terms, provisions, limitations and conditions of said Training Program.

* * * * * *

(3) The undersigned Employer agrees to contribute to each: the Welfare Fund, the Pension Fund and the Training Program, the contributions required by the then current collective bargaining agreement which is in effect from time to time between L.I.U.N.A. Local 93 and South Texas Contractors Association at the times and in the amounts set forth therein and in accordance with the Trust Agreement establishing each of the Trust Funds as they may be amended from time to time. The Employer further agrees that it is aware of the due dates required for each of the contributions and further agrees that all past due payments shall be subject to the liquidated damages, interest and to all costs of collections, including reasonable attorney's fees, auditor's fees and costs of court as may be required under either the applicable collective bargaining agreement or the Trust Agreement establishing the Trust Fund in question.

The trial court considered the definition of the term "employees" under 1(a) within the agreement and found two groups of covered employees within the definition: 1) employees who are members of a participating Local Union of the Laborers' International Union of North America; and 2) employees who have their wage rate and working conditions established by the collective bargaining agreement negotiated by the Association and Local Union which established the Fund. Moreover, according to the court, because the parties stipulated that they never entered into a collective bargaining agreement, category one constituted the only applicable group. The lynchpin of D.E.W.'s and the district court's position is that section 1(a) controls the entire adoption agreement and requires contributions only on behalf of union members.

Section (1), and particularly subsection (1)(a), cannot be the only pertinent part of the adoption agreement when the agreement must be considered as a whole. "Contracts are to be construed in their entirety to give effect to the intent of the parties, considering each provision with reference to the entire contract, so that every clause has some effect, and no clause is rendered meaningless." *REO Indus.*, 932 F.2d at 453 (footnotes omitted). The district court wholly failed to analyze and apply the adoption agreement in its entirety. The district court never addressed the remainder of the contract, in particular section 3. A court cannot disregard as surplusage the succeeding provisions of a contract; it must give effect to all.

The adoption agreement is equally as clear that in section 3 it adopted the contribution provisions of the collective bargaining agreement. The agreement itself provides for contributions in the amount set out in Article XXV. Article XXV provides without any ambiguity that all employees in the defined laborer classifications receive the benefits, including contributions to all of the Funds. What is critical in these provisions of the bargaining agreement which the parties adopted is that "union" and "non-union" are not even mentioned in the provision. There is no distinction made in benefits or contributions between union and non-union employees. We have so held in a case involving the same contribution provisions of this collective bargaining contract. *Laborers'*
201 *National Pension Fund v. Jaydee Masonry Co.*, 931 *201 F.2d 890 (5th Cir.1991) (table). This is an unpublished per curiam opinion.

In essence, the district court relied entirely on the parties' stipulation that D.E.W. had never signed nor authorized a bargaining agent to sign the collective bargaining agreement with the defendants. But the stipulation can have no significance to this issue. An employer can in writing obligate itself to follow portions of a collective bargaining agreement without signing the collective bargaining agreement itself. D.E.W. did not need to have signed the collective bargaining agreement to be bound by its terms because it clearly adopted them in the adoption agreement.

The adoption agreement signed by both parties contains at its inception the following statement: "WHEREAS, each of the Trust Agreements establishing the Welfare Fund, the Pension Fund and the Training Program provides that other employers *are not bound* by a collective bargaining agreement requiring contributions to the Trust fund *may adopt* the Trust Funds."

In oral argument D.E.W. placed great weight upon *Walsh v. Schlecht*, 429 U.S. 401, 97 S.Ct. 679, 50 L.Ed.2d 641 (1977) and *Culinary Workers and Bartenders Union No. 596 Health and Welfare Trust v. Gateway Cafe, Inc.*, 95 Wash.2d 791, 630 P.2d 1348 (Wash.1981), *cert. denied sub nom. Restaurant Employees, Bartenders & Hotel Service Employees Welfare and Pension Trusts v. Gateway Cafe, Inc.*, 459 U.S. 839, 103 S.Ct. 87, 74 L.Ed.2d 81 (1982). These cases do not avail the appellee. In urging *Schlecht* as authority, D.E.W. incorrectly stated as the Court's ruling an argument that the Court posited but later rejected. Furthermore, the facts in that case are entirely distinguishable. A collective bargaining agreement between a general contractor and the Oregon State Council of Carpenters required that the general contractor pay contributions to certain trust funds with respect to hours of carpentry work performed by employees of a non-signatory subcontractor but not in their behalf. It was urged that such a provision violated § 302(a)(1) of the Labor Management Relations Act. Contrary to D.E.W.'s analysis, the Supreme

Court held that it did not. In view of the adoption agreement in the case before us, D.E.W. has adopted as binding certain provisions and is not in the legal status of a "non-signatory" employer as to those provisions.

D.E.W. also relied heavily on *Gateway Cafe* for the proposition that a trust fund cannot collect contributions on behalf of employees from an employer whose employees were not union members or who did not select the union as its bargaining representative. The case is not at all apposite. The employer signed a collective bargaining agreement for its employees although they were non-union and they had never expressed an interest in collective bargaining. The only expression by the employees was an earlier vote rejecting collective bargaining. The collective agreement set up the payments. Further, it also required all employees either to join the union or face discharge. The court properly held that such contributions would violate federal law as discriminatory.

This Court finds that the provisions in the adoption agreement concerning the collective bargaining agreement make it clear that it is irrelevant that D.E.W. has not signed the full collective agreement. D.E.W. has agreed because its adoption of the contribution provisions of the collective bargaining agreement between Local 93 and the Association that it will pay for all laborers the contributions as mandated by the collective bargaining agreement. Under the agreement, contributions are not limited to those in behalf of union members only. Consequently, adoption of the contribution provisions in the collective bargaining agreement plainly contradicts D.E.W.'s contention that it never incurred an obligation to contribute on behalf of non-union employees.

It might well be the conclusion at this stage of analysis that the contract is ambiguous because of a conflict between the application of section 1(a) and section 3 of the agreement. The validity of this conclusion is destroyed, however, by one strong
202 and persuasive consideration. Except for *202 the rarest of circumstances, this adoption agreement if it limits contribution to union members only is in violation of federal law. The illegality arises under section 8(a)(3), 29 U.S.C. § 158(a)(3), of the Labor Management Relations Act, Title I, Sec. 101 (the National Labor Relations Act, as amended).

If the contribution plan is limited to union members only and no virtually identical benefits are paid to non-union employees, membership in the union is encouraged. Since Texas is a right-to-work state, advantageous benefits to union members violate the Texas statute as encouraging a union shop which is forbidden by the state. Tex. Civ.St. art. 5207a(3) (West 1987). On the other hand, if there is a separate benefit program for non-union employees which is more favorable to them, membership in the union is discouraged in violation of the law.

Such a discriminatory provision as is present under the interpretation of Sec. 1(a) by the district court is a violation of Sec. 8(a)(3) of the statute and in turn of Sec. 8(a)(1) prohibiting coercive conduct. Within the test of the leading case, *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34, 87 S.Ct. 1792, 1798, 18 L.Ed.2d 1027 (1967), it is "'inherently destructive' of important employee rights." As the Third Circuit said in *Byrnes v. DeBolt Transfer, Inc.*, 741 F.2d 620, 623 (3rd Cir.1984): "The absence of any distinction in the agreements between union and non-union members can be easily explained: the law does not permit such a distinction."

It follows that the wording of section 1(a) may be inept but its purpose must be one of inclusion of non-union employees rather than exclusion. The coverages definition was copied from the definition of covered employees in the Health and Welfare Fund basic document itself. This document, and its definition, on its face was written originally to cover employers who had signed a collective agreement and had both union and non-union employees covered by bargaining. Inclusion of non-union employees was necessary to make the provision lawful, and it was difficult to define the employees included. The non-union employees had to be those, but only those, who were counterparts of the union employees in their work. Actually, spelling it out in more detail, the non-union employees had to be those who would be included in the same collective bargaining unit as included the union employees if there had been a bargaining unit.

Yet, if this interpretation is unacceptable, it makes no difference. The provision otherwise is illegal and we are still left with a contract that is unambiguous and requires employer contribution to the funds for the non-union employees doing the same work in the laborer classification as union employees.

As a final contention, D.E.W. asserts that the courts are not the proper forum to raise the issue of legality because the NLRB should deal initially with unfair labor practice claims. *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). But *Vaca v. Sipes* merely held that an employee bound by a collective agreement providing a grievance procedure must first invoke and carry through the grievance procedure on behalf of that employee. The case before us does not involve a grievance by employees nor is there an available grievance procedure.

D.E.W. omits the application of firmly established Supreme Court precedent. The Supreme Court has concluded that "[t]he authority of the [National Labor Relations] Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by § 301, but it is not exclusive and does not destroy the jurisdiction of the courts in suits under § 301." *Smith v. Evening News Ass'n*, 371 U.S. 195, 197, 83 S.Ct. 267, 269, 9 L.Ed.2d 246 (1962). *See also* *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 82 S.Ct. 1318, 8 L.Ed.2d 462 (1962); *Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235, 90 S.Ct. 1583, 26 L.Ed.2d 199 (1970); *Arnold Co. v. Carpenters Dist. Council*, 417 U.S. 12, 94 S.Ct. 2069, 40 L.Ed.2d 620 (1974); Gorman, Labor Law, Chap. 23, § 4, at 548 (1976). The district court properly exercised jurisdiction over the Funds' § 301 action to
203 recover contributions due. The suit clearly involved *203 a dispute "governed by the terms of the collective-bargaining agreement itself." *Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees of America v. Lockridge*, 403 U.S. 274, 300-301, 91 S.Ct. 1909, 1925, 29 L.Ed.2d 473 (1971).

We find that the adoption agreement on its face, in adopting the fund contributions provisions of the collective bargaining agreement, makes no distinction between union employees and similarly situated non-union employees. In any event, the law requires this result.

III. CONCLUSION

We hold that the adoption agreement unambiguously incorporates the health and welfare, pension, and training contribution provisions of the applicable collective bargaining agreement. We also hold that the provisions in the signed adoption agreement incorporating parts of the collective bargaining agreement make irrelevant the fact that D.E.W. has not signed the collective agreement. D.E.W. has agreed in writing in a signed adoption agreement that it will make contributions for all laborer employees both union and non-union as provided in the collective bargaining agreement. Indeed, the adoption agreement would violate federal labor law if it did not.

The district court erred in failing to apply the entire adoption agreement, including those portions of the collective bargaining agreement made applicable in terms by Section 3 of the adoption agreement. We reverse and grant summary judgment in favor of the appellants.

REVERSED.

SUMMARY JUDGMENT FOR APPELLANTS GRANTED.

[1] D.E.W. originally sought a declaratory judgment regarding its rights under two adoption agreements in which it had entered: a September 24, 1984 agreement with the Texas Iron Workers Health, Benefit & Pension Funds and a September 27, 1984 agreement with the Laborers' Funds. In making its determination, the district court noted the uniformity and continuity created by similarly construing both adoption agreements. According to the court, the Laborers' Funds' reading of the adoption agreement strained credulity in that D.E.W. would have entered into "two diametrically opposed agreements within three days of each other on the same subject matter." It may raise some doubt that the district court made such an assessment at the outset since the two agreements are wholly different. Ultimately, although the district court's decision was applicable to both agreements, D.E.W. reached a settlement with the Iron Workers.

[2] An adoption agreement is an agreement independent of a collective bargaining agreement under which in this case the employer individually assumed and agreed to adopt the terms of multi-employer union trust funds agreements and agreed to make contributions to the funds for covered workers. An adoption agreement often references an underlying collective bargaining agreement, as it did in this case, though it does not have to do so.

[3] The Funds had been established pursuant to the provisions of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 185 *et seq.*, and the Employer Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, and are administered by the trustees of the Laborers' Funds.

[4] D.E.W. asserts that it has made contributions to an insurance benefit fund for its non-union employees. The record does not reflect the nature or amount of any such contribution.

893 F.2d 763 (1990)

James W. TOREN and Wilmington Trust Company, as Trustees of the BRNF Liquidating Trust, Plaintiffs-Appellants,

v.

BRANIFF, INC., and Dalfort Corporation, Defendants-Appellees.

No. 88-7045.

United States Court of Appeals, Fifth Circuit.

February 7, 1990.

764 *764 Stephen E. Herrmann, Richards, Layton & Finger, Nathan B. Ploener, Wilmington, Del., J. Lyndell Kirkley and John W. Proctor, Brown, Herman, Scott, Dean & Miles, Ft. Worth, Tex., for plaintiffs-appellants.

Wesley N. Harris and E. Glen Johnson, Ft. Worth, Tex., for Braniff, Inc. and Dalfort Corp.

Before GARZA, REAVLEY and POLITZ, Circuit Judges.

GARZA, Circuit Judge:

James W. Toren and Wilmington Trust Co. (collectively "Toren"), trustees for the trust liquidating now-bankrupt Braniff Airways, Inc. ("Airways"), sued Braniff, Inc. ("Braniff") and Dalfort Corp. ("Dalfort"), successors to Airways, alleging breach of a lease agreement and unjust enrichment. The district court entered judgement, based on a jury verdict, for Braniff and Dalfort. Toren now appeals,
765 complaining that the district court erred in construction and enforcement *765 of the lease agreement. We AFFIRM the judgment of the district court.

In May of 1982, Airways filed a petition for reorganization under Chapter 11 of the Bankruptcy Code, and in connection with that filing, submitted a Plan of reorganization. Under that Plan, Airways changed its name to Dalfort and created a subsidiary named Braniff, which was controlled but not wholly owned by Dalfort. For the benefit of the secured creditors of Airways, the Plan created the BRNF Liquidating Trust ("BRNF"), and Toren was named trustee. The Plan transferred assets of Airways to BRNF, which then leased them to Braniff (the "Lease").[1] Braniff continued to operate as an airline under the Plan, and Dalfort did all of Braniff's maintenance work.

Pursuant to the Lease, Braniff returned ten aircraft to BRNF in 1985, but did not then return rotable parts also included in the Lease. Instead, Braniff kept the rotables and exchanged them, through formal and informal loan agreements, with other airlines. It is industry custom for one airline to exchange rotables with others, as no airline can maintain a full stock of rotables at each airport it services.

Toren sued Braniff in Federal court, alleging that the rotable loan agreements Braniff had with other airlines were prohibited by the Lease, and that Braniff was unjustly enriched by those loans. The Lease provided that Texas law should control its interpretation. The district court found that the Lease was ambiguous, submitted it to a jury for interpretation, and entered judgment in Braniff's favor based on that jury verdict. Toren now appeals the judgment, complaining that the district court erred in finding the Lease was ambiguous, and in submitting the Lease to the jury for interpretation. Also, Toren complains that Braniff should be charged for Toren's attorney's fees.

Ambiguity of the Lease

The preliminary question of whether a contract is ambiguous is one of law. *Carpenters Amended and Restated Health Benefit Fund v. Holleman Construction Co., Inc.*, 751 F.2d 763, 767 (5th Cir.1985). In answering that question, the court should consider the intent of the parties as evidenced by the terms of the contract and industry custom. *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex.1983). But once a court has found ambiguity in a contract, "the interpretation of the instrument is a question of fact for the jury." *Reilly v. Rangers Management, Inc.*, 727 S.W.2d 527, 529 (Tex.1987). In this case, the district court found that the lease was ambiguous as to whether Braniff's loans of rotables were prohibited. Therefore, the court submitted the Lease to the jury for

interpretation. Toren complains that the district court erred in failing to find that the Lease prohibited Braniff's lending of rotables as a matter of law. Toren contends that sections 6 and 20(b) of the Lease unambiguously prohibit the loans, and, since determination of whether a contract is ambiguous is a question of law, the district court should not have found ambiguity or submitted the Lease to the jury for interpretation.

1. Section Six[2]

In support of its argument, Toren takes two words from Section 6 — "encumbrance" and "claim" — out of context, and argues that those words unambiguously prohibit Braniff from lending rotables. But Toren ignores the list of words which falls before the chosen two. The specific items listed (security interest, mortgage, pledge, lien, charge) refer to financing agreements in which the lender takes a non-possessory interest in property as security for an indebtedness. While "encumbrance" and "claim" are less
766 clearly defined, in Texas, "[w]here there is a list of *766 certain specific items, followed by general words, the general words are held to refer to the same class of items as those items specifically mentioned." *Haney v. Minnesota Mutual Life Ins. Co.*, 505 S.W.2d 325, 328 (Tex.Civ.App. — Houston [14th Dist.] 1974, writ ref'd n.r.e.). Given this construction of "encumbrance" and "claim," it is ambiguous whether Section 6 was intended to prohibit the lending of rotables.

Industry custom, too, shows that the parties to the Lease did not intend specifically to prohibit the lending of rotables. The Lease itself reflects that the parties contracted with reference to industry custom and usage.[3] And the testimony of expert witnesses Joe Dooley, Fred Maurstad, and Charles Thornton explained clearly that lending of rotables among airlines is industry custom. Given the language of the Lease itself, and its construction in light of industry custom, we affirm the district court's finding of ambiguity and submission of the Lease to the jury for interpretation.

