

KNOW YOUR ENEMY

Sources of Uncertain Meaning in Contracts



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What's the opposite of "plain language" in contract drafting? Well, there's contract prose that's wordy. That's ornate. That's archaic. But most pernicious is prose that's confusing. Confusion leads to uncertain meaning; uncertain meaning can lead to dispute; and winning a dispute over uncertain meaning is a distant second to avoiding the dispute in the first place.

If you want to root out confusion, you have to know the forms in which it comes. This article describes the different kinds of uncertain meaning in contract language: ambiguity, failure to be sufficiently specific, mistake, conflict, failure to address an issue, and vagueness. All are pernicious, except for vagueness, which is an essential drafting tool when used carefully.

Courts tend to see all instances of uncertain meaning as ambiguous—witness how *Black's Law Dictionary* defines *ambiguity* in part as "Doubtfulness or uncertainty of meaning or intention, as in a contractual term or statutory provision."¹ But the sources of uncertainty operate differently from each other. Lump them together and you risk misunderstanding them.

Ambiguity

For linguists, text is ambiguous if it's capable of conveying two or more distinct meanings. For purposes of contracts, whether an alternative meaning

makes sense is less important than whether a contract party is willing to use that alternative meaning as a stick with which to beat the other party.

Here are the different ways that ambiguity manifests itself in contracts.

Lexical ambiguity

Lexical ambiguity occurs when a word has more than one meaning. One form of lexical ambiguity is homonymy, which occurs when words happen to have identical forms but unrelated meanings. An example is *bank*, which might mean a financial institution or the bank of a river. Given the unrelated meanings, homonymy is unlikely to give rise to confusion—the context allows readers to determine which meaning is intended. That's particularly the case in the limited and stylized context of contracts.

The other kind of lexical ambiguity, polysemy, occurs when a word has lexical senses that relate to the same basic meaning of the word as it occurs in different contexts. To expand on the example above, *bank* can mean a financial institution or a building that houses a financial institution. Those meanings are complementary.

Polysemy occurs in words and phrases that are standard in contracts. For example, for an action to be *willful*, does it have to be malicious or just intentional?² That uncertain meaning can lead to disputes.³ So instead of using *willful* (or *willfully*), express the intended meaning another way.

Polysemy also occurs in words and phrases found less often in contracts. For example, does *foreclosure* refer to foreclosure proceedings or to a foreclosure sale?⁴ And regarding use of the word *offshore* with respect to an oil rig, a court held that it could refer to a location in the Gulf of Mexico or in inland waters.⁵

To eliminate lexical ambiguity, make clear which meaning you have in mind, either by stating that meaning instead of

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using the ambiguous word or phrase or by using a defined term. For routine instances of lexical ambiguity, applying the fix should be routine too. But it can require imagination to spot lexical ambiguity in words and phrases that don't occur routinely in contracts.

Ambiguity in references to time

References to time are a fertile source of lexical ambiguity, but it's convenient to consider them separately.⁶

Ambiguity arises in reference to points in time, as in this example:

The Option expires on September 1. Does the option expire at the beginning of the day? At the end of the day? Some other time? Instead, include a time of day.

It also arises in references to periods of time:

Upon expiration of the Option, Widgetco may sell the Property back to Acme. When, if at all, does Widgetco's right to sell back the property end? Instead, state how much time Widgetco has.

And it arises in provisions that apportion quantities per unit of time:

Acme shall pay Widgetco the Royalty Amount no later than 30 days after the beginning of each year. What does *year* mean? One of the 12 months of the year? The period from the date of the contract or its anniversary to the beginning of the corresponding day the next year?⁷

FAST FACTS

Confusion leads to uncertain meaning; uncertain meaning can lead to dispute; and winning a dispute over uncertain meaning is a distant second to avoiding the dispute in the first place.

Syntactic ambiguity arises when a given sequence of words can be construed as having two different grammatical structures, each associated with a different meaning.

Vagueness in a contract can be more risky or less, depending on how it's used.



Again, instead of being ambiguous, be explicit as to which meaning you intend. The fix depends on the context.

Ambiguity of the part versus the whole

Use of plural nouns and the words *and*, *or*, *every*, *each*, and *any* can result in ambiguity. And that can lead to disputes.⁸

In each case, the question is whether it's a single member of a group of two or more that's being referred to, or the entire group, so I use the phrase "the part versus the whole" to refer to this sort of ambiguity.⁹

Here's an example featuring *and*:

[1] The Seller has complied with all laws applicable to the Business and the Acquired Assets.

[1a] *The Seller has complied with all laws applicable to the Business and all laws applicable to the Acquired Assets.*

[1b] *The Seller has complied with each law applicable to both the Business and the Acquired Assets.*

For two reasons, ambiguity of the part versus the whole is particularly tricky. First, how it manifests itself depends on the grammatical context. Does it relate to the subject of the sentence? The direct object? Both? What is the effect of adjectives? And so on. Because of this complexity, it's likely that you'll spot this kind of ambiguity only if you're looking for it.

And second, ambiguity of the part versus the whole occurs often in contracts, even several times in a single sentence. Because eliminating this kind of ambiguity involves

adding extra words, eliminating it wherever it occurs could make contract prose heavy going. So in addition to spotting this kind of ambiguity, you have to decide whether the likelihood of confusion is such that it's worth adding extra words to the contract to eliminate the unintended meaning. For example, does the risk of unintended meaning [1b] prevailing make it worth replacing [1] with [1a]?

It's not simply a matter of leaving in a contract any unintended meaning that's unreasonable and eliminating those that are more plausible. A disgruntled contract party might argue for an unreasonable meaning, and in a fight the unreasonable meaning might prevail.¹⁰ Consider leaving in a contract only those unintended meanings that are unlikely enough that someone would look silly arguing for them.

Syntactic ambiguity

Syntactic ambiguity arises when a given sequence of words can be construed as having two different grammatical structures, each associated with a different meaning.¹¹ It's primarily a function of modifiers. A modifier is a word or phrase that changes the meaning of a word or phrase to which it is grammatically related. The nature of syntactic ambiguity and how to eliminate it depends on the position of the modifier.

For example, it can be unclear whether a modifier that precedes two or more nouns modifies all the nouns or only the first. In [2] below, *children's* could modify just *apparel*, or it could modify all three nouns. If you intend the former meaning, using enumeration, as in [2a], would eliminate the ambiguity. So would using semicolons, as in [2b], although that's less clear than using enumeration. So would putting *apparel* last, as in [2c]. If instead the modifier modifies all the nouns, you could repeat it before each noun, as in [2d], or use the structure in [2e].

[2] Acme may sell in the Stores only children's apparel, accessories, and footwear.

[2a] *Acme may sell in the Stores only (1) children's apparel, (2) accessories, and (3) footwear.*

[2b] *Acme may sell in the Stores only the following: children's apparel; accessories; and footwear.*

[2c] *Acme may sell in the Stores only accessories, footwear, and children's apparel.*

[2d] *Acme may sell in the Stores only children's apparel, children's accessories, and children's footwear.*

[2e] *Acme may sell in the Stores only the following items for children: apparel, accessories, and footwear.*

Syntactic ambiguity features routinely in litigation.¹² In addressing syntactic ambiguity, courts are willing to invoke principles of interpretation—generalized notions of how readers understand text—when they're unable to determine what meaning, if any, the drafters had intended. As such, principles

of interpretation are a convenient fiction. That's perhaps why some who favor principles of interpretation call them "canons"¹³—the ecclesiastical-law origins of that word lend the concept of principles of interpretation an undeserved air of solidity.

Furthermore, one principle of construction that courts apply to syntactic ambiguity is inconsistent with English usage and should be rejected. That's the notion that if in a sentence a series of nouns, noun phrases, or clauses is followed by a modifier and the modifier is preceded by a comma, the modifier applies to the entire series, not just the final element in the series.¹⁴

To avoid the mess that comes with having to sort out syntactic ambiguity, those who draft and review contracts should root it out. Unlike ambiguity of the part versus the whole, you're not required to pick your battles.

Antecedent ambiguity

In the sentence *John is late because he overslept*, the antecedent of *he* is *John* (assuming that the broader context doesn't suggest an alternative, such as John's father). Confusion can arise if it's not clear what the antecedent is of a given element. For example, in *John read Bill's e-mail, and he is furious*, the antecedent of *he* could be either *John* or *Bill*.