2. Section Twenty[4]

Toren complains that the district court should have found that Section 20(b) of the Lease prohibited the lending of rotables as a matter of law, and therefore submission of the Lease for interpretation by the jury was error. This contention must fail, for several reasons. First, Section 20(a) of the Lease governs assignment by Toren, the Lessor. Where Section 20(b) addresses assignment of the "Lease and all or any part of [Braniff's] rights," Section 20(a) addresses assignment of the "Lease, the *Leased Property* and all or any part of [Toren's] rights" (emphasis added).[5] The parties specifically addressed assignment of the leased *property* by Toren, but did not do so for Braniff. We cannot say, therefore, that Section 20(b) unambiguously addresses and prohibits Braniff's lending of the leased property.

Second, even if Section 20(b) did address assignment of the leased property by Braniff, it is not clear whether Braniff's lending of rotables falls within Section 20(b)'s prohibitions. That is, whether Braniff's loan agreements constitute assignments, transfers, or conveyances as those terms are used in Section 20(b). Because Section 20(b) does not unambiguously prohibit Braniff's lending of rotables, the district court did not err in submitting the lease to the jury for interpretation, and we affirm the district court's judgment based on the jury's findings.

Return of Rotables

Section 3(a)(vii) of the Lease provides that Braniff should return to Toren any rotables that "are surplus to [Braniff's] needs, as determined in good faith by [Braniff]." The district court submitted an interrogatory to the jury on the issue[6], and the jury found that Braniff had made a good faith determination of which rotables were surplus to its needs. Toren complains now that the district court should have found that the rotables lent to other airlines were surplus as a matter of law, and the issue of good faith should not have submitted the issue to the jury for determination. Toren argues that, because Braniff had loan agreements with other airlines, specifically Alaska Airlines, the rotables lent were, by necessity, surplus to Braniff's needs.

767 At trial, the jury heard testimony from Joe Dooley, an expert in the airline industry. *767 He testified that because Braniff at the time of the transactions was not yet a stable concern, their needs were uncertain, but they had retained only those rotables that were foreseeable and necessary for their operations. In fact, Mr. Dooley testified that he would have retained more rotables than Braniff did. Given this and other testimony, we cannot say that Braniff retained excess rotables as a matter of law. The district

court, therefore, correctly submitted the issue to the jury for determination. We affirm the judgment of the district court reflecting the jury's finding of good faith.

Other Theories of Recovery

Toren complains that, because Braniff's lending of rotables was unlawful, Toren is entitled to recover for unjust enrichment, conversion, and Braniff should be subject to a constructive trust for Toren's benefit. But these claims presuppose the unlawfulness of Braniff's loan agreements. And, as those agreements have been found to be lawful, we find no merit in Toren's contentions.

Attorneys' Fees

Section 22 of the Lease provides that Braniff shall indemnify Toren for "reasonable attorneys' fees" incurred in enforcing a right under the Lease. As a consequence, the district court allowed testimony as to the legal services rendered and their value. The jury was correctly instructed as to the factors to consider in determining attorneys' fees, and given an interrogatory to answer. They found that the reasonable value of Toren's attorneys' fees was zero. Toren now argues that we should set aside that factual determination and order a new trial, simply because the jury did not follow their recommendation in setting reasonable value. We decline to do so, as the Lease merely entitles Toren to *reasonable* fees, not *actual* fees, or *all* fees, or fees testified to at trial. The jury's determination of reasonable fees will stand.

Waiver

The district court submitted an interrogatory to the jury on the affirmative defense of waiver, and the jury answered in Braniff's favor. Toren now complains that the interrogatory was not supported by the evidence since Braniff presented no evidence of a *written* waiver, as would be required by the Lease. Because the jury found that the Lease itself allowed Braniff's loan transactions, Toren need not have waived any rights under the Lease to allow the transactions. Therefore, we do not reach Toren's complaint on this issue.

For this reason and those stated above, the judgment of the district court is in all things AFFIRMED.

REAVLEY, Circuit Judge, concurring:

I concur in the judgment. I see no factual ambiguity. Under prevailing industry custom and the terms of the lease, Braniff was entitled to exchange rotables with other airlines.

[1] The assets included thirty Boeing 727-200 aircraft, aircraft engines and certain aircraft parts. The parts included "rotables," which are parts rotated on and off an aircraft for repair, as opposed to "expendables," which are used and then discarded.

[2] Section 6 provides, in pertinent part:

"Mortgages, Liens, etc. Lessee will not, directly or indirectly, create, incur, assume, or suffer to exist any security interest, mortgage, pledge, lien, charge, encumbrance, or claim on or with respect to the Leased Property...."

[3] Sections 1(v), 1(x), 1(bb), 8(l) and 11 of the Lease provide specifically that Lease enforcement and construction should reflect industry standards.

[4] Section 20(b) provides, in pertinent part:

"This lease and all or any part of Lessee's rights hereunder shall not be assigned, transferred, or otherwise conveyed by Lessee without the express written consent of the Lessor."

[5] The term "leased property" is specifically defined in Section 1(y) of the Lease to include "Airframes, the Engines, and the Rotables, including all manuals, logs and records relating thereto...."

[6] The interrogatory read:

"Do you find from a preponderance of the evidence that Braniff failed to make a determination in good faith as to which rotables, if any, were surplus to its needs when it returned aircraft to the trust."

E-Mails to Clients: Avoiding Missteps

By Kristin J. Hazelwood

In 1998, the KBA Ethics Committee issued E-403, concluding that, absent "unusual circumstances," a Kentucky lawyer may communicate with a client via unencrypted e-mail without violating the lawyer's duty of confidentiality.[1] Despite its popularity[2] and ease of use, e-mailing with a client still poses special concerns. Not all communications are appropriate for e-mail, and, even when e-mail is appropriate, drafting the e-mail demands more of the writer than the typical e-mail.

Is E-mail Appropriate for this Communication?

Here are some questions a careful lawyer should consider before e-mailing with a client:

Does this communication deal with an extraordinarily sensitive matter? In E-403, the Ethics Committee stated that unencrypted e-mail with a client is appropriate absent "unusual circumstances." "Unusual circumstances" that can make e-mail inappropriate include a communication involving an "extraordinarily sensitive matter."[3] When the client would suffer serious adverse consequences from disclosure of the e-mail, the lawyer should take extra steps (like encryption) to ensure its security.

Does a third person have access to the e-mail account or device that the client uses? According to a recent ABA ethics opinion, because a lawyer has the obligation to use reasonable care to protect the client's confidential information, a lawyer ordinarily has an ethical obligation to instruct the client not to use a computer or other telecommunications device or e-mail account for sensitive (or may even any attorney-client) communications if another person has a right to access it.[4] Specifically, the ABA was concerned with the situation in which a client uses an employer's e-mail account or an employer's computer or smartphone to access a web-based e-mail account.[5] If the employer's policies give it a right of access to e-mails sent via the employer's account or device, then the employee does not have a reasonable expectation of privacy in the e-mail.[6] That same analysis applies when members of a family share an e-mail account or when the client (or the lawyer) uses a public or borrowed computer such as at a library or hotel.[7]

Does the communication convey bad or emotionally charged news? E-mail's short and direct form make drafting e-mails that convey the appropriate tone challenging. Much as a lawyer would call or meet with a client to discuss a hearing with an unfavorable result rather than write a letter, the lawyer should similarly resist the temptation to e-mail such news to the client. In conveying bad or emotionally charged news to a client, the lawyer needs to be able to respond to the client's verbal and nonverbal cues.[8] That responsiveness is not possible with e-mail.

Would I want to hear this communication read in court? Just like with letters, a lawyer should always be mindful of the longevity of e-mail and the ease with which it can be shared with others. Forwarding e-mailed documents is particularly problematic because of the metadata that can unknowingly be passed along with a document.

Does this E-mail Look Like Professional Correspondence?

Writing professional e-mail is tricky because it involves the use of an informal mode for serious matters. Consider these questions in evaluating the content and form of an e-mail:

Have I proofread and edited carefully? Shortcuts in social e-mail may be

part of professional e-mail.[9] Not much calls into question a lawyer's intellectual capabilities faster than grammatical errors.[10] The careful lawyer proofreads and polishes an e-mail just as carefully as a brief being filed in court.[11]

Is the e-mail concise? Recipients expect e-mails to be short. At least one scholar has recommended the "no scrolling" rule: The recipient should be able to read the entire message on a single computer screen and should not have to scroll down to read it.[12] Now that e-mails are often read on smartphones and tablets, the need for concise e-mails is even more pressing.

Is the e-mail reader-friendly? Focus the client on the legal issue by creating a subject line that conveys the specific purpose of the e-mail and change it as the thread evolves.[13] To make sure that the client understands and knows how to respond to your message, use a simple, block format for your e-mail and put questions that need to be answered at the beginning of the message.[14] Put extra space between the chunks (either paragraphs or numbered items) for readability.

Have I double-checked the list of recipients? Check the recipient list carefully to make sure everyone on the list really needs to be included, especially when replying to a message.[15] It's frustrating to have one's inbox clogged with unnecessary messages. Even more problematic, if the e-mail contains confidential information and goes to an opposing party or some other third party, the consequences for the client could be disastrous. Although the Kentucky Rules of Professional Conduct deal with the issue of inadvertent disclosure[16] and even if the e-mail contains a privilege statement, the lawyer can easily avoid the embarrassment and risk to the client by double-checking the list of recipients. Waiting until after writing the body of the e-mail to add the recipients will help identify who should receive it.

E-mail can be a valuable tool for lawyers, but its misuse can create ethical and credibility problems. Carefully client as well as the e-mail's form and content will help avoid missteps.

ENDNOTES

1. Ky. Bar Ass'n Ethics Comm., Op. E-403 (1998).
2. Kristen Konrad Robbins-Tiscione, *From Snail Mail to E-mail: The Legal Memorandum in the Twenty-First Century*, 58 J. Legal Educ. 32, 32-33 (2008).
3. Ky. Bar Ass'n Ethics Comm., Op. E-403 (1998). The Illinois State Bar Association opinion on which the Ethics Committee relied in E-403 listed "extraordinarily sensitive matters" as an "unusual circumstance" that would make unencrypted e-mail unethical. Ill. State Bar Ass'n, Adv. Op. 96-10 (1997).
4. ABA Comm. on Ethics &Prof'l Responsibility, Formal Op. 11-459 (2011).
5. *Id.*
6. *Id.*
7. *Id.*
8. Tracy Turner, *Email Etiquette in the Business World*, 18 Persps.: Teaching Legal Res. & Writing, Fall 2009, at 18-19.
9. Kendra Huard Fershee, *The New Legal Writing: The Importance of Teaching Law Students How to Use E-mail Professionally*, 71 Md. L. Rev. Endnotes 1, 16 (2011).
10. *Id.*
11. Ian Gallagher, *A Form and Style Manual for Lawyers* 181 (2005).
12. Wayne Schiess, *Writing for the Legal Audience* 33-34 (2003); *see also* Gallagher, *supra*, at 181-82 (emoticons and texting abbreviations should never be part of professional email).
13. Schiess, *supra*, at 38.
14. *Id.* at 40. According to Professor Schiess, this format is preferable because formatting is often lost when an email is transmitted.
15. Gallagher, *supra*, at 180 ("The lesson here is that you must think carefully about who is receiving every communication you send . . . and what the implications of the receipt of the document are.").
16. Ky. Sup. Ct. R. 3.130 (4.4).

Two examples sent to me of very good client communications.

Here's the first:

In the crane case, we are in the process of responding to a large set of document requests from Deep South. There are numerous requests related to the refinery's Hurricane Ike claim, including requests for documents related to (a) the Ike property damage claim submitted to OIL; (b) the Ike business interruption arbitration; and (c) the damage calculations and source data submitted to the insurers for the refinery interruption loss.

Although the refinery and Navigant have controlled for and excluded the effects of Ike in calculating the crane damages, we don't think there is a strong objection to be made to prevent Deep South from obtaining discovery regarding the refinery portion of the Hurricane Ike claim to ensure there is no double-counting. And we don't want to delay the crane case by objecting to the production of documents that Judge Wilson is very likely going to order us to produce.

So our plan is to produce (subject to relevancy objections) the following to Deep South in response to its Ike-related document requests: (a) the schedules/materials LYB has regarding the Ike property damage claim submitted to OIL; (b) the pleadings in the Ike arbitration (statement of claim, statement of defence, and reply); and (c) the final proof of loss calculations (and supporting data) for the refinery loss as submitted to insurers by Navigant.

Please let us know if you disagree with this approach or want to discuss.

Thanks.

Here's the second:

CONFIDENTIAL & PRIVILEGED: ATTORNEY-CLIENT COMMUNICATION AND WORK-PRODUCT

Mark -- Attached is a motion to compel filed by plaintiffs late yesterday.

The motion seeks net worth information from Houston Refining, LP. (The underlying discovery responses and objections were lodged by Mills Shirley on June 20, 2011; the requests were served on May 16.)

The motion is set for hearing on **September 19 at 10:00 am.** Our deadline to file a response is Thursday, September 15.

We will confer with you more later about a response. But we wanted to point out at least the following issues now:

1) Plaintiffs' counsel did not confer with us on these issues. We checked with Etta, and there was no attempt to confer with them on these objections either. We will argue that the motion should be struck for failure to comply with the local rules and for a misrepresentation to the court regarding their efforts to confer.

2) The motion is patently devoid of argument on facts or law. This seems to be a habit of Vuk and Sean. They file a one-page motion asking for relief, inducing defendants to file a long response trying to counter arguments that haven't even been made yet; then plaintiffs come back with a reply that narrows the issues and / or points out the problems with the defendant's speculative arguments. We may point this out to the court to call them out on this practice.

3) Last Friday the Texas Supreme Court issued an order granting oral argument on a mandamus case involving this same issue. The case is No. 110007, IN RE ASCENSION MARTINEZ, JR.. The case arises from a San Antonio court of appeals opinion issued last December upholding an order compelling a party to produce net worth documents. (That opinion is attached.) The Texas Supreme Court set oral argument in this case for December 7, 2011. Without speculating too much on what they might do, the fact that they took the case is at least some indication that they will clarify the law on these issues and it could have some bearing on our position here (even though oral argument is set for after our trial date).

Again, we can discuss specific response arguments more later and we will send any response to you before filing. Also, we should discuss whether Houston Refining is even able (or willing) to produce responsive documents if so compelled by the trial court. We will likely need to know this for any response.

Thanks, and let us know if you want to discuss,

- John

<<Plt's First Motion to Compel Responses to Written Discovery Requests.pdf>>

<<Westlaw_Document_16_53_53.doc>>

Writing for Your Client

Wayne Schiess

We all write letters to nonlawyer clients at some time. Yet what we write is often poorly targeted to that audience. A partner in a prestigious law firm recently told me that he is "appalled" at the writing style of letters that his colleagues send to clients: the tone and style are too stuffy and legalistic.

As lawyers, we need to be aware that when we write to clients, we face a dramatic shift in audience. In this article, I address three typical characteristics of legal language that appear too often in client letters: legalisms, legal citation, and overformality. I'll paraphrase George Bernard Shaw (who used *literature* and *literary* where I'm using *law* and *legal*): "In law the ambition of a novice is to acquire the legal language; the struggle of the adept is to get rid of it."[1]

Avoid Using Legalisms

Legalisms are "the circumlocutions, formal words, and archaisms that characterize lawyers' speech and writing."[2] They are the distinctive characteristics of traditional legal-writing style.

But you should banish them from client letters. Simply put, do not use traditional legal-writing style when writing to clients. Try *not* to sound like a lawyer. That's a challenge because legalisms

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1 Quoted in John R. Trimble, *Writing with Style: Conversations on the Art of Writing* 183 (2d ed., Prentice Hall 2000).

2 Bryan A. Garner, *A Dictionary of Modern Legal Usage* 516 (2d ed., Oxford U. Press 1995).

abound in what lawyers read and in what they normally write. Many lawyers will continue to use legalistic words and phrases when writing to clients, primarily for two reasons.

First, some lawyers use legalisms to impress or intimidate the client. Under this theory, the client who is baffled by the language is the client who needs the lawyer. But I say try to impress the client with your knowledge of the law, with your hard work, and with your ability to get favorable results, not with legalese.

Second, some lawyers use legalisms out of habit or reflex. Sometimes lawyers forget what they once didn't know. That happens to teachers all the time. You teach the concept from the perspective of someone with 10 or 20 years' experience, forgetting that your audience has no experience. But skilled teachers — and practitioners — adapt their writing to the audience.

Let's take an example. Read this excerpt from a practitioner's letter to a new client. Typical legalisms are highlighted.

> Dear Mr. Wilkins:
>
> Enclosed please find the retainer agreement. Please sign and return same at your earliest convenience.
>
> Pursuant to our conversation of December 20, 2001, I have conducted legal research on the question as to whether your arbitration claim was timely under the Texas Seed Arbitration Act. Tex. Agric. Code Ann. § 64.006(a) (Vernon 2001) (the "Act"). According to Texas common law construing the Act, the court would apply the plain-meaning canon of construction, *Fitzgerald v. Advanced Spine Fixation Systems, Inc.*, 996 S.W.2d 864, 865 (Tex. 1999), and should hold that said claim was timely.
>
> Unfortunately, this conclusion is not guaranteed and is subject to certain qualifications discussed herein. *See, e.g., Continental Cas. Ins. Co. v. Functional Restoration Assocs.*, 19 S.W.3d 393, 399 (Tex. 2000).

These boldface terms are almost exclusively "legal" — that is, only lawyers use them. The words and phrases fall into different categories: *same*, *pursuant to*, *said*, and *herein* are commonly used by lawyers but do not have unique legal meanings; *common law* and *canon of construction* have specialized legal meanings. But you can replace all of them with common terms:

Instead of:	*Write:*
same	it, the agreement
Pursuant to	As discussed in, As we agreed in
common law	court cases, judicial decisions
canon of construction	rule, method of interpreting statutes
said	the, your
herein	here, in this letter

By removing the legalisms, you make the text easier for the client to understand, and you avoid sounding pompous.

Limit Formal Legal Citations or Simplify Them Greatly

The example letter I excerpted contains three legal citations. All three use correct form. All three direct the reader to the proper authority. All three state the proposition they are cited for. So what's the problem?

First, they clutter up the text. Legal readers are used to citations and, frankly, are apt to skip over them. But to the uninitiated, they are large speed bumps. They're too long to be ignored, and yet they are not textual sentences, so readers must slow down and try

to figure them out. Good client writing doesn't ask the reader to slow down and figure things out.

Second, they contain specialized information that most clients won't understand. In particular, the volume-reporter-page portion can be baffling: *996 S.W.2d 864*. Certainly that means nothing to the nonlawyer client.

Third, citation signals must seem equally strange to the client. What is *See, e.g.*? Signals are a perfect example of something that has a specialized legal meaning. Their meaning is not intuitive but is specially defined in citation manuals. We should not expect our clients to consult a citation manual.

So rather than lard your client letters with legal citations, choose from these options:

Option 1

Omit citation of legal authority altogether. Ask yourself some questions. How important is it for my client to know the citation for the Texas Agriculture Code? Can't I just say *Texas law* or *Texas statutes*? Does my client need to know that the case I'm relying on is *Fitzgerald v. Advanced Spine Fixation Systems, Inc.*, that it's found in volume 996 of the South Western Reporter, Second Series, page 864, and that it was decided by the Texas Supreme Court in 1999? (Besides, is my client going to know what the South Western Reporter, Second Series, is? Or that it's abbreviated S.W.2d?)

Completely omitting the citations in a client letter cleans up the text and makes the document much more readable. But some lawyers will not want to go that far. And in some situations, you do want the client to know the names and sources of the authority.

Option 2

Put the citations in footnotes. This technique has much the same effect as omitting the citations because now the long, baffling speed bumps are gone, and the client can read the text smoothly. Most clients will treat the footnotes as "legal stuff" and will ignore them, and those who want the bibliographic information can find it in the footnotes. But footnotes are a mixed blessing. Some clients will be annoyed that the information at the bottom of the page requires them to nod up and down to take everything in.

Option 3

Use a shortened form of the citation. Rather than list the entire case name and bibliographic information, simply refer to the case in a shorthand way. Leave the details in your memo to the file.

Under Option 3, our letter excerpt might look like this (with the legalisms replaced):

> Dear Mr. Wilkins:
>
> Enclosed please find the retainer agreement. Please sign and return it at your earliest convenience.
>
> As we discussed in our conversation of December 20, 2001, I have conducted legal research on the question as to whether your arbitration claim was timely under the Texas Seed Arbitration Act. According to a Texas case called *Fitzgerald*, the court would apply the plain-meaning rule and should hold that your claim was timely.
>
> Unfortunately, this conclusion is not guaranteed and is subject to certain qualifications discussed in this letter. For example, one qualification arises from a Texas Supreme Court case called *Continental Casualty*, decided in 2000.

Use a Colloquial Tone

By *colloquial*, I do not mean slangy or substandard language. The phrase *colloquial tone* means "a conversational style."[3] Of course, we should not usually write to clients in the same way we speak or carry on conversation. That is far too informal and would appear unprofessional. But we *can* write in a clear, simple, and direct way that avoids pompous, turgid prose.

Ultimately, lawyers should reduce the level of formality when writing to clients. What is too formal and what is too informal will often be a matter of taste, but consider a few examples from our revised excerpt. I have highlighted the words and phrases that strike me as unnecessarily formal or stuffy.

> Dear Mr. Wilkins:
>
> Enclosed please find the retainer agreement. Please sign and return it at your earliest convenience.
>
> As we discussed in our conversation of December 20, 2001, I have conducted legal research on the question as to whether your arbitration claim was timely under the Texas Seed Arbitration Act. According to a Texas case called *Fitzgerald*, the court would apply the plain-meaning rule and should hold that your claim was timely.
>
> Unfortunately, this conclusion is not guaranteed and is subject to certain qualifications discussed in this letter. For example, one qualification arises from a Texas Supreme Court case called *Continental Casualty*, decided in 2000.

None of these phrases is wrong or bad; they simply elevate the formality unnecessarily. They create a distance between the writer and the reader — a distance you do not want between you and your client.

---

[3] *Id.* at 171.

Here are some possible revisions:

Formal Phrase:	*Comment:*
Enclosed please find	This phrase and its sister, *Please find enclosed,* have been criticized since 1880.[4] Try *Here is* or *I have enclosed.*
at your earliest convenience	Almost harmless, but stuffy; try *as soon as you can* or *when you can.*
conducted legal research	One word, *researched,* does the job of three.
the question as to whether	A common legal space-filler; prefer *whether.*
Unfortunately	Perfectly correct, but long. Short transition words make your writing more crisp and natural.[5] Use *But.* (And yes, you can start a sentence with *But.*)
is subject to certain qualifications	Highly formal; perhaps we should omit it or revise it in a complete reworking of the sentence. Suggestion: *there are exceptions.*

By avoiding legalisms, limiting citations, and adopting a less formal tone, we now have a shorter, clearer, and more readily understandable letter.

4 *See id.* at 314; *see also* Bryan A. Garner, *The Elements of Legal Style* 113 (2d ed., Oxford U. Press 2002) (describing the phrase as "swollen deadwood in lawyers' correspondence").

5 Bryan A. Garner, *Legal Writing in Plain English: A Text with Exercises* 50 (U. Chi. Press 2001).

Use a Bold Synopsis

Do you begin your court papers by introducing the parties and the procedural background? Stop it.

You're squandering a great chance to get your point across. One experienced practitioner and expert writer, Beverly Ray Burlingame, put it this way: "By devoting the entire opening paragraph to restating the needlessly long title, lawyers waste judges' time and sacrifice a valuable chance for persuasion."[1]

So put a summary of your point or points up front. Giving a summary at the beginning is not a new idea. Many legal-writing professionals recommend putting the conclusion up front. Here's a sampling of quotations:

> Virtually all analytical or persuasive writing should have a summary on page one . . . .[2]

> Try to begin the document and the main divisions with one or two paragraphs that introduce and summarize what follows, including your answer.[3]

> In each part of your legal analysis, give the bottom line first . . . .[4]

---

[1] Beverly Ray Burlingame, *On Beginning a Court Paper*, 6 Scribes J. Legal Writing 160, 161 (1996–1997).

[2] Bryan A. Garner, *Legal Writing in Plain English: A Text with Exercises* 58 (U. Chi. Press 2001).

[3] Joseph Kimble, *The Elements of Plain Language*, in *Lifting the Fog of Legalese: Essays on Plain Language* 69, 71 (Carolina Academic Press 2006); *see also* Joseph Kimble, *First Things First: The Lost Art of Summarizing*, 8 Scribes J. Legal Writing 103, 103 (2001–2002).

[4] Irwin Alterman, *Plain & Accurate Style in Court Papers* 97 (ALI-ABA 1987).

> All briefs should have a first-page, introductory summary, whether the rules require one or not.[3]

So in any court paper, put a summary right at the beginning. Whether you state the issue, summarize your position, or assert the correct result, you should do it up front. Yet too many court papers don't.

I recommend that when you submit a motion to a trial judge, you begin with a bold synopsis: write a one- or two-sentence summary of your point, highlight it with boldface text, and set it off with indentations.

To see how it works, compare these before-and-after examples of trial motions:

Before — a typical first page

> DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
> & BRIEF IN SUPPORT THEREOF
>
> TO THE HONORABLE JUDGE OF SAID COURT:
>
> COMES NOW CHRIS SMITH AND READY-FOODS, INC., D/B/A ARBY'S, collectively ("Defendants"), pursuant to Rule 166a, and move this Court to grant summary judgment against all claims of Remy Gonzalez ("Plaintiff"), in the above-referenced matter.

This standard opener tells the judge almost nothing about the issue and nothing specific about the grounds for the motion. It's all preliminary. Instead, get right to the point: tell the judge the purpose of the motion — specifically — right at the beginning.

---

[3] Steven D. Stark, *Writing to Win: The Legal Writer* 144 (Main Street Books 1999).

After — with a bold synopsis

Motion for Summary Judgment

Chris Smith and Arby's move for summary judgment because they were never the plaintiff's employer under Texas law. In addition, the plaintiff has not exhausted his administrative remedies.

1. Background. This case was filed on . . . .

Below is another before-and-after example. Notice that the writer takes up a good portion of the original opener with defining party names. If that's necessary at all, the first paragraph is not the place to do it. Get the judge focused on your points, not on the parties' defined names.

Before — a typical opener

PLAINTIFF'S TRIAL BRIEF

Plaintiff, Reginald E. Curtis ("Curtis"), files his Trial Brief in his suit against the Texas Commission on Wages ("TCW") and the Texas Labor Commission ("TLC") (collectively, "Defendants"), as follows . . . .

After — with a bold synopsis

Plaintiff's Trial Brief

The EEOC's conclusions and factual findings should be admitted into evidence here. Its hearings involved the same parties in this suit, and its conclusions and factual findings are highly probative of discrimination.

1. Background. This case was filed on . . . .

Trial judges are busy. The bold synopsis — or any good up-front summary — will help the judge by putting the critical information first. That way, the judge does not waste time searching through your document, looking for the point. Judges will appreciate that.

Organize Overtly

Now, suppose that the judge has time to read your whole document. How will the judge differentiate your case, your issues, your points, from all the other cases on the docket? The best way to ensure that a trial judge will understand your case is to make the organization of your paper obvious. Make your organizational plan overt.

Section headings

One good technique is to use short, boldface headings for each new section and subsection (as in this article itself). By doing that, you allow the judge, at any point in the text, to refer to a subject heading and quickly know where he or she is. Headings are cues to large-scale organization. For example:

> **Motion in Limine**
>
> **This motion asks the court to exclude evidence that Regional Hospital fired Nurse Esther Green. The firing was a "subsequent remedial measure" and is inadmissible under Rule 407.**
>
> 1. **Background. This case was filed on . . . .**
> 2. **Authority. Under the Federal Rules of Evidence . . . .**
> 3. **Argument. Evidence of Nurse Green's dismissal is not admissible . . . .**

The busy judge may want to skip ahead to the critical information, and the headings allow that. The busy judge may forget what's going on in your case, and the headings bring the judge's attention back into focus. In short, the headings make it easy on the busy judge. And that's good.

Enumeration and tabulation

To cue the judge about the small-scale organization, I recommend that legal writers break up long or complex ideas into smaller chunks of text. Use enumeration (1, 2, 3 or a, b, c) and tabulation (setting off text with hard returns or bullets) to help you organize the text and highlight important material within paragraphs and sentences — the small-scale organization. These techniques tell the judge where you are with this idea, as opposed to where you are in this document.

Just to clarify what I mean by enumeration and tabulation, here are some examples (although you'd normally have longer items — not one-worders).

An example of enumeration:

> Legal documents should be (1) lettered, (2) numbered, or (3) tabulated.

An example of tabulation:

> Legal documents should be:
>
> lettered,
>
> numbered, or
>
> tabulated.

An example of enumeration and tabulation:

> Legal documents should be:
>
> 1. lettered,
> 2. numbered, or
> 3. tabulated.

Even for something as common as reciting a legal rule, you can use tabulation to present the rule in a clear and direct way:

Instead of this:

> To decide whether the limits on selling the plaintiff's car are valid, courts have distinguished between a "direct and total deprivation" of the right to sell, and "mere impingement" of that right. *Spielman-Fond, Inc. v. Hanson's, Inc.*, 379 F. Supp. 997, 999 (D. Ariz. 1973). A direct and total deprivation of the right to sell is more serious: it means preventing the sale by seizing the car or by enforcing statutory or contractual terms that prohibit the sale. *Id.* Mere impingement simply means discouraging the sale or making it more difficult. *Id.*

Try this:

> Rule of Law: To decide whether the limits on selling the plaintiff's car are valid, courts have distinguished between:
>
> 1. a "direct and total deprivation" of the right to sell, and
> 2. "mere impingement" of that right.
>
> *Spielman-Fond, Inc. v. Hanson's, Inc.*, 379 F. Supp. 997, 999 (D. Ariz. 1973). A direct and total deprivation of the right to sell is more serious: it means preventing the sale by seizing the car or by enforcing statutory or contractual terms that prohibit the sale. *Id.* Mere impingement simply means discouraging the sale or making it more difficult. *Id.*

With boldface headings, enumeration, and tabulation, your documents will stand out. Your points will be understandable. Your case will capture the judge's attention.

Be Honest

In his excellent book *Writing to Win: The Legal Writer*, Steven Stark lists "Thirteen Rules of Professionalism in Legal Writing." Here are the first four:

1. Never lie, under any circumstance.
2. Don't use euphemisms to disguise the truth.
3. If it's not required, hedging is a form of dishonesty.
4. Avoid the use of hyperbole to distort the truth of your assertions.[6]

Wow. Do you get the impression that Stark, a former judicial clerk and an experienced litigator, is big on honesty? Well, trial judges are too. Consider a quotation on honesty and candor from Judge Stanley Sporkin, formerly of the federal district court in Washington, D.C.: "A lawyer's credibility with the judge . . . is the key to any litigation. Candor is essential. . . . Be honest with the judge . . . ."[7]

Be honest about the facts

Tell the truth about the facts of your case. Don't omit relevant facts, even if they are unfavorable. Don't fudge. And by *fudge*, I

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[6] *Id.* at app., 269.

[7] Stanley Sporkin, *The Inside Scoop*, 27 Litigation 3, 3 (Spring 2001).

mean to falsify or fake. If you fudge, you risk your credibility. Remember that several potential audiences can scrutinize your court paper besides your colleagues and your own client: the trial judge, the judge's clerk, and — since most court papers are public documents — the press. Someone will figure out that you've fudged on the truth and bring it to the judge's attention.

And don't forget opposing counsel. One experienced litigator reminded me that in a lawsuit, opposing counsel is getting paid to look for your mistakes: "With a paid critic always checking your work, it just doesn't make sense to fudge."[8]

If you do fudge, you'll lose credibility with the judge, and that might mean sanctions or bar discipline. So write about the facts as favorably as possible for your client, but write honestly.

Be honest about the law

Sometimes amateurs make mistakes in this area, like the student in this story, who omitted part of the rule of law:

> In the case the students were working on, the rule was that the court should look at five factors to determine the reliability of the witnesses. Tom chose to discuss only three of the factors and omit the two that hurt his case. [His writing instructor] commented on this problem by writing, "What about the other 2 requirements?" [Tom responded,] "Why put them in? They kill my case."[9]

That's a naive mistake by a novice legal writer, and I hope it doesn't sound familiar. You can't afford to make that mistake. Read the cases you cite, report their holdings accurately, and check thoroughly to make sure that your cases are still good law.

[8] Interview with Kamela Bridges, Lecturer at Univ. of Tex. School of Law (Sept. 2, 2004).

[9] Anne Enquist, *Critiquing Law Students' Writing: What the Students Say Is Effective*, 2 Legal Writing: J. Legal Writing Inst. 145, 165 (1996).

But why? In Tom's case, the writing instructor had the right response. If you don't report the legal rule accurately, the instructor said, "the State [opposing counsel] will seize on your omission and argue your lack of candor to the court."[10] If you are dishonest about the law, opposing counsel will not let the judge forget it. Judge Sporkin put it this way:

> If you try to spin a court by hiding a key decision that goes against you, the chances are the judge will find out about the decision either from your adversary or from a law clerk. At that point, your credibility is zero.[11]

An up-front summary, an obvious organizational plan, and honesty: three writing skills that will please trial judges — and might even surprise them.

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[10] *Id.*

[11] Sporkin, *supra* n. 7, at 3.

The Appellate Record : Texas Appellate Lawyer & Attorney Kendall Gray for Fifth Circuit & Supreme Court Appeals

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Font Advice

Posted on October 5, 2012 by Kendall Gray

I received an inquiry from a reader the other day asking about fonts--a perfect excuse for another a nerd-er-rific post on fonts and typography. He wrote:

> Dear Appellate Record:
>
> I continue to enjoy reading your blog. One question: What font do you prefer for your appellate briefs? Do you use a different font for trial court filings?
>
> Signed,
>
> The Fonts of San Francisco

Providing advice on font choice is a grave responsibility for a blogger. Being a font role model is even more daunting. But we here at the Appellate Record will not shirk.

To whom much has been given, much shall be required.

After the jump, the fonts we use and why.

So you want to choose a font.

Congratulations. You have taken the first step.

No longer will you allow software engineers at Microsoft decide what your brief looks like. No longer will you be defaulting to their . . . uhm . . . defaults.

You wouldn't let someone with a pocket protector choose the suit you wear to oral argument. Why would you let them choose how your brief looks?