This kind of ambiguity arises in contracts. For example, in one case, the following contract language was at issue:

The defendant agrees to pay for one-half the cost of Sarah's college educational expenses for a four year degree net of scholarships or grants subject to the limitation that said cost shall not exceed the tuition for a full-time residential student at UCONN–Storrs.¹⁵

If a word or phrase in a contract turns out to have been too general, the parties might end up fighting over which more specific meaning had been intended.

Was the defendant's liability capped at half the tuition for a full-time residential student at UCONN–Storrs (the meaning sought by the defendant), or was it capped at the full amount of that tuition? In other words, was the antecedent of "said cost" "one-half the cost" or "the cost" of Sarah's expenses?

And an English case involved uncertainty over what was the antecedent of "such sums" in the phrase "all such sums due to you under the contract."¹⁶

It's perhaps no coincidence that the two examples cited above involve archaisms—*said* used instead of *that*¹⁷ and *such* used instead of *those*.¹⁸ It's more challenging to spot antecedent ambiguity when you're in a fog of traditional contract language.

Contract-reference ambiguity

Ambiguity can arise in a contract reference to that contract. For example, does the word *hereunder* in a given section apply just to that section or to the entire contract?¹⁹ Similar disputes have arisen over *hereinbelow*,²⁰ *herein*,²¹ and *except as provided below*.²² Even *the foregoing* has the potential to be confusing.²³

So if you're referring to the entire contract, use *this agreement*. If you're referring to some part of it, then say so, for example by saying *this section 4.2*.

Failure to be sufficiently specific

If a word or phrase in a contract turns out to have been too general, the parties might end up fighting over which more specific meaning had been intended.

For example, disputes have arisen over the unduly general *subcontractor*,²⁴ *cobabitation*,²⁵ *moral turpitude*,²⁶ and *on a full-time basis*.²⁷

Regarding the last of those examples, use of *on a full-time basis* raises several questions: How many hours a day and days per week do you have to work for work to be full-time? How long does that level of work have to be maintained? Does someone have to be an employee to work full-time, or can you be a consultant? Does volunteer work count?

Plenty of other words and phrases that are commonplace in contracts fall into this category. For example, the phrase *civil insurrection* occurs in force majeure provisions. What level of mayhem does it require?

Mistake

Uncertainty of meaning can also arise if the parties are mistaken as to the facts and the contract reflects that mistake. A famous instance of such a mistake is found in the English case *Raffles v Wichelbaus*.²⁸ The contract in question provided for purchase of cotton from a ship named "Peerless" that was to depart from Bombay. It transpired that two ships named

“Peerless” were to depart from Bombay a couple of months apart—the buyer had one ship in mind, the seller the other.

Courts and treatises also use the term *latent ambiguity* to describe such situations.²⁹ But the contract text itself doesn’t present alternative meanings, so it’s unhelpful to attribute the confusion to ambiguity. Judicial fondness for the phrase *latent ambiguity* perhaps arises from euphonious contrast with the phrase *patent ambiguity* (namely actual ambiguity).

Conflict

Conflict occurs when two or more elements of a contract aren’t compatible. It can be caused by careless repetition, for example when the words and digits used to state a number don’t match.³⁰

And entire provisions can conflict. For example, *United Rentals, Inc v RAM Holdings, Inc*,³¹ a high-profile dispute over a failed acquisition, involved conflict between two provisions on remedies.³²

Failure to address an issue

Uncertainty can occur if a drafter neglects to address an issue.³³ (That’s different from the parties electing not to address an issue to facilitate their reaching agreement.) Avoiding this kind of uncertain meaning can be more challenging than avoiding other kinds—instead of eliminating that which is problematic, you have to figure out what’s missing.

Vagueness

Vague words used in contracts include the adjectives *reasonable*, *prompt*, *material*, *negligent*, and *satisfactory* (among many others) and the related adverbs. With vagueness, whether

a given standard has been met is a function of the circumstances. For example, how fast a contract party has to act to comply with an obligation to do something promptly is a function of what would be reasonable under the circumstances. There’s no specific deadline.

It follows that with vagueness comes the possibility of dispute. A contract party under an obligation to do something promptly might act fast enough that no one could reasonably say that they hadn’t acted promptly. But the longer they take, the greater the likelihood of the other party’s deciding that they hadn’t acted promptly.