So now what? How do you choose a font? The answer to that question is a combination of what the court requires, what the court allows, how the font was designed, and only a little bit of personal taste.

Just a couple of weeks ago I encountered a state supreme court that still has a requirement for electronic copies on a 3.5 inch floppy disk in its rules. Similarly backward, there are some courts that actually require briefs in Courier font (*wretch*) or Times New Roman, which is a horrible choice for briefing.

If the court allows you to choose a font so long as you comply with a font size requirement, think about what you are using the font for. For briefs--whether in the trial court or the court of appeals--you are writing with a relatively long line length, more like a book than a newspaper. So choose a font that is designed for books, not a font designed for the narrow columns of a newspaper like Times New Roman.

If you don't believe me believe the Seventh Circuit. Their website guide to briefing says:

> Typographic decisions should be made for a purpose. The Times of London chose the typeface Times New Roman to serve an audience looking for a quick read. Lawyers don't want their audience to read fast and throw the document away; they want to maximize retention. Achieving that goal requires a different approach—different typefaces, different column widths, different writing conventions. Briefs are like books rather than newspapers. The most important piece of advice we can offer is this: read some good books and try to make your briefs more like them.

> Use typefaces that were designed for books. Both the Supreme Court and the Solicitor General use Century. Professional typographers set books in New Baskerville, Book Antiqua, Calisto, Century, Century Schoolbook, Bookman Old Style and many other proportionally spaced serif faces. Any face with the word "book" in its name is likely to be good for legal work. Baskerville, Bembo, Caslon, Deepdene, Galliard, Jenson, Minion, Palatino, Pontifex, Stone Serif, Trump Mediäval, and Utopia are among other faces designed for use in books and thus suitable for brief-length presentations.

For body text, this usually means I use Book Antiqua or Century Schoolbook. Both are very clear, readable, graceful, and don't call attention to themselves as being quirky. If I have my 'druthers, I like to use Century Schoolbook, but not everyone has that on their machines. So when I collaborate outside the firm, Book Antiqua is a safer choice.

Of course, I use a different font altogether for headings. But that's a post for another day.

Hope that answers the question, and thanks for reading.

Tags: Nerdlaws

Comments (3)Read through and enter the discussion with the form at the end

Ron Kovach - *October 9, 2012 2:37 PM*

Presentation goes a long way thanks for your work.

Catherine - *November 6, 2012 11:13 AM*

On using different fonts in headers: I tried it when I was at the Justice Department. I was told never to try such a thing again because the higher-ups couldn't countenance such radicalism. (No one disputed that the text looked better.) I realize the government will be the last to embrace the concept, but how would you make the case that using a different font for headers will not end Life as We Know It?

Kendall - *November 6, 2012 11:20 AM*

Catherine, I use two things to argue in favor of my radicalism:

First, there is some research showing sans serif fonts read moderately better in headings. Check out painting with print.

Second, common sense. There is a reason why street signs and freeway signs and other short bursts of declarative information are in sans serif fonts. Legibility. Text must be readable, but headings and headlines must be legible and quickly absorbed. Mimic a freeway sign.

Thanks for reading.

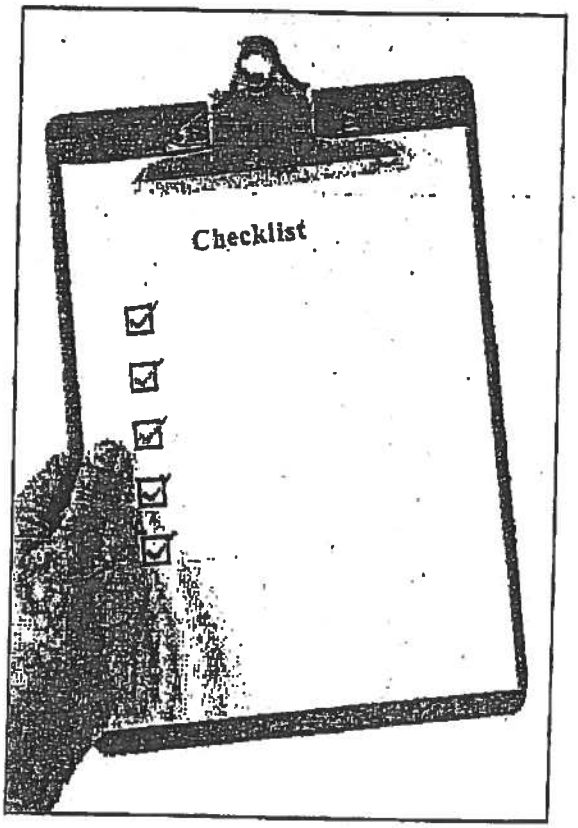
Checklists for Powerful, Efficient Legal Writing

by Jennifer Murphy Romig

Writing can be deeply satisfying but also equally frustrating. Writers may struggle with getting started, creating an effective outline, avoiding common errors or a combination of challenges. In the legal context, lawyers may wish for their writing to be more powerful and efficient, but not know what to change or how to implement changes.

One solution that speaks to each phase of the writing process and every writing situation is this: a checklist. Actually, the solution is not just one single checklist, but the method of using checklists throughout the writing process as well as in broader conversations about effective legal writing.

First, it is important to define what a checklist is—and what makes a good one. There are actually three distinct variations on effective checklists, as outlined in the inspiration for this column, Atul Gawande's book *The Checklist Manifesto: How to Get Things Right* (Metropolitan Books 2009). The most classic type of checklist is a "read-do." This type of checklist is a list of mandatory steps to "read" and then "do" in sequence to complete a task.



Another familiar checklist is the "do-confirm." You "do" the task in your own way, and then "confirm" that it

A third kind of checklist is based on process rather than substantive steps, and is most useful for professionals working in teams. Process-based checklists force team members to communicate and brainstorm problems and solutions at specified points during the team project. For example, in building a large multistory building, team members such as architects, construction managers, pipefitters and others must stop and confer at specific points in the process before moving on to the next phase of construction.

What all good checklists have in common is that they must be "simple, brief and to the point."[1] Checklists that are too lengthy or confusing will not generate good results and are likely to be simply disregarded in practice.

For lawyers attempting to write, and to write well, checklists are valuable at the beginning, middle and end of the writing process. Teams of legal writers beginning a project, especially a long, complex or high-stakes project, can benefit from using a process-based checklist of short check-ins at various points throughout the project. For counsel and local counsel working together, such check-ins would promote timely discussion of various issues such as how a particular strategy might succeed—or flop—in the local court environment. For senior lawyers delegating to junior lawyers, such check-ins could help minimize unnecessary rewriting time due to a project's veering off in the wrong direction.

For solo lawyers as well as those writing in teams, the substantive "read-do" and "do-confirm" checklists are equally promising at the beginning of a writing project. A template for a document is really a "read-do" checklist of components to include, such as the following outline of a demand letter:

- Choice of appropriate recipient, depending on strategy;
- Introduction signaling purpose
- Body including exposition, legal authority and argument, tailored for the situation; and
- Concise demand in closing.[2]

These types of checklists may seem fairly simple, but they can remind the writer of the expected parts of such a document, and can make the writing process more efficient by helping the writer break down a writing project into smaller pieces.

Checklists can also be helpful for brainstorming the content of a legal argument in any type of legal analysis or argument. My favorite checklist-style source on this point is Wilson Huhn's book *The Five Types of Legal Argument* (Carolina Academic Press 2002). These five arguments include arguments from (1) statutory text, (2) statutory intent, (3) precedent, (4) tradition and (5) policy. Within each type of argument, Huhn details further arguments to consider, such as lists—one might even say checklists—of statutory arguments and counter-arguments. By testing a draft against the classic list of arguments, a writer can ensure a thorough set of affirmative arguments. Such checklists could also better prepare the writer to anticipate counter-arguments.

At the end of a writing project, checklists can help both lawyers working alone and those working in teams. Checklists are particularly valuable in catching errors—what Gawande calls "the stupid [illegible] 'do-confirm' checklist could help the writer to write a draft, then confirm that certain editing errors are not present. These types of checklists can be found in legal writing textbooks[3], legal writing CLE materials[4] and free online sources.[5]

To improve your writing in general—separate and apart from any one project—consider creating your own personalized writing checklist. General editing checklists in books and online can be a good starting point but should be tailored to address your own strengths and weaknesses. If you only use passive voice when it fits the situation, then your checklist does not need an item for removing inappropriate passive voice.[6] If you have always been told your sentences are overloaded, then add an item for breaking up long sentences. Creating a writing checklist like this, and talking about it with experienced lawyers, can be an excellent opportunity for lawyers at all seniority levels to discuss legal writing issues in a constructive, non-critical way.

These personalized writing checklists can help good writers who want to become great. A "good to great" checklist might include smoothly connecting the beginning of each sentence to preceding material, using grammatical "shape" to reinforce the content, and ending each paragraph and section on a persuasive note.[7] Or, to enhance the demand-letter checklist described above, a writer [illegible]

might use a checklist of cognitive considerations under exploration in current legal writing scholarship such as the following[8]:

- Does the letter set the appropriate initial impression, since initial biases are hard to overcome?
- If appropriate, does the letter use a "foot in the door" strategy to seek the audience's agreement with an initial small request, potentially opening the door to larger requests?
- Does the letter take into account potential reader backlash due to anger or perceived unfairness?

There is an obvious overlap between checklists for writing and checklists for lawyering more generally. For example, as a new lawyer I benefited greatly from a checklist of potentially applicable affirmative defenses to consider in drafting an answer. This checklist was a help both to competent lawyering and to drafting the answer efficiently. This column does not mean to suggest that the checklist concept is valuable only for improving legal writing; checklists can in fact enhance lawyers' professional performance across the board.

The author thanks Bard Brockman and David Ross for their comments on drafts of this column. Romig has written a longer exploration of checklists in legal writing, The Legal Writer's Checklist Manifesto: Book Review, 8 Legal Comm'n & Rhetoric: *JALWD 93 (2011), available at http://ssrn.com/abstract=1932973.*

Jennifer Murphy Romig is the special guest columnist for this installment of Writing Matters. She is an instructor of legal writing, research and advocacy at Emory University School of Law. She also serves as a writing coach and consultant for lawyers, summer associates and paralegals.

Endnotes

1. *Id.* at 34.
2. *See generally* Bret Rappaport, *A Shot Across the Bow: How to Write an Effective Demand Letter*, 5 J. ALWD 32 (2008), available at http://ssrn.com/abstract=1268436.
3. *E.g.*, Linda Holdeman Edwards, *Legal Writing: Process, Analysis, and Organization* 231 (5th ed 2010) ("Checklist for Language and Usage Errors").
4. *E.g.*, Bryan A. Garner, *Advanced Legal Writing & Editing: A LawProse Seminar* (Revised Edition 2000) (checklist of writing advice and specific editing suggestions found on the inside front cover).
5. *E.g.*, University of Wisconsin, *The Writer's Handbook: An Editing Checklist*, available at http://writing.wisc.edu/Handbook/CommonErrors.html (last accessed September 23, 2011); Ross Guberman, *Judge Painter: The Most Common Errors I See*, available at http://www.legalwritingpro.com/articles/F52-just-say-no.php (last accessed September 30, 2011).
6. Bryan A. Garner, *The Redbook: A Manual on Legal Style* § 10.27 (2d ed. 2002) (outlining appropriate and inappropriate situations for passive-voice verbs).
7. Joseph Williams' *Style: Ten Lessons in Clarity and Grace* (8th ed., Longman 2005) provides a template for such a checklist, conveniently located on the inside front cover. *See also* Stephen V. Armstrong & Timothy P. Terrell, *Thinking Like a Writer: A Lawyer's Guide to Effective Writing and Editing* 409–15 (2d ed., P.L.I. 2003) (summing up principles and techniques of 400-page book in seven-page chart).
8. *See* Carrie Sperling, *Priming Legal Negotiations Through Written Demands*, 60 Catholic L. Rev. 107 (2010), available at http://ssrn.com/abstract=1661145.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ZACHARY BELLI, et al.,

Plaintiffs,

v.

CASE NO: 8:12-cv-1001-T-23MAP

HEDDEN ENTERPRISES, INC., d/b/a INFINITY TECHNOLOGY SOLUTIONS

Defendant.
_____/

ORDER

On August 3, 2012, the plaintiffs moved (Doc. 22) for leave to submit a motion that exceeds the page limit. The motion states, "The complex factual and legal issues involved[] make it difficult to meet the page limitation of twenty-five [] pages." Two hours later and without leave, the plaintiffs submitted (Doc. 23) a twenty-nine-page motion. Based on the mistaken premise that this FLSA collective action presents atypically complex issues, the motion to exceed the page limit (Doc. 22) is **DENIED**. The motion for conditional collective status (Doc. 23) is **STRICKEN**.

A review of the proposed, twenty-nine-page motion's commencement confirms that a modicum of informed editorial revision easily reduces the motion to twenty-five pages without a reduction in substance. Compare this:

~~Plaintiffs, ZACHARY BELLI, BENJAMIN PETERSON, ERIC KINSLEY, and LARRY JOHNSON, (hereinafter referred to as "Plaintiffs"), individually and on behalf of all others similarly situated ("Class members"), by and through the undersigned counsel and pursuant to the Fair Labor Standards Act of 1938, (the "FLSA"), 29 U.S.C. § 216(b) files this motion seeking an order~~ [move] (1) [to] conditionally certify~~ing this case as~~ a collective ~~class~~ action; (2) [to] requir[e]~~ing~~ the Defendant~~, HEDDEN ENTERPRISES, INC. d/b/a INFINITY TECHNOLOGY SOLUTIONS (hereinafter "Defendant")~~, to produce ~~and disclose all of~~ the names[,] ~~and last known~~ addresses[,] and telephone numbers of the [each] potential ~~C~~[c]lass ~~M~~[m]embers ~~so that notice may be implemented~~; and (3) [to] authoriz[e]~~ing~~ notice ~~by U.S. First Class mail to all~~ [of this action to each] similarly situated persons employed by Defendant within ~~the past three (3)~~ years[.] ~~to inform them of the pendency of this suit and to inform them of their right to opt-in to this lawsuit. In support of this Motion, Plaintiffs sets forth the following facts and provides this Court with a Memorandum of Law in support of the Motion, and asserts as follows:~~

To this:

> Plaintiffs move (1) to conditionally certify a collective action; (2) to require the Defendant to produce the name, address, and telephone number of each potential class member; and (3) to authorize notice of this action to each similarly situated person employed by Defendant within three years.

Concentrating on the elimination of redundancy, verbosity, and legalism (*see, e.g.*, BRYAN A. GARNER, THE ELEMENTS OF LEGAL STYLE (2d ed. 2002)), the plaintiffs may submit a twenty-five-page motion on or before **August 15, 2012.**

ORDERED in Tampa, Florida, on August 7, 2012.

STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

Plaintiff,

v.

APPLE, INC.,
HACHETTE BOOK GROUP, INC.,
HARPERCOLLINS PUBLISHERS, L.L.C.
VERLAGSGRUPPE GEORG VON
HOLTZBRINK PUBLISHERS, LLC
d/b/a MACMILLAN,
THE PENGUIN GROUP;
A DIVISION OF PEARSON PLC,
PENGUIN GROUP (USA), INC. and
SIMON & SCHUSTER, INC.,

Defendants.

Civil Action No.12-CV-2826 (DLC)

BRIEF OF BOB KOHN AS *AMICUS CURIAE* *

* Five-page version of Proposed Brief *Amicus Curiae* at Docket No. 97.