That being the case, it would seem sensible to be specific instead of vague, for example by saying *no later than five days after*. But drafters use vagueness if lack of control (over the future, over someone else’s conduct) means that a precise standard wouldn’t make sense. For example, if a provision requiring reimbursement of legal expenses would apply to a broad range of litigation, from the trivial to the catastrophic, it might make sense to express a cap not as a specific amount but instead by referring to *reasonable legal expenses*—a vague standard.

Vagueness might also be expedient if addressing an issue precisely would make negotiations longer or more contentious than one or both parties want.

Limiting the risk in vagueness

Vagueness in a contract can be more risky or less, depending on how it’s used.

It would be prudent to use vagueness only if not too much is at stake and the context is sufficiently commonplace that the parties and any court would have a basis for determining what would be reasonable in the circumstances.

It would also make sense to narrow the scope of vagueness. For example, in the case of an obligation to use *reasonable efforts*, the party that has the benefit of that obligation could reduce its risk by identifying any component of the larger task where the party under the obligation has sufficient control to justify imposing an absolute obligation. For example, if Acme is required to use reasonable efforts to obtain a permit, you could also impose on Acme a flat obligation to apply for the permit no later than a stated date.

And the party under a *reasonable efforts* obligation could reduce its risk by specifying actions it wouldn’t be required to take in complying with that obligation.³⁴

Gradations of vagueness

The notion of gradations in vagueness is an unhelpful one.

It’s on display in use of *negligent* and *grossly negligent*. If negligent behavior is unreasonable behavior, grossly negligent behavior would seem to be, in effect, really unreasonable behavior. It’s not clear how bad behavior has to be to be grossly negligent—*gross negligence* has no settled meaning,



and many jurisdictions don't recognize degrees of negligence. Adding *reckless* and *wanton* to the mix only aggravates the confusion.³⁵

The biggest misconception regarding gradations of vagueness is the notion of a gradation of standards featuring *efforts*, with *best efforts* being the most exacting standard.³⁶ It fails as a matter of semantics and contract logic. Furthermore, U.S. courts have said, with essentially one voice, that all *efforts* standards mean the same thing—*reasonable efforts*. Courts in other jurisdictions, notably England³⁷ and Canada,³⁸ have tried to articulate a meaningful distinction but have failed.

Blurred boundaries

Instead of being distinct, some of the categories of uncertain meaning blend into each other.

The difference between lexical ambiguity and failure to be sufficiently specific is one of degree. The former involves established alternative meanings; the latter involves a broader range of alternative meanings. One can shade into the other.

Similarly, the distinction between failing to be sufficiently specific about an issue and failing to address it at all is one of degree.

And contract usages can be both vague and ambiguous. Given the confusion over ostensible gradations in *efforts* standards, the phrase *best efforts* can be considered not only vague but also ambiguous. The same applies to the word *material*. It pertains to significance, but drafters use it to express not only that which is important but also that which is simply nontrivial.³⁹ ■