TABLE OF AUTHORITIES

Cases

Statutes

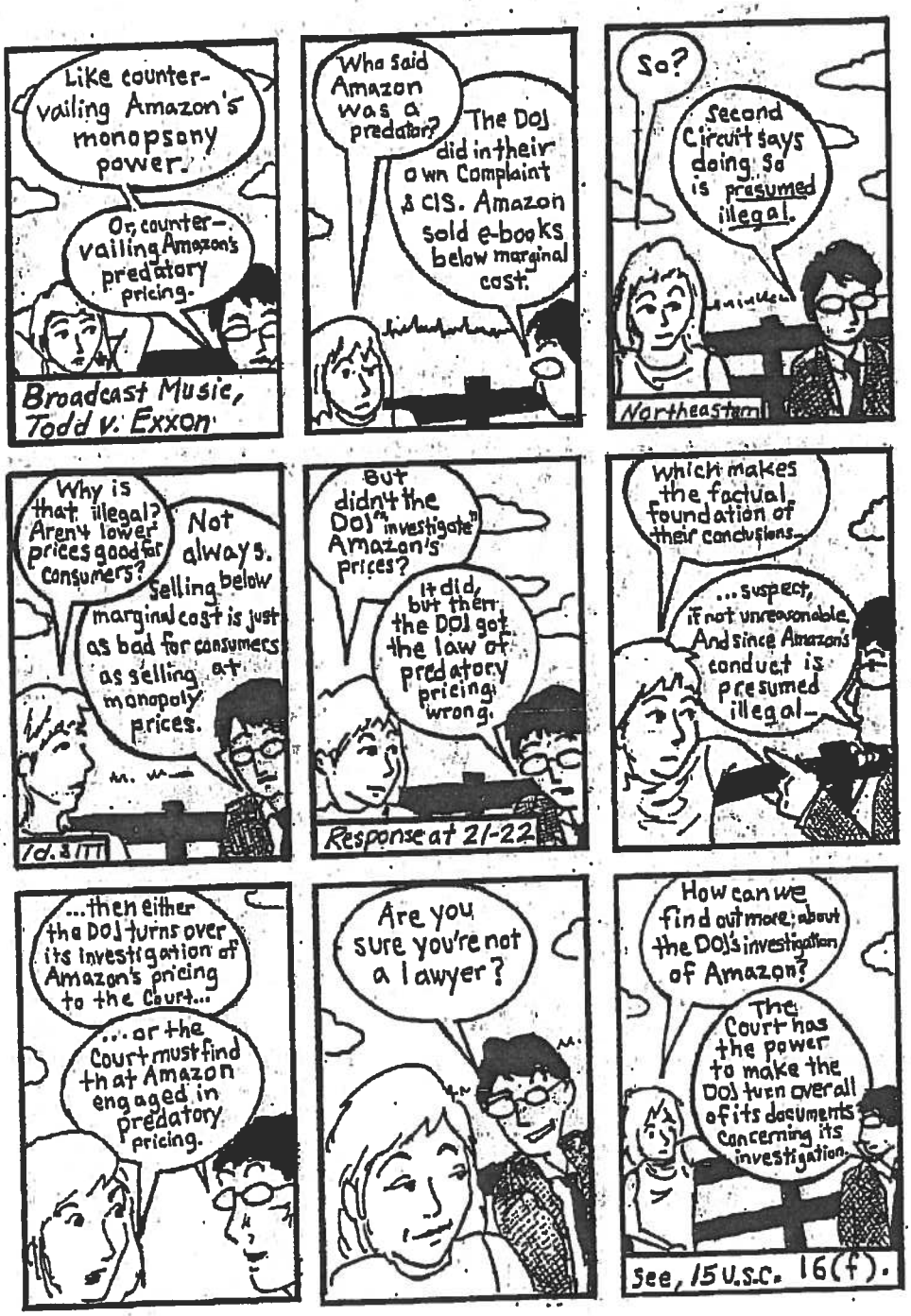
Rules

Articles & Treatises

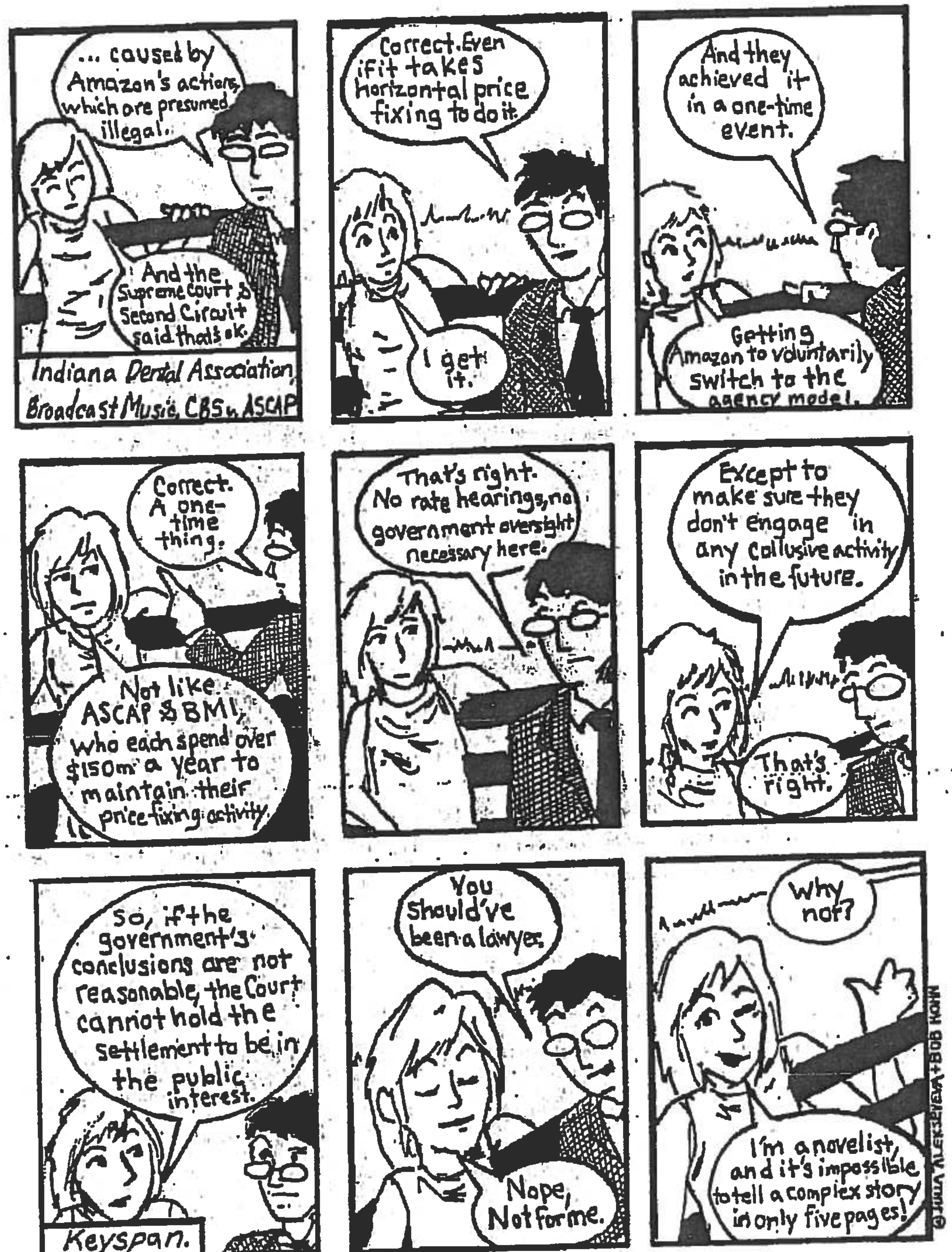
Court Documents & Public Comments


Five pages?
Five pages.
AT HOME
Are the DOJ's conclusions reasonable?
See, Keyspan
Court should defer to DOJ, but not when its conclusions are unreasonable.
Id.
Relief sought is an instrument of wrong to the public
Contrary to U.S. Supreme Court and Second Circuit Precedent.
What were they thinking?
It even fails DOJ's own IP Guidelines.
It's all going digital.
IP Guidelines say copyrights are different.
E-Books are public goods— they compete with piracy.
I wrote about this in my public comments.
E-Books are systems goods— no value to consumers in isolation.


Watcha workin on?
Trying to explain why supply & demand does not operate normally on pricing of e-books.
Moor Law
Oh, because of illegal downloading
Right. And because of network effects, you also must look at effect of a restraint on a number of different goods markets.
IP Guidelines
And you must weigh the restraint against the pro-competitive benefit in these different markets.
Why?
Because if the restraint is reasonably necessary to achieve the benefits, it's legal.
Id.
THE NEXT DAY
Says who?
Says the DoJ's own U.S. Supreme Court authority!
FTC v. Indiana Dentists Assn
I'm not a lawyer, but that sounds like a major screw-up.
Yup.
My challenge is to explain all this in five pages.
So, what did the Supreme Court say?
The high Court said that collusive conduct is ok under rule of reason where there is a counter-vailing pro-competitive virtue.
Did they give examples of that?
Yes, a couple, but I like this one the best: horizontal price fixing is ok if it will "create efficiencies in the operation of a market"
Like what?


Like countervailing Amazon's monopsony power.
Or, countervailing Amazon's predatory pricing.
Broadcast Music, Todd v. Exxon
Who said Amazon was a predator?
The DOJ did in their own Complaint & CIS. Amazon sold e-books below marginal cost.
So?
Second Circuit says doing so is presumed illegal.
Northeastern
Why is that illegal? Aren't lower prices good for consumers?
Not always. Selling below marginal cost is just as bad for consumers as selling at monopoly prices.
Id. at 177
But didn't the DOJ "investigate" Amazon's prices?
It did, but then the DOJ got the law of predatory pricing wrong.
Response at 21-22
Which makes the factual foundation of their conclusions...
...suspect, if not unreasonable. And since Amazon's conduct is presumed illegal-
...then either the DOJ turns over its investigation of Amazon's pricing to the Court...
...or the Court must find that Amazon engaged in predatory pricing.
Are you sure you're not a lawyer?
How can we find out more about the DOJ's investigation of Amazon?
The Court has the power to make the DOJ turn over all of its documents concerning its investigation.
See, 15 U.S.C. 16(f).


So, how does all this help solve the case?
You see, when Amazon lowered e-book prices to below its marginal cost...
... any conduct that raised them back to marginal cost could not have harmed consumers.
I get it! Let me complete the argument.
Showing harm to consumers is fundamental to the factual foundation of the DOJ's case.
Correct!
Without it, the DOJ's conclusion about the remedy is... Unreasonable.
You got it!
Keyspan
Wow! The DOJ really blew this one.
Yup
Where did the DOJ go wrong?
Well, a lot of places. But if I had to point to one it would be this...
Low prices are one of the principal goals of antitrust law
I was gob-smacked when I read that in the DOJ response
Whoa. You don't have to be an economist to see through that.
That's right. The goal is efficient prices, not low prices.
So, I see what you're saying. All the Defendants did was to counter a serious market failure.


... caused by Amazon's actions, which are presumed illegal.
And the Supreme Court & Second Circuit said that's ok.
Indiana Dental Association, Broadcast Music, CBS v. ASCAP
Correct. Even if it takes horizontal price fixing to do it.
I get it.
And they achieved it in a one-time event.
Getting Amazon to voluntarily switch to the agency model.
Correct. A one-time thing.
Not like ASCAP & BMI, who each spend over $150m a year to maintain their price-fixing activity.
That's right. No rate hearings, no government oversight necessary here.
Except to make sure they don't engage in any collusive activity in the future.
That's right.
So, if the government's conclusions are not reasonable, the Court cannot hold the settlement to be in the public interest.
Keyspan.
You should've been a lawyer.
Nope, Not for me.
Why not?
I'm a novelist, and it's impossible to tell a complex story in only five pages!
©JULIA ALEKSEYEVA+BOB KOHN

Dated: September 4, 2012

Respectfully submitted,

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Journal of Appellate Practice and Process
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Essays

*7 19 TIPS FROM 19 YEARS ON THE APPELLATE BENCH [FNa1]

Patricia M. Wald [FNaa1]

I am now, like the Oldest Living Confederate Widow, the most senior judge on the D.C. Circuit--edging our present Chief Harry Edwards out by nine months or so. To be the oldest living anything is an awesome responsibility, indeed, but one that must be gotten used to, the alternative being what it is. Unlike the O.L.C.W., however, who took some 1,000 pages to spill her secrets, I will try to do it in 19 tips, memorializing each year of my tenure. The 19 tips, incidentally, are distilled from about 2,600 appeals I have sat on and the 800 majority or dissenting opinions that I have written during my 19 years on the bench.

TIP 1

The first hurdle for an appellate lawyer these days in our circuit is "getting there"--not to the circuit court as an institution, but to the judges as individual decisionmakers, the realpolitik of judicial review as it were. The D.C. Circuit has one of the least overwhelming of all dockets, in numbers, that is--in fact there has been some sentiment in Congress and even among colleagues on our own court that we don't need to fill our 12th judge vacancy at all. Although we hear many complex and important cases, we dispose of far fewer total cases on the merits than other circuits. Of the 25.8 thousand federal appeals terminated on the merits during the year ending September 30, 1997, the D.C. Circuit accounted for only 732, the second lowest of all courts. (By comparison, the Ninth Circuit terminated 4,800, the Fifth and Eleventh over 3,000; even the First *8 bottomed out at 696.) But even so, we dispose of over 40% of that relatively small number in summary fashion. That means a panel of three judges, sitting for a few months at a time, assembles itself once every two weeks and proceeds expeditiously; some might even say whips, through 20-30 cases in a morning. If your case is so channeled, candidly, it means the three judges are more likely than not to follow the recommendation of the memorandum written up by the staff counsel; only rarely do the judges read the briefs in full, as they always do for cases on the argument docket. If one judge does evidence some concerns, the case will be kicked over to a regular panel, and then three judges do read the briefs and listen to argument as well. But the bottom line is if you don't make it past that initial barrier reef onto the regular calendar, your case is processed and even perceived in a different light. That can be good or bad, depending on whether you are the appellant or appellee.

Now mind you, I personally don't think many injustices result from the two-tiered system. If anything, the young staff counsels' hearts bleed more profusely than do the counterpart organs of battle-scarred judges. But there is always a longshot that if a judge really reads your eloquent and elegant stuff, she will be caught up in its drama and impressed by its taut logic and realize this case deserves more than garden-variety analysis or gumball-machine reasoning. That is extremely unlikely to happen, though, if one of the staff counsel screens your appeal out for summary disposition. When I came on the court 19 years ago, less than 5% of cases went that route; now it is over 40%. Back then it happened only to small one-on-one civil cases; now it includes many criminal appeals and administrative agency appeals as well.

As I said, if you're counsel for the appellee, the shift is good news (except maybe fee-wise). The case may be all wrapped within 9-10 months from filing and after one brief. (This is to be compared with about 15 months for a fully argued and briefed case.) For an appellant counsel the going is rougher, your burden greater, to get onto the argument track where you can try to engage the judges' interest and empathy on your client's dilemma or in the development of circuit law. It's clear to me, however, that we have little alternative to our tracking *9 procedures if we are to give adequate time to the more complex and precedent-setting cases--unless of course we adopt Judge Steven Reinhardt's approach and let a thousand federal judges bloom. Nationally, 60% of federal appeals terminated on the merits get no argument. In 9 of the 12 circuits, the paper route is over the halfway mark; 4 circuits are at or above the 70% mark. The trend is probably irreversible, as numbers grow and judicial resources stay the same or even decrease. But at the same time, I'd be surprised if inevitably a truncated process doesn't mean we make some wrong calls, and dispose of some cases by a staff-drafted memorandum that might come out differently with more dialogue and a deeper level of thought from the judges themselves.

An appellate counsel's--particularly an appellant counsel's--first and often most critical job is to get to us, the judges, in a forum where we can give your case careful, individualized attention. This may mean that you should personally write or at least edit and meticulously supervise the initial brief in any case you care about, so that it fully reflects the novelty or the seriousness of the case and its worthiness in terms of the time and effort three judges must spend reading the briefs and listening to argument. Once you're consigned to the summary docket, unless your case is so clearly right it's a slamdunk, and that's why it's there, your chances of winning (though by no means impossible) are much slimmer.

TIP 2

This one is about appellate brief-writing. The more paper you throw at us, the meaner we get, the more irritated and hostile we feel about verbosity, peripheral arguments and long footnotes. In my 19 years on the court we have by judicial fiat first shortened main briefs from 70 to 50 pages, then put a limit of 12,500 on the number of words that can go in the brief, and in complex, multi-party cases our staff counsel threaten and plead (we get into the act ourselves sometimes) with co-counsel to file joint or at least nonrepetitive briefs. It's my view we can, should and will do more to stem the paper tidal wave. Repetition, extraneous facts, over-long arguments (by the 20th page, we are muttering to ourselves, "I get it, I get it. No more for God's *10 sake") still occur more often than capable counsel should tolerate. In our court counsel get extra points for briefs they bring in under the 50-page limit. Many judges look first to see how long a document is before reading a word. If it is long, they automatically read fast; if short, they read slower. Figure out yourself which is better for your case. Our politicians speak often of judicial restraint; I say let it begin with the lawyers whose grist feeds our opinion mills.

The worst example of the judicial sore-eye phenomenon in the D.C. Circuit is the intervenor's brief. You won at the agency level; the agency is defending its ruling on appeal; but you may think you as counsel for the winner below can say it nicer than the overworked agency counsel. Please don't. Ninety percent of intervenor briefs in my experience add little or nothing; a very few may provide some additional vantagepoint that for some institutional reason, the agency doesn't care to use. But from the court's point of view, if the agency and intervenor counsel can agree on a brief, that's nirvana; even if they can't, the intervenor should isolate the new idea or extra facts in 4-5 pages. The full 50-page treatment of the same facts and issues the agency has already addressed makes sense for only one real-world reason, which I won't even state out loud. It never carries the day and the burden of reading, storing, and even eventually destroying 40 copies makes it just plain inefficient.

With the docket the way it is--and growing (federal court appellate filings went up again last year)--we judges can only read briefs once. We cannot go back and re-read them, linger over phrases, chew on meanings.

1 JAPPPR 7
1 J. App. Prac. & Process 7
(Cite as: 1 J. App. Prac. & Process 7)

Your main points have to stick with us on first contact--the shorter and punchier the brief the better. And yet--this may seem inconsistent--everything that counts has to be in there. Our court, at least, has gotten ever more strict with the passing of time in its waiver doctrines as to what you can raise at argument or even in a reply brief, if you didn't raise it in your main appeal brief. Afterthoughts and new opportunities at oral argument--even if provoked by a judge's questions or comments--are seldom tolerated. The same goes for raising issues for the first time on appeal, unless, of course, they are jurisdictional (whatever that means) or there has been an intervening hit from the Supreme Court just on target.

*11 Confident counsel should almost always go for broke and rely on their one or two best arguments, abandoning the other 9-10 wish-list entries. There is, of course, always some small risk of dropping an argument that might appeal to one or two judges, but I can assure you in the vast majority of cases that possibility is theoretical only, and the fewer arguments you make the more attention they will get from us in preparing and disposing of your case. We tend to engage ourselves more intensely with a few strong issues than with a strung-out list of 10 reasons why the decision below needs to be reversed. Judges become euphoric on encountering a brief that begins, "The only issue in this case is ...." On the other hand, with the top 10-type brief, the presumption in favor of the decision below kicks in when you reach Nos. 3 or 4 and with each succeeding argument, you have a higher psychological threshold to surmount.

TIPS 3-7

Tips 3-7 are quickies on brief-writing.

3. Visualize the whole before you begin. What overriding message is the document going to convey? What facts are essential to the argument? How does the argument take off from the facts? How do different arguments blend together? Better still, if it's a brief, visualize the way the judge's opinion should read if it goes your way. (Too many briefs read as if the paralegal summed up all conceivably relevant facts, and then the lawyer took over with the legal arguments, and never the twain doth meet.)

4. Make the facts tell a story. The facts give the fix; spend time amassing them in a compelling way for your side but do not omit the ones that go the other way. Tackle these uncooperative facts and put them in perspective. (Too many times the judge reading both briefs will not recognize they are about the same case.) If you're appealing, make it seem like a close case, so any legal error will be pivotal. Above all, be accurate on the record; a mistaken citation or an overbroad reading can destroy your credibility vis-à-vis the entire brief. Describe what happened low-key ("Just the facts, ma'am") with no rhetorical or judgmental flourishes--well done, the facts should make your case by themselves.

*12 5. Think hard before writing what the "Issue" is. This provides the lens through which the judge-reader filters the rest of the brief. Avoid abstractions; make it a concrete, easily understood question to which the answer is inevitable after you read the upcoming "Fact" section. (If your facts are terribly unsympathetic, you may be driven to describing the issue in abstract, formalistic terms, but do so only as a last resort.) Use neutral words; don't mix it up with argument or rhetoric; be especially fair in stating the real issue.

6. Be sure and tell why it is important to come out your way, in part by explaining the consequences if we don't. The logic and common sense of your position should be stressed; its appropriateness in terms of precedent or statutory parsing comes later, i.e., the state of the law allows this result, rather than requires it. In complex cases, you need to fully understand the real-world dispute to write accurately or convincingly about consequences; more cases are decided wrongly by judges because they don't understand the underlying problem

than because they read cases badly. Perceived confusion or ignorance on the part of counsel about "what really happened" can be fatal.

7. In the same vein, don't over-rely on precedent; few cases are completely controlled by it. If yours isn't, don't pretend it is. Precedent can be indicative of a trend or persuasive in its reasoning, but concentrate on saying why rather than declaring victory on the basis of a 1967 opinion. Judges like a "novel question"--it makes them feel more important.

There is another caveat about precedent I will mention. Some judges like certain precedent and intensely dislike other precedent. How can you know which precedent is which ahead of time? Well, it's certainly not worth some big shark hunt, but over time you may glean from opinions which judges on other circuits, or even which circuits, or which past or present judges in their own circuit, certain judges like or don't. For example, some of our D.C. Circuit judges admire Seventh Circuit precedent very much and appear quite skeptical about many products of the Ninth. Where this kind of knowledge is at your fingertips, it's useful because judges have an institutional interest in nourishing and propagating precedent they like and in starving and diminishing that which they don't like. I'm not *13 suggesting manipulation or brazen omission--if a case is on point either way you should cite it. But conversely if it's not essential to your case and you know the judge doesn't approve of it, you may not wish to cite it. Nowadays in our circuit, citing Judges Bazelon's or Wright's decisions on standing, defendants' rights, or criminal responsibility is not the sure route to success. On the other hand, a solid Leventhal precedent can go a long way. He is, not surprisingly, the most frequently cited ghost of judges past in our circuit's opinions.

As for citing the judge's own precedent back to her, you have to be careful there too. First of all, if she has been on the bench as long as I, she probably won't remember what the case was about or even which way it held. Second, it can be overdone and look like pandering. However, to cite other judges' rulings on a relevant point and leave out the sitting judges' own contribution can create irritation. In general, analogizing to liked precedent--even if a bit removed--and distancing from unliked precedent--unless it's squarely on point--makes the most sense.

TIP 8

My advice on short, punchy briefs clearly raises a dilemma for those of you who handle the mammoth regulatory cases that wind up on our special complex track. Every year, about a dozen cases--those with the longest records, the greatest number of issues, and the most parties--get put on that track. A special panel is then assigned to the case, briefing runs to the thousands of pages, oral argument goes on all day and sometimes into the next, and the panel members inevitably split up the opinion-writing task, which itself runs into hundreds of printed pages. For instance, in a recent FERC opinion on review of Order 636, which radically restructured the natural gas pipeline industry, there were 529 parties to the agency proceedings below, 151 in our court; the order under review took up 339 small-type double-column pages of the Federal Register, 1,000 briefing pages and our opinion was 170 pages long. In that setting it is not so easy to be brief and punchy, so we, the court, and you, the counsel, have no alternative but to buckle our seat belts and take off.

*14 However, perspicacious counsel should always be on the alert for how the internal processing differences associated with the special complex track panel can subtly affect their chances of success. Although typically in our circuit every judge does his or her own preparation for a regular case--no bench memoranda or even comments on the cases are exchanged beforehand--that is not true for these monster cases. For them, we usually divide up the bench memoranda between chambers so that we all feed off of the same clerk work before argu-

ment like the members of the Supreme Court do on their clerk pool for certiorari petitions. And, at the other end, the dimensions of the opinion-working task are so great that there is demonstrably a stronger pull toward consensus. You will note few dissents in complex cases; basically we stand or fall down together from fatigue. Thus, if you are the appellant in one of these three-ring circuses, you must usually have a very strong case against the agency; the close calls will be made for the agency, and the likelihood of a strong dissent leading the way to an en banc or even certiorari granted is near-zero. The Supremes are too smart to take one of these babies. Your challenge really has to stand out among the 30 or 40 others being simultaneously argued, any or all of which might merit its own dialogue had it been heard alone in a separate case. Agencies must love the complex track, but caveat petitioners.

There is also the risk in these day- or days-long arguments with so many counsel that each issue and counsel will get a very small allotment of time for argument--5-10 minutes, on the average, sometimes as little as 2-3 minutes. Up/down, up/down all day long; it's hard to make your cameo appearance memorable in those circumstances. I'm surprised--maybe I'm not--that more counsel don't join forces and let one of their ranks take on several points in a decent block of time. But perhaps the clients would not understand. Anyway, the government, which generally has only one or two counsel argue the entire case, gets an advantage in continuity and flexibility here when confronted with 12-15 private counsel on the other side. Don't think the David/Goliath analogy is lost on the government--or possibly even on the court.

*15 TIP 9

While we're on special proceedings, let me talk a bit about en bancs. They spell cruel and unusual punishment for all concerned. Think before you ask for one. We get hundreds of petitions but grant on average less than six a year. The Ninth Circuit led with 16 in 1997, and the Fifth was second with 15. Federal Rule of Appellate Procedure 35 says that en bancs are disfavored and ordinarily will not be ordered except when necessary to secure uniformity or for a question of exceptional importance. Those have not been the de facto criteria in my experience. En bancs most often occur when a majority feels strongly that the panel is wrong about something they care a lot about or which may be precedential outside the confines of the immediate case. Every judge writes panel opinions (or dissents) in the shadow of an en banc and when there is the threat of one, panel majorities will often try to conciliate opponents or temper rhetoric in a supplemental opinion on rehearing; they may pull back from excessive rhetoric, too-broad holdings, or clarify the scope of the original opinion. En bancs usually follow a strong dissent, but can also be provoked by a unanimous panel composed of a philosophical minority on the court. I once sat on a now-notorious panel that had three unanimous decisions en banc-ed and one reheard by the panel to forestall an en banc. One of the en bancs went on to the Supreme Court, I might add, which reinstated two-thirds of the original panel opinion. That is what can happen in a conflicted court. The Washington Times opined at great length about why the panel could not have been chosen at random (it was) because the chance of having those three judges get those particular issues (gays in the military, a notorious libel suit against The New York Times, and the FCC's indecency rules) in one sitting was greater than being struck by lightning or being kidnapped by terrorists while vacationing in Europe.

At any rate, remember four things about en bancs before you jump to ask for one when you lose before a panel:

(1) They take a long time, often up to two years before the court can assemble itself and get all the opinions written. If your case is really hot, you could be up on certiorari long before, and chances are either you or your opponent will go for certiorari *16 anyway afterwards. As court of appeals dockets go up, the Supreme Court's steadily declines--only 86 cases argued last year.

(2) There are apt to be many en banc opinions written--likely a plurality and several other unclassifiable opinions rather than just a majority and dissent--so that the law is not necessarily the clearer or cleaner for the exercise.

(3) An en banc is like a constitutional convention. Everything--in circuit law--is up for grabs. The decision may emerge on grounds argued by neither party and desired by neither party. Advocates lose control since judgepower is at its zenith; except for Supreme Court precedent, the decision can go anywhere. You, the counsel, no longer hold the road map.

(4) Since en bancs so often occur in fundamental value-conflicted cases, astute counsel can pretty well predict the outcomes on the basis of past positions taken by the judges. If you don't have a shot at winning an en banc, all you do is risk an even stronger set of nails in your coffin.

Oral argument, which I'll speak about generally later on, in an en banc is an especially perilous undertaking. The mere fact that an en banc has been commenced usually means that the court is divided and panel members in the majority are already unhappy. Many more of the judges' questions in en banc arguments seem to be motivated by the desire to establish rather than explore positions or to defuse the positions of other judges. The counsel is often the woman in the middle of an intramural contest. She may not be aware of the real reason why the en banc was voted or what the court thinks is really at stake. The judges may have their own agendas as to what precedential underbrush the en banc will clear out or even what brand new doctrinal formula it will encapsule into law--with or without aid of counsel. It's also harder to control the flow of questioning from 11 judges than from 3: More judges means more interruptions, cross-conversations between judges, and attempts to bind counsel to or divorce him from another judge's articulation of the issue or the acceptable resolution of it.

In sum, more is not always better, so think before en bancing. A really important case will likely go up anyway; a really wrong decision is worth a preliminary try at the en banc, but most of the rest bring much hassle and little success.

*17 TIP 10

Oral argument. The importance of oral argument has always been in contention. I think it is very important in close cases. A judge's physical presence in the courtroom alongside the counsel with the opportunity to engage in a one-on-one dialogue (or more accurately a three-on-one dialogue) produces a qualitatively different stimulus to the judge's creative juices and perceptions of the issue than the isolated experience of judge alone with cold briefing text. I don't mean to get metaphysical about it, but I do think argument affords the talented counsel a real second chance to make his case. It is not unusual for a judge to come to conference after an argument saying, "I came into the courtroom with a tilt toward the appellant (or appellee); now I'm not so sure at all." And that's it in a nutshell. Oral argument seldom brings you 180 degrees around, but if your tilt is, say, 50-49%, it can make a big difference. For one thing, it allows the judge to pin counsel down on points or casual comments they gracefully glided over in the brief. It allows the judge to make sure her understanding of the facts is right, and it requires counsel to explain why he omitted something that bothers the judge. Forthright and persuasive counsel can often carry a judge over the 50% edge; slippery or unprepared counsel can push her further away from the brink.

Of course you are aware that in many countries, Anglo-Saxon and Continental, counsel may argue to their hearts' content, and it is written submissions that are limited. In our own country I often hear older counsel nostalgically complain that the time for oral argument has diminished over the years until it is now totally inad-

equate. They are right; the time has gone down, but I think they are wrong in claiming they do not have time to make their case. It is interesting that in the complex cases I spoke of where the total amount of time for each side is much greater, counsel often don't use up their full allotment and we come in under the line. In addition, because at least in our court we rarely if ever cut counsel off when he is answering judges' questions, I have seen skillful counsel parlay 10 minutes into a half-hour by keeping the court engaged. Generally, *18 however, the argument just peters itself out within the assigned time limit.

TIP 11

No matter how much time you are allotted, a "hot bench" may use it all up in what the judges want to talk about, leaving counsel no time to make his neatly organized and focused presentation. The worst-case scenario is the "seduce and abandon" technique of some judges who keep counsel skewered on some peripheral line of argument, which when the opinion comes down turns out to have had no relevance at all. That's the paradigmatic "life is not fair" case. We once had a petition for rehearing (from a pro se-er) complaining that he never got to make his argument because the judges asked so many questions. Ordinary counsel would not have dared to say it, but he had a point. It's an intensely frustrating experience and even the judges themselves have no notice when one of their members is going on a verbal bender. The only advice I can give is to ask at the end for a minute or two to sum up the key points you didn't get to make. Often the other judges will be sympathetic to your plight and let you have it. And, of course, you may never prophesy how a close case will come out by the way the judges act at argument. After all, that one week a month in court is the only recreation an appellate judge gets from the paperwork and she will likely act up, play devil's advocate, lead you down primrose paths and pounce at the dead end. Later in conference she will say she was having some fun, testing the waters, seeing how far you would actually go on a point.

Which leads to the even more ticklish problem of judges who abuse counsel from the bench. Some do. They denigrate, demean, belittle, and yell, knowing counsel cannot answer back. Lamentable, yes; unfair, yes; avoidable, no. It's scant comfort to beleaguered counsel to know that their colleagues on the bench often do worry abusive judges a bit afterward, though I must admit the intractable ones are practically unrehabilitatable. You just have to stand your ground, keep your dignity, don't stoop to their level; again, their colleagues will respect you for it. Actually, I think that's why lawyer evaluations of judges are probably a good thing; every judge ought to read how those on *19 the other side of the bench perceive her judicial temperament. Verbal abuse of counsel is like spanking a child; the adult may think he is acting for the child's benefit, but the relative bargaining position of the participants is so basically unfair, it rarely accomplishes anything but hostility.

TIP 12

Tip 12 is a sidebar. Making concessions at oral argument (or in briefs) is a two-edged sword. If they are not critical, they can increase your credibility with the judges. Abandoning a losing argument doesn't hurt you much; it's better than looking like King Kong batting away a hundred one-engine planes on the top of the Empire State Building. But always remember, there is a recorder in the room, as well as three busy law clerks taking notes, and any concessions you make will be picked up and may be cited against you in the opinion. That is why you often see one judge on a panel engaging in a rescue mission of counsel from some answer he gave to a question by another judge that will predictably be used by that judge as a quotable concession. Think hard about the predicates of judges' questions--your implicit acceptance of them is often more dangerous than any answers you will give to the main question.

I sometimes think that there ought to be a rule like the FTC issued for door-to-door or telephone solicitations. Counsel gets 48 hours in which to renege on concessions made under pressure in the courtroom. But there

isn't, so the best I can say is be careful.

TIP 13

Apart from an acceptance of the "life is not fair" motif to oral argument, probably the most important thing for an appellate lawyer is to "know the record." It is not good enough that the paralegal or the associate who drafted the brief knows the record inside and out; the lawyer who argues the case must. I concur with Chief Justice Rehnquist's lament about oral advocates who depend too heavily on their subordinates in writing the brief, and who cannot answer questions about the basic case or the record. The more arcane the subject matter (at *20 what temperature does ICPD vaporize is the food on which the D.C. Circuit beast feeds), the more intimate with the record the advocate needs to be. All the questions of fact and expert opinion that the brief may have raised in the judges' minds will surface at argument, and nothing frustrates a bench more than a lawyer who does not know the answers. Your credibility as a legal maven spurts as soon as you show familiarity with the facts of the underlying dispute. Chevron I and II will get you only so far, even in our court.

Admittedly, in some of our complex regulatory cases, the record is tough going. The Department of Justice lawyers who argue for the EPA or other agencies are sometimes at a handicap themselves; generally, they keep an agency counsel at close range for the expertise-oriented questions. But when a lawyer cannot smoothly answer a question securely rooted in his knowledge of the record, the specter of a remand for inadequate explanation by the agency comes quickly to the fore. If you watch, we don't ask you so many questions about the meaning of precedent as we do about the underlying dispute in the case: What is it really all about? Why does one party care so much about a few words in an agency rule? Of course, counsel can always offer to submit record cites after argument, but inability to locate them onsite definitely detracts from the image of her being in complete control of the case.

An aside on the importance of a well-developed record: Many--if not most--appeals are won or lost in the trial court or the agency, where the record is made in the first place. I have personally seen several worthy constitutional issues forfeited because the challenging parties were so anxious to get to their brilliant legal arguments that they pushed prematurely for summary judgment, stipulating problematical facts in order to get there. Those stipulations in turn decidedly influenced the way the constitutional issue was decided on appeal--usually to their detriment. Few statutory or constitutional issues are really so pure that they can be decided completely apart from their contextual moorings. Factual concessions made or factual issues not disputed below can be fatal on appeal. A fully-developed record is like a warm, woolly comforter to an appellate lawyer; you can wrap yourself up in it in all sorts of ways, and store many goodies in its folds. A summary judgment Statement of *21 Material Facts Not in Dispute is often a thin and threadbare substitute.