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ENDNOTES

1. *Black's Law Dictionary* (10th ed).
2. See Adams, *A Manual of Style for Contract Drafting* (Chicago: ABA Publishing, 3rd ed, 2013), §§ 13.761–13.762.
3. See, e.g., *Johnson & Johnson v Guidant Corp*, 525 F Supp 2d 336, 349–351 (SD NY, 2007).
4. *Provident Bank v Tennessee Farmers Mut Ins Co*, 234 F Appx 393 (CA 6, 2011).
5. *Jones v Francis Drilling Fluids*, 613 F Supp 2d 858 (SD Tex, 2008).
6. See *A Manual of Style*, ch 10.
7. See Kenneth Adams, Adams on Contract Drafting, *The Time for Taking Action "Upon" Something Happening* <<http://www.adamsdrafting.com/the-time-for-taking-action-upon-something-happening>> (posted June 8, 2015). All websites cited in this article were accessed September 13, 2016.
8. See, e.g., Kenneth Adams, Adams on Contract Drafting, *A Reminder that "And" and "Or" Matter* <<http://www.adamsdrafting.com/a-reminder-that-and-and-or-matter>> (posted May 8, 2015).
9. See *A Manual of Style*, ch 11.
10. See, e.g., *Meyer v CUNA Mut Ins Society*, 648 F3d 154 (CA 3, 2011); see also Adams, *Making a Mess of Ambiguity: Lessons from the Third Circuit's Opinion in Meyer v CUNA Mutual Insurance Society*, *Bus L Today* (November 20, 2011).
11. See *A Manual of Style*, ch 12.
12. See, e.g., Kenneth Adams, Adams on Contract Drafting, *The Delaware Supreme Court Tackles Industrial-Strength Syntactic Ambiguity* <<http://www.adamsdrafting.com/the-delaware-supreme-court-tackles-industrial-strength-syntactic-ambiguity>> (posted March 28, 2013).
13. See, e.g., Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St Paul: Thomson/West, 2012).
14. See Adams, *Bamboozled by a Comma: The Second Circuit's Misdiagnosis of Ambiguity in American International Group, Inc v Bank of America Corp*, 16 *Scribes J Legal Writing* 45 (2014–2015).
15. *Loso v Loso*, 132 Conn App 257, 259, 262; 31 A3d 830 (2011).
16. *Rainy Sky SA v Kookmin Bank*, [2011] UKSC 50.
17. See *A Manual of Style*, § 13.590.
18. See *id.* at § 13.635.
19. *Weichert Co of Maryland, Inc v Faust*, 419 Md 306; 19 A3d 393 (2011).
20. See Kenneth Adams, Adams on Contract Drafting, *"Hereinbelow" (No Prizes for Guessing What the Fight Was About)* <<http://www.adamsdrafting.com/hereinbelow>> (posted February 9, 2016).
21. See Kenneth Adams, Adams on Contract Drafting, *"Herein" (And I Need a Label for This Kind of Ambiguity)* <<http://www.adamsdrafting.com/herein>> (posted February 7, 2014).
22. See Kenneth Adams, Adams on Contract Drafting, *"Except as Provided Below"* <<http://www.adamsdrafting.com/except-as-provided-below>> (posted March 8, 2013).
23. See Kenneth Adams, Adams on Contract Drafting, *"The Foregoing,"* <<http://www.adamsdrafting.com/the-foregoing>> (posted June 27, 2016).
24. See *Mosser Constr, Inc v Travelers Indemnity Co*, 430 F Appx 417 (CA 6, 2011) (considering whether "subcontractor" means any supplier to a contractor or something more).
25. See *Graev v Graev*, 898 NE2d 909 (NY, 2008) (holding that the word "cohabitation" as used in a separation agreement did not have a plain meaning and that relevant factors might include whether those living together engaged in sexual relations or commingled their finances).
26. See *Marmolejo-Campos v Gonzales*, 503 F3d 922 (CA 9, 2007).
27. See *In re CPY*, 364 SW3d 411 (Tex App, 2012).
28. *Raffles v Wichelhaus*, 159 Eng Rep 375; 2 Hurl & C 906, (1864); see Hunter, *Modern Law of Contracts* (2016), § 19:6 (including this case in its discussion of mistake).
29. See *Black's Law Dictionary* (10th ed).
30. See, e.g., Kenneth Adams, Adams on Contract Drafting, *The Texas Court of Appeals on Words-and-Digits Inconsistency* <<http://www.adamsdrafting.com/the-texas-court-of-appeals-on-words-and-digits-inconsistency>> (posted July 2, 2015).
31. *United Rentals, Inc v RAM Holdings, Inc*, 937 A2d 810 (Del Ch, 2007).
32. *Id.*
33. See, e.g., *Sabatini v Roybal*, 150 NM 478; 261 P3d 1110 (2011) (involving a dispute over the phrase "private garage" that could have been avoided if the contract had specified whether there was any limit on the size of the garage).
34. See Kenneth Adams, Adams on Contract Drafting, *How to Limit the Uncertainty in "Reasonable Efforts"* <<http://www.adamsdrafting.com/how-to-limit-the-uncertainty-in-reasonable-efforts>> (posted March 30, 2016).
35. See *A Manual of Style*, §§ 13.439–13.447.
36. See *id.* at ch 8.
37. See Adams, *Beyond Words*, 158 *Solicitors J* 18 (2014).
38. See Adams, *With "efforts" provisions, reasonable is better than best*, *Lawyers Weekly* (May 16, 2014), p 13.
39. See *A Manual of Style*, §§ 9.3–9.6.