TIP 14

If your court is divided philosophically, and on our court most panels are, your best bet is to strive for a narrow fact-bound ruling that will not force one or two judges to revisit old battles or reopen old wounds. "This case is not like ...," the banner goes. "It is all by itself; it will not require overruling old precedent, or breaking new ground." You want to win unanimously; you do not want a messy dissent to provoke a petition for en banc or even certiorari. On a divided court, big forward or backward (depending on your point of view) leaps in the law come usually only in en bancs, or if they do come in a panel, often end up in en bancs. Take your narrow, "for this case only" holding, hug it to your bosom, and run.

TIPS 15-17

15. These next three tips are on style, a subject about which I may be unqualified to speak because Judge

Posner says I have none. Nonetheless, as a general principle, your brief is better with it than without. The well-turned phrase in a brief can capture a judge's attention, which tends to wane after 60,000 words of legalese; the surprising allusion can set her thinking along different lines. In argument, too, though a serious manner is usually de rigueur, an occasional witticism or comparison with some other aspect of life-- sports, movies--can lighten the somber atmosphere and even create a kind of commonality between judge and counsel. Pepper your briefs or argument with relevant metaphors or quotations and I can guarantee the best ones will reappear in the judges' opinions. But strained attempts at humor or passion usually end up embarrassing everyone. And the worst of all is to misquote or misattribute a quotation and have the judge correct you. You can't sink much lower than that.

16. Don't engage in unanchored accusations or swipes at your opponent's work-product; if you have a gripe, tie it to a specific mistake or miscite. Examples of "no-nos" taken from a recent brief include general allegations that the author's *22 opponent "misstated issues and arguments raised by appellants," "made selective and incomplete statements about the evidence," "distorted the causation issue." Judges' eyes glaze over as we read that kind of prose.

17. And lastly, proofread with a passion. You cannot imagine how disquieting it is to find several spelling or grammatical errors in an otherwise competent brief. It makes the judge go back to square one in evaluating the counsel. It says--worst of all--the author never bothered to read the whole thing through, but she expects us to.

TIPS 18-19

These final two are philosophical:

18. Fight like the devil but be prepared to lose, especially if you are the appellant. Last year we reversed or remanded in less than 15% of our terminated appeals--that number has been going down recently. In less than 3% of our total appeals and in less than 11% of our published opinions was there even a dissent. In less than 38% of our cases was there even a published opinion. In the 1997-98 term, the Supreme Court took seven of our cases and affirmed our court in five. Think about those odds before starting the appeal ball rolling. Yours may of course be the pièce de résistance of our next term, but do a reality check anyway.

19. On the way up, consider settlement or mediation or whatever peaceful processes are available for resolving the underlying dispute. The old shibboleth was cases don't settle on appeal--the winner below has no incentive to settle; the loser has nothing more to lose; and the expenses of appeal are relatively low and so present no impediment to forging ahead. Government lawyers particularly have no fee problems and see no gain in not going for broke. That's not the way it has turned out, however, in our government-litigation-dominated court. We are mediating 60-70 cases annually, one-third of them involving the federal or local government. About one-third of all mediations end in the appeals being dismissed, many of them class actions and involving lots of money. It is worth remembering that in a majority of wins on appeal, the victory is not clean; the case is only remanded for a new trial or a new *23 agency determination. The ultimate result remains at risk. The common wisdom around the court is clients like mediation; lawyers not so much, maybe because litigation is in our blood. But think about the "less travel'd" path and whether it won't bring you home faster in some cases.

CONCLUSION

Somehow it seems prosaic to count the passing of the years by the things you have learned about how an able advocate should present a case. Yet our legal system is based on the notion that two sides of any issue well argued will permit an impartial judge to rule justly. It may be an imperfect theory, but it's all we've got. Justice,

like the rest of life, is becoming increasingly complex; courts have less time for even the fleeting contact that oral argument entails. Much more emphasis has to be put on making one's case stand out enough that it will actually engage the judge in reading your brief to begin with; debatable as the concept has become, there is, inevitably, creeping bureaucratization of the judging process--special panels, law clerks, staff counsel. In most cases those shortcuts will not change the result or corrupt the development of the law. But it is the unusual, the aberrational, the special case that counsel and judges live for, and it is in both our interests that that case not be smothered in the heap. I hope my 19 tips--never mind my 19 years on the court--will contribute a little to making sure that doesn't happen to any of you.

[FNa1]. This article is an expansion of remarks given to the American Academy of Appellate Lawyers on August 2, 1996, and printed in the Academy's newsletter.

[FNaa1]. Judge, United States Court of Appeals for the District of Columbia Circuit; Chief Judge 1986-1991.

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Where Do Sentences Come From?

By VERLYN KLINKENBORG

Sift the debris of a young writer's education, and you find dreadful things - strictures, prohibitions, dos, don'ts, an unnatural and nearly neurotic obsession with style, argument and transition. Yet in that debris you find no traces of a fundamental question: where do sentences come from? This is a philosophical question, as valuable in the asking as in the answering. But it's a practical question, too. Think about it long enough, and you begin to realize that many, if not most, of the things we believe about writing are false.

Whenever you find an unasked question you've also found an assumption. Here's another example: what is writing for? The answers seem obvious - communication, persuasion, expression. But the real answer in most classrooms is this: writing is for making assigned writing. Throughout their education, students everywhere are asked repeatedly to write papers that are inherently insincere exercises in rearranging things they've read or been told - papers in which their only stake is a grade. There's no occasion to ask something as basic as "Where do sentences come from?"

Certain kinds of writers do try to answer this question. They talk about "process" as if it explained something important. But what "process" usually describes is the circumstances - time, place, tools - in which certain writers believe that sentences come from wherever they come from. That gets us nowhere. It's like asking where water comes from and pointing to a David Hockney pool as an answer.

So let's demystify the origin of sentences. Think of it this way. You almost surely have a voice inside your head. At present, it's an untrained voice. It natters along quite happily, constructing delayed ripostes and hypothetical conversations. Why not give it something useful to do? Memorize some poetry or prose, nothing too arcane. A rhythmic kind of writing works best, something that sounds almost spoken. Then play those passages over and over again in your memory. You now have in your head something that is identifiably "language," not merely thoughts that somehow seem unlinguistic.

Now try turning a thought into a sentence. This is harder than it seems because first you have to find a thought. They may seem scarce because nothing in your education has suggested that your thoughts are worth paying attention to. Again and again I see in students, no matter how sophisticated they are, a fear of the dark, cavernous place called

the mind. They turn to it as though it were a mailbox. They take a quick peek, find it empty and walk away.

So experiment a little. Make a sentence of your own in your head. Don't write it down. Any kind of sentence will do, but keep it short. Rearrange it. Reword it. Then throw it out. Make another. Rearrange. Reword. Discard. You can do this anywhere, at any time. Do it again and again, without inscribing anything. Experiment with rhythm. Let the sentences come and go. Evaluate them, play with them, but don't cling to them. If you find a sentence you really like, let it go and look for the next one. The more you do this, the easier it will be to remember the sentences you want to keep. Better yet, you'll know that you can replace any sentence you lose with one that's just as good.

There's a good reason for doing this all in your head. You're learning to be comfortable in that dark, cavernous place. It's not so frightening. There's language there, and you're learning to play with it on your own without the need to snatch at words and phrases for an assignment. And here's another good reason. A sentence you don't write down is a sentence you feel free to change. Inscribe it, and you're chained to it for life. That, at least, is how many writers act. A written sentence possesses a crippling inertia.

What should these mental sentences be about? Anything you happen to notice. Anything you happen to think. Anything you want to say. You could make a sentence merely because a word keeps popping into your mind. But learn to play with every sentence you make in your head, shuffling words, searching for accuracy, listening for rhythm. Your memory will surprise you. Because you're writing nothing down, it may seem as though you're not writing at all. But you're building confidence, an assurance that when you're in the place where sentences come from - deep in the intermingling of thought and words - you're in a place where good things usually happen.

Before you learn to write well, to trust yourself as a writer, you will have to learn to be patient in the presence of your own thoughts. You'll learn that making sentences in your head will elicit thoughts you didn't know you could have. Thinking patiently will yield far better sentences than you thought you could make.

I'm repeatedly asked how I write, what my "process" is. My answer is simple: I think patiently, trying out sentences in my head. That is the root of it. What happens on paper or at the keyboard is only distantly connected. The virtue of working this way is that circumstances - time, place, tools - make no difference whatsoever. All I need is my head. All I need is the moments I have.

There's no magic here. Practice these things, and you'll stop fearing what happens when it's time to make sentences worth inscribing. You'll no longer feel as though a sentence is a glandular secretion from some cranial inkwell that's always on the verge of drying up. You won't be able to say precisely where sentences come from - there is no where there - but you'll know how to wait patiently as they emerge and untangle themselves. You'll

discover the most important thing your education left out: how to trust and value your own thinking. And you'll also discover one of things writing is for: pleasure.

Verlyn Klinkenborg is a member of The New York Times Editorial Board and the author, most recently, of "Several Short Sentences About Writing."

The Supreme Court and Gender-Neutral Language: Splitting *La Difference*

by Judith D. Fischer[1]

Introduction

"*Vive la difference*," the French say, affirming the value of both sexes.[2]

The structure of language itself provides ways to affirm or negate the importance of a gender. Typically, when linguistic forms minimize one sex, it is women who are subordinated.[3] This problem occurs in a number of languages, each with its own unique issues with gender bias.[4] A movement to address the specific issues in English gathered momentum in the second half of the twentieth century.[5] As a result of that movement, many English speakers now consider gender-biased language inaccurate, unfair, and no longer acceptable.[6]

Judges are in a unique position to promote fairness in the use of language. However, a recent study of the United Supreme Court showed the Court lagging behind current standards for gender neutrality.[7] Meanwhile, commentators have suggested that putting more women in positions of leadership will change our culture for the better.[8] Women, this hypothesis says, will

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[2] *Vive la difference* denotes "approval of the difference between the sexes." XIX OXFORD ENG. DICTIONARY 714 (2d ed., J.A. Simpson & E.S.C. Weiner eds., 1989).

[3] Graham Martin, *When Is a 'Manageress' a 'Manager'? Approaches to Gender-Neutral Language Use in Five West European Languages*, 40 LINGUIST: J. INST. LINGUISTS 80, 80 (2001) (discussing efforts at gender-neutral language in English, French, Spanish, Italian, and German).

[4] *Id.* at 80-83.

[5] See infra notes 65 to 67 and accompanying text.

[6] See *infra* notes 65 to 91 and accompanying text.

[7] Leslie M. Rose, *The Supreme Court and Gender-Neutral Language: Setting the Standard or Lagging Behind?*, 71 DUKE J. GENDER L. & POL'Y 81, 82 (2010).

[8] *See, e.g.*, MARIE C. WILSON, CLOSING THE LEADERSHIP GAP 6-7 (2004); Deborah L. Rhode, *The Difference 'Difference' Makes*, in THE DIFFERENCE "DIFFERENCE" MAKES 3, 17-18 (Deborah L. Rhode, ed., 2003).

effect change in many areas, including business,[9] government, and the courts, where more women judges will promote fairness by bringing women's perspectives to their decisions.[10]

By now the number of women judges in the United States is substantial.[11] The most dramatic recent change in gender composition occurred on the United States Supreme Court, where three women sat for the first time in the 2010 term. This led Justice Ruth Bader Ginsburg to remark, "We are really here. We're no longer one- or two-at-a-time curiosities."[12]

This article considers how the justices are approaching the issue of gender-inclusive language now that there are three women on the Court. Part I discusses the meaning of the phrase "gender-neutral language." Part II discusses why gender-neutral language is important, and Part III summarizes its history in the English language. Part IV then analyzes the justices' use of gender-neutral language in the 2010 term, presenting examples of both biased and inclusive language from the justices' opinions. The examples demonstrate how some of the justices are solving the problem of biased language by employing graceful gender-neutral language.

My analysis of the 2010 opinions yielded mixed results. At one end of the spectrum, Justice Ruth Bader Ginsburg regularly employed inclusive language, and Justices Sotomayor and Alito used it most of the time. But at the other end of the spectrum, Justice Antonin Scalia avoided it almost entirely, and Justice Elena Kagan seldom used it. The justices, then, are splitting *la difference* when it comes to gender-neutral language.

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[9] WILSON, *supra* note 8, at 7 (stating that women in leadership make "richer business"); Darren Rosenblum, *Feminizing Capital: A Corporate Imperative*, 6 BERKELEY BUS. L.J. 55, 94 (2009) (stating that "capital will gain power from feminization).

[10] Deborah L. Rhode, "The Difference 'Difference' Makes," in *The Difference "Difference" Makes* 3, 21 (Deborah L. Rhode, ed., Stanford U. Press 2003).

[11] Ronald George, *Second Annual Golden Gate University School of Law Chief Justice Ronald M. George Distinguished Lecture Women Chief Justices*, 41 GOLDEN GATE U. L. REV. 153, 157 (2011) (stating that about one-third of the states' chief justices are women, and some states' high courts now contain a majority of women).

[12] Stephanie Frances Ward, *Family Ties: The Private and Public Lives of Justice Ruth Bader Ginsburg*, ABA J. 37, 43 (Oct. 2010).

Of course, a writer's decisions in favor of inclusiveness cannot always be detected easily. Efforts at gender neutrality may be inconspicuous, especially in the hands of an expert writer. Indeed, that approach is often recommended, on the premise that good prose should not cause the reader to stumble.[217] Therefore, my tally of obviously biased and gender-neutral passages can provide only a rough gauge of individual justices' commitment to inclusive language.

Justice Scalia wrote that Bryan Garner, his co-author of a book on writing, "displayed inventiveness of a DaVinci and the imagination of a Tolkien in devising circumlocutions that have purged my contributions to [the book] (at some stylistic cost) of all use of 'he' as the traditional generic . . . ."[218] But bias-free prose can be written without clumsy linguistic contortions, as several justices have demonstrated.

1. The justices' handling of pronouns

Pronoun problems most often provoke the accusation that gender-neutral language must be awkward.[219] But it need not be, as several justices demonstrated through the following techniques.

a. Using a plural noun

Changing a noun to the plural can avoid the need for a gendered pronoun, as Justice Ginsburg's dissent in the *Wal-Mart* case demonstrates: "Wal-Mart's supervisors do not make their discretionary decisions in a vacuum."[220] This sentence could easily have been written with a singular masculine pronoun, but the passage unobtrusively sidesteps that problem.

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[217] *E.g.*, SCALIA & GARNER, *supra* note 56, at 116 (Garner advising writers to employ "invisible gender neutrality" in order to "avoid distracting readers.")
[218] *Id.* at 119.
[219] *See* GARNER, *supra* note 62, at 799 (stating that generic masculine pronouns have "caused the single most difficult problem in the realm of sexist languagezz').
[220] *Wal-Mart*, 131 S, Ct. at 2563 (Ginsburg, J. dissenting).

b. Using a genderless pronoun

A genderless pronoun such as "who" or "one" can also avoid the need for a gendered pronoun. Justice Breyer employed that approach in this sentence: "[O]ne is guilty as a principal when one uses an innocent third party to commit a crime."[221]

Similarly, Justice Alito used a genderless pronoun and combined it with a plural to produce this passage:

> A "law enforcement officer" is defined as one "whose duty it is to preserve the peace," [citation] and fulfilling that duty involves a range of activities. Police on the beat aim to prevent crime from occurring, and they no less carry out "law enforcement purposes than officers investigating a crime scene."[222]

The passage uses the genderless pronoun "one" and then makes an effortless transition to the plural, avoiding the need for a gendered pronoun, and belying the notion that gender-neutral language must be awkward.

c. Repeating a noun

Another way to avoid a gendered pronoun is to repeat a noun. Justice Breyer did that when writing of a hypothetical about someone who "killed a person with the intent to prevent that person" from talking to officers,[223] repeating the noun in a perhaps deliberate decision to avoid a gendered pronoun. Similarly, in a case with many generic references, Justice Kennedy repeated the noun "citizen," avoiding a gendered pronoun.[224]

d. Using paired pronouns

Several of the justices used paired pronouns like "he or she," as Justice Alito did in this example: "[I]f [a hypothetical] defendant were at least 18, the court could not find that he or she

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[221] Janus Capital Group, Inc., v. First Derivative Traders, 131 S. Ct. 2296, 2310 (Breyer, J., dissenting).
[222] Milner v. Dept. of the Navy, 131 S. Ct. 1259 (2011) (Alito, J., concurring.)
[223] Fowler v. U.S., 131 S. Ct. 2045, 2048 (2011).
[224] Nevada Comm'n on Ethics v. Carrigan, 131 S. Ct. 2343, 2352 (2011).

was in custody."[225] This approach is not new, as at least one eighteenth-century American statute illustrates.[226] However, because pronoun pairs can be awkward, they are best used sparingly.

e. Restructuring the passage:

Justice Alito structured this passage so it did not require a gendered pronoun: "[A] suspect's dress and manner will often be different when the issue is litigated in court than it was at the time of the interrogation."[227] Justice Alito could easily have written, "at the time of his interrogation." If this was a deliberate effort to avoid gender bias, Justice Alito smoothly accomplished that goal.

2. The justices' handling of nouns

Male-linked generic nouns like "mankind" were noticeably few in the 2010 opinions. Of the nouns I searched for,[228] outside of language quoted from other sources, I found only one use of "policeman"[229] and three uses of "congressman" or its plural, "congressmen."[230] Those references seem incongruous now that so many women are police officers or members of Congress. Thus in Justice Scalia's statement that "fuzzy" laws are attractive to a "Congressman"[231] who wants approval, "Congressman" seems oddly off pitch. But aside from these few instances, the justices avoided biased nouns.

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[225] J.D.B. v. C.C., 131 S. Ct. 2394, 2416 (Alito, J., dissenting).
[226] *Stanford*, 131 S. Ct. at 2194 (quoting the Patent act of 1790 as requiring an inventor to state that "he, she, or they" invented or discovered the item to be patented).
[227] J.D.B., 131 S. Ct. at 2416 (Alito, J., dissenting).
[228] *See infra* Part IV A.
[229] Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968, 1988 (2011) (Breyer, J. dissenting).
[230] DePierre v. U.S., 131 S. Ct. 2225, 2237 (2011) (Scalia, J. concurring in part and concurring in the judgment); Sykes v. U.S., 131 S. Ct. 2267, 2288 (2011) (Scalia, J., dissenting); Borough of Duryea, Pa. v. Guarnieri, 131 S. Ct. 2488, 2506 (2011) (Scalia, J., concurring in the judgment in part and dissenting in part).
[231] Sykes, 131 S. Ct. at 2288.

Meanwhile, they did use some gender-neutral nouns. Justices Alito, Kagan, and Scalia used the unbiased term "Members of Congress,"[232] and Justice Kennedy wrote about "Congress Members."[233] Other unbiased nouns were "police officers," which appeared in twelve cases,[234] and "firefighter," which Justice Alito used once.[235] The opinions included no instances of other inclusive nouns I searched for, such as "business person," "mail carrier," and "postal carrier."

3. The justices' handling of inclusiveness in longer passages: contrasting approaches

Several cases present interesting examples of varied approaches to gender neutrality, because they include majority opinions as well as concurrences and dissents where issues of gender neutrality were handled differently.

The controversial *Wal-Mart* case provides instructive contrasts. As discussed above,[236] Justice Scalia's majority opinion employed generic masculine pronouns, even though the case concerned a claim brought by women only. But in the same case, Justice Ginsburg's dissent avoided generic masculine words. Instead she used the gender-neutral noun *humankind*[237] and the pronoun "she" for unspecified claimants[238] who were, after all, women only. Justice Ginsburg also used a plural noun and avoided a gendered pronoun in this sentence: "Wal-Mart's

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[232] Bruesewitz v. Wyeth LLC, 131 S. Ct. 1068, 1080 n. 64 (2011) (majority opinion, by Justice Scalia); Brown v. Plata, 131 S. Ct., 1966 (2011) (Alito, J. dissenting); Arizona Christian School Tuition Organization v. Winn, 131 S. Ct. 1436, 1355 (2011) (Kagan, J. dissenting).
[233] Bond v. U.S., 131 S. Ct. 2355, 2366 (2011).
[234] *E.g.* Fowler v. U.S., 131 S. Ct. 2045, 2048 (2011) (majority opinion, by Justice Breyer); *Id.* at 2054, 2055, 2056 (Scalia, J., concurring in the judgment); Sykes, 131 S. Ct. at 2271 (majority opinion, by Justice Kennedy); *id.* at 2278-2282 (Thomas, J., concurring in the judgment); *id.* at 2288, 2290, 2291, 2293 (Kagan, J., dissenting)
[235] Snyder v. Phelps, 131 S. Ct. 1207, 1224 (2011) (Alito, J., dissenting).
[236] *Supra* notes 206 to 213 and accompanying text.
[237] *Wal-Mart*, 131 S. Ct. at 2564.
[238] *Id.* at 2567.

supervisors do not make their discretionary decisions in a vacuum."[239] She might have written a biased sentence using a singular noun and "his," but she avoided that foray into sexism.

Nevada Commission on Ethics v. Carrigan[240] also presents instructive contrasts. That case concerned a Nevada ethics law governing public officials,[241] a topic that lent itself to general or hypothetical statements about officials. Justice Scalia's majority opinion includes a biased "his" for a generic legislator.[242] By contrast, Justice Kennedy's concurring opinion used the pronoun pair "he or she" both for a citizen and a legislator.[243] And Justice Alito's separate concurrence is gender neutral. In one passage, he avoided biased pronouns by repeating a noun: "If a member of the legislative body chooses to vote in [a] straw poll, the legislator's act" is expressive.[244] In another passage, he avoided the pronoun problem by using the genderless "that": "If an ordinary citizen casts a vote in a straw poll . . . that act indisputably constitutes a form of speech."[245]

Another case showing the justices' contrasting approaches is *Chamber of Commerce of the United States v. Whiting*.[246] The case involved employment of aliens, which is governed by a statute written in gender-neutral language.[247] Congress accomplished that by using the neutral terms "individual," "person," and "entity" and repeating them where necessary instead of using gendered pronouns.[248] But the *Chamber of Commerce* case's majority opinion employed some

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[239] *Id.* at 2563.
[240] 131S. Ct. 2343 (2011).
[241] *Id.* at 2346.
[242] *Id.* at 2350.
[243] *Id.* at 2352, 2353 (Kennedy, J. concurring).
[244] *Id.* at 2355 (Alito, J., concurring in part and concurring in the judgment).
[245] *Id.*
[246] 131 S. Ct. 1968 (2011).
[247] 8 U.S.C. § 1324a.
[248] For example, that statute reads in part as follows:
(a) Making employment of unauthorized aliens unlawful
(1) In general
It is unlawful for a person or other entity--

biased language. Chief Justice Roberts used "he" for a generic employer[249] and twice used "his" for a generic employee,[250] despite the gender neutrality of the immigration statute he cited.

Justice Sotomayor's dissent illustrates how the same subject matter can be treated in a gender-neutral manner. She used no generic masculine pronouns. Meanwhile, in an apparent choice for gender neutrality, in two passages she avoided gendered pronouns by repeating the noun "person,"[251] using phrasing similar to that in the gender-neutral statute.[252] Later, she referred to a generic employer as "it,"[253] a sensible approach since many employers are entities.

The differing approaches in the *Wal-Mart*, *Nevada Commission on Ethics*, and *Chamber of Commerce* cases show that graceful and even unobtrusive gender-neutral language can be created with a little attention. All good prose must be carefully crafted, as Justice Scalia[254] and other justices have emphasized.[255] It is worth investing the effort to craft bias-free language, since the issue that involves fairness to half the population.

Conclusion

> (A) to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3) of this section) with respect to such employment, or (B) (i) to hire for employment in the United States an individual without complying with the requirements of subsection (b) of this section or (ii) if the person or entity is an agricultural association, agricultural employer, or farm labor contractor (as defined in section 1802 of Title 29), to hire, or to recruit or refer for a fee, for employment in the United States an individual without complying with the requirements of subsection (b) of this section.

8 U.S.C.A. § 1324a(a)(1).

[249] *Id.* at 1974.

[250] *Id.* at

[251] *Id.* at 2000, 2003 (Sotomayor, J., dissenting).

[252] *See* 8 U.S.C.§ 1324a.

[253] *Id.* at 2001 (Sotomayor, J., dissenting).

[254] *Id.* at 80-81; *Interview with Justice Antonin Scalia*, 13 SCRIBES J. LEG. WRITING 51, 52-53 (2010) (transcript of interview recorded on Oct. 2, 2006) (stating, "I go over and over" an opinion and "I don't believe in the facile writer.").

[255] *E.g.*, *Interview with Chief Justice John Roberts*, 13 SCRIBES J. LEG. WRITING 5, 33 (2010) (transcript of interview recorded on March 2, 2007) (stating, "I'm sure it's harder to write shorter and crisper than it is to write long and dull"); *Interview with Justice Clarence M. Thomas*, 13 SCRIBES J. LEG. WRITING 100, 100 (2010) (transcript of interview recorded on March 28, 2007) (stating that good prose style "requires lots of rounds of editing"); *Interview with Justice Ruth Bader Ginsburg*, 13 SCRIBES J. LEG. WRITING 133, 134 (2010) (transcript of interview recorded on November 13, 2006) (stating that she works "very hard" at writing and produces "innumerable drafts").

IBM/Lufkin Problem

Lufkin is a multi-billion-dollar global, energy-focused company headquartered in Lufkin, Texas. In 2009, Lufkin decided to replace its outmoded business-software system across all three of its business units. Lufkin's CFO, Chris Boone, was in charge of selecting the new software system. At first, Lufkin considered state-of-the-art custom-designed systems provided by either of two competing companies, Oracle or SAP, but what it thought it needed at that time was a "preconfigured," "lower cost" option, as their trial witnesses later put it.

Lufkin's planned software change came to the attention of IBM, which had in the past provided consulting services to Lufkin. IBM pitched its version of an SAP system, called the Express Solution, to Lufkin's CFO Boone, and other Lufkin executives. The Express Solution can be customized according to a customer's needs, but it is not a fully custom-designed product. Instead, the Express Solution begins as a preconfigured version of an SAP software system that has certain business operations pre-loaded into the software, thus reducing the extent of customization required to meet the customer's needs. IBM explained that the Express Solution could serve as a less-expensive alternative to a SAP system custom-built entirely from scratch. That was attractive to Lufkin management, some of whom had previously experienced expensive and time-consuming installations of highly customized business software both at Lufkin and at other

companies. A long sales and due diligence process followed IBM's initial presentation. After months of due diligence, including discovery workshops conducted by IBM with Lufkin employees Lufkin chose IBM's Express Solution software, and decided to hire IBM to install and implement it.

Contractual Documents Between Lufkin and IBM, Including Two Disclaimers of Reliance

Lufkin and IBM extensively negotiated the terms of their agreement, as ultimately reflected in the comprehensive "Statement of Work." The Statement of Work contained a detailed description of what IBM was to deliver and what IBM and Lufkin were required to do in the installation process. During the negotiation process, both Lufkin and IBM had ready access to legal counsel, including in-house counsel. The parties exchanged numerous drafts of the Statement of Work, proposing, counter-proposing and accepting numerous revisions. The negotiations addressed the price, scope, staffing, and timeline of the project.

The Statement of Work set out the responsibilities of both parties, describing a cooperative effort. But Lufkin always reserved the ultimate decision on what type of software system to install:

> Lufkin Industries will be responsible for the review and evaluation of the IBM recommendations as well as all final decisions and implementations relating to, or resulting from, the IBM recommendations contained in the deliverable Materials.

Further, Lufkin promised that its IT staff would have the "appropriate skills and experience" to make decisions about how to configure the software system.

In negotiating the Statement of Work's terms, the parties discussed many terms, including cost, time of completion, savings, costs, and results—issues over which the trial would later be conducted. As shown by an email between Lufkin CFO Chris Boone and IT Manager Tim Coker, Lufkin and IBM specifically discussed potential penalties and rewards for coming in below or above cost estimates:

> Chris,
>
> I was able to successfully negotiate another 9% off the IBM hourly rates. .We told them we were not going to pay for their Project Executive oversight. . . . . I asked them to lower the cost of the three Consulting types. I originally asked for 20% discount and they came back with 2%. They ultimately met me halfway. This puts on-site consulting at blended rate of $200/hour. This is what we paid our Baan consultants 12 years ago. . . . . Total reduction in estimated cost $1,139,850.
>
> They indicated they would be willing to put some kind of penalty discount should they go over the hours, following the Blueprint phase, when the scope had been well defined. They would also want to put in a reward system should the beat the numbers? We will need to discuss this approach in further detail. Not sure how much time would be wasted on negotiating each and every simple task, whether it was or was not in scope.
>
> Thanks
>
> Tim Coker

The negotiations did not lead to any penalty or reward clauses, but they did result in two other key provisions: an integration (a/k/a merger) clause and a disclaimer of reliance. Both provisions appeared conspicuously, not only on the signature page, but also in another location in the Statement of Work.

The integration provision in sections 2 and 2.11 of the Statement of Work limited the "complete agreement between Lufkin and IBM" to the Statement of Work and another document, the IBM Customer Agreement:

2. IBM Statement of Work

This SOW, its Appendices, and the [IBM Customer] Agreement represent the entire agreement between the parties regarding the subject matter and replace any prior oral or written communications....

2.11 Signature Acceptance

This SOW and the referenced [IBM Customer] Agreement identified below, are the complete agreement between Lufkin Industries and IBM regarding Services, and replace any prior oral or written communications between us.

Each party accepts the terms of this SOW by signing this SOW by hand or, where recognized by law, electronically. By such acceptance each party agrees that no modifications have been made to this SOW.

....

Agreed to:	Agreed to:
Lufkin Industries, Inc.	International Business Machines Corporation
By: /s/	s/
Authorized Signature	Authorized Signature
Name (type or print): Chris Boone Chief Financial Officer	(type of print): Deborah Davis Partner

In the corresponding two disclaimer provisions, found in the same sections and pages of the Statement of Work as the integration clauses, Lufkin disclaimed any reliance on prior statements by IBM not specifically contained in the Statement of Work:

2. IBM Statement of Work

. . . .

In entering into this SOW, Lufkin Industries is not relying upon any representation made by or on behalf of IBM that is not specified in the [IBM Customer] Agreement or this SOW, including, without limitation, the actual or estimated completion date, amount of hours to provide any of the Services, charges to be paid, or the results of any of the Services to be provided under this SOW.

. . . .

2.11 Signature Acceptance

. . . . [I]n entering into this SOW, neither party is relying upon any representation that is not specified in this SOW including without limitation any representations concerning 1) estimated completion dates, hours, or charges to provide any Service, 2) the experiences of other customers, or 3) results or savings Lufkin Industries may achieve.

. . . .

Agreed to:	Agreed to:
Lufkin Industries, Inc.	nternational Business Machines Corporation
By: /s/	s/
Authorized Signature	Authorized Signature
Name (type or print): Chris Boone Chief Financial Officer	(type of print): Deborah Davis Partner

Over the next six months, Lufkin and IBM jointly worked to develop the software design plans for the software system that Lufkin wanted.

On September 16, 2010, Lufkin's project manager approved and signed the final contract document authorizing IBM to install the SAP software system.

Trial

At trial, the parties presented very different views of the facts surrounding the selection and installation of the IBM Express Solution. On the one hand, Lufkin argued that IBM misrepresented that the Express Solution was an easy-to-install, much-less-expensive version of SAP software that would still be suitable "as is" for 80% of Lufkin's business needs. Lufkin contended that IBM made those misrepresentations, knowing the Express Solution was not suitable for Lufkin without substantial customization, which would greatly increase costs, delay implementation, and create operational problems.

On the other hand, IBM denied making any false statements. IBM's Juan Gonzalez had made no "guaranteed" representations that the Express Solution would supply 80% of Lufkin's business needs. Further, it was Lufkin's decision whether to confine the implementation to the preconfigured capabilities of the Express Solution or to agree to requests from Lufkin employees to customize the system. Lufkin chose the latter course and authorized IBM to install the software system that Lufkin operates today.

After the system was installed and in operation, Lufkin sued IBM on multiple claims, alleging that the new software system was not suitable for Lufkin's business operations. Lufkin submitted these claims to a jury: (1) fraudulent inducement; (2) fraud; (3) breach of contract; and (4) negligent misrepresentation.

The jury found that Lufkin was not entitled to recover damages on its claims for breach of contract or negligent misrepresentation. Instead, the jury found for Lufkin and awarded damages only on the claims for fraudulent inducement and fraud. The trial judge, the Honorable Paul E. White, signed a judgment on the verdict for $21 million on the fraudulent inducement claim and, alternatively, a judgment in the amount of $6 million on the fraud claim. IBM filed a notice of appeal.

A central issue in this appeal is whether Lufkin's contractual disclaimers bar its claim for fraudulent inducement. Reasonable reliance is a necessary element for fraudulent conduct of any kind. *Haase v. Glazner*, 62 S.W.3d 795, 798 (Tex. 2001).[1] IBM argues that Lufkin repeatedly disclaimed reliance on all

[1] Under Texas law, all of the elements of fraudulent inducement are: "a misrepresentation; that defendant knew the representation was false and intended [to] induce plaintiff to enter into the contract through that misrepresentation; that plaintiff actually relied on the misrepresentation in entering into the contract; and that plaintiff's reliance led plaintiff to suffer an injury through entering into the contract." *Bohnsack v. Varco, L.P.*, 668 F.3d 262, 277 (5th Cir. 2012).

representations not included in its contract with IBM for installation of a business software system.

Cases we will use for this assignment:

Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171 (Tex. 1997)

Forest Oil Corp. v. McAllen, 268 S.W.3d 51 (Tex. 2008)

Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am., 341 S.W.3d 323 (Tex. 2011).

Matlock Place Apartments, L.P. v. Druce, 369 S.W.3d 355 (Tex. App.—Fort Worth 2012, pet. denied).

Worldwide Asset Purchasing, L.L.C. v. Rent-A-Center East, Inc., 290 S.W.3d 554 (Tex. App.—Dallas 2009, no pet.)

RAS Group, Inc. v. Rent-A-Center East, Inc., 335 S.W.3d 630 (Tex. App.—Dallas 2010)

McLernon v. Dynegy, Inc., 347 S.W.3d 315 (Tex. App.—Houston [14th Dist.] 2011, no pet.)