

The Return of the “Contract Clause from Hell”

By David T. Daly

The following column is written in response to the Opinion and Dissent on page 150.

Thanks for your letter. I'm glad you read the Plain Language column. Many colleagues tell me that it's their favorite part of the *Bar Journal*. Sorry for any inaccuracies in “translating” the “Contract Clause from Hell.” That's the problem with legalese—it's so hard to read that it's bound to be misinterpreted.

Legalese—The Beast That Never Dies

Like the villain in a scary movie, contract clauses from hell refuse to die and stay dead! They're copied from document to document by law clerks and senior partners alike, each afraid to confront the monster for fear of making a “substantive error” in “translation.” The only hope for saving humanity (okay—I exaggerate) is for some brave lawyer to pick up the silver stake of plain English and drive it through the heart of the fiendish beast, killing it once and for all.

Legalese Needs to Be Translated

I agree with the characterization of my rewriting exercise as a “translation.” Like a

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foreign language, legalese is incomprehensible to most people. Even lawyers must study it word for word to understand it. Legalese wastes time and money while people try to discern—and then proceed to argue about—what it was supposed to have meant. And all the while, some poor client is paying the cost of the argument.

Your letter indicates that some points were lost in translating the “Clause from Hell” into English. But I say that, in the original “Clause from Hell,” the *main* point is lost, and only a patient few will ever find it. And consider that the “Clause from Hell” was just one paragraph out of a 20-page commercial contract! If every contract clause were written like this, our whole economy would stop.

Revised Translation of the “Clause from Hell”

Of course, the purpose of my article was not to capture the exact meaning of the “Clause from Hell” in plain English, but to discuss the problems typical of wordy clauses, and how to fix them. I'm providing a new translation, which is written in normal, college-level English. I hope it addresses your comments and shows that anything that needs to be said can be said in plain English. (See chart.)

Response to Specific Points

Now, let me try to answer the points raised in your letter as best I can, taking them in reverse order:

Settlement/Consent

In translating the “Clause from Hell,” I deleted the phrase after Roman numeral (ii), because it was redundant. If one party gives an indemnity conditioned on its right to defend and the other party violates the condition by settling the case, it's obvious the indemnity doesn't apply. I don't view that as a substantive change.

I also added the statement in b(2)B—“The indemnified party... has no liability for a... settlement effected without its consent”—to balance the unfortunate implication of b(2)A that the indemnified party might be required to consent to a settlement involving less than full indemnification. Apparently, this change caused more confusion than it solved, so I removed it in the revised translation. Either way, I don't view this as a substantive change.

[Note that the original “Clause from Hell” contains parallel language requiring each party to not unreasonably withhold its consent to a proposed settlement. But this parallelism is deceptive, since each party's situation concerning what is “reasonable” consent is inherently different. A “reasonable” settlement for an indemnifying party—who must, in general, pay all the bills—is not the same as a “reasonable” settlement for the indemnified party, who, in general, gets off the hook. (After all, that's the purpose of an indemnity.) This asymmetry in position was obscured in the wordiness of the “Clause from Hell,” but became glaringly obvious in plain English.]

Attorney's Fees

The original translation could have been clearer that the indemnifying party's responsibility to pay the indemnified party's legal fees stops when the indemnifying party assumes the defense. (Thanks to legalese, I missed this issue entirely in reading the original.) But this oversight makes no practical difference if, as you say, the indemnifying party will always assume the defense right away. The revised translation clarifies this point.

Retaining Counsel Satisfactory to the Indemnified Party

The point that the indemnifying party's counsel must be satisfactory to the indemnified party is clear from context, but I agree that *must* is better than *may*. Note that, if read literally, the original “Clause

from Hell” also required the indemnifying party to retain counsel satisfactory to the indemnified party only “to the extent it [the indemnifying party] shall wish.” The revised translation clarifies this point, and also adds a standard of reasonableness.

Is the Original “Clause from Hell” Substantively Better?

All in all, I disagree that the original “Clause from Hell” was substantively better or that it “got the legal relations right.” What actually happened to it was that the

clients rejected not just this paragraph, but the entire contract draft. The final contract—prepared using a different form—contained a single indemnity, but made no mention of indemnification procedures.

Given this result, one might question whether the “Clause from Hell” got the legal relations right, or whether *anything* it contained was truly important. Consider, on the other hand, that if the parties had had a plain-English version of the clause, they might have dealt with indemnification procedures in the contract, and the contract might have been better for it.

Do the Benefits of Plain English Outweigh the Risk of “Translation Error”?

The old saying goes, “If it ain’t broke—don’t fix it.” In fact, it seems that every time someone tries to rewrite a bit of legalese to make it more understandable, someone else complains—sometimes rightly, sometimes wrongly—that the “translation” is inaccurate, and that some important detail or refinement is lost.

But are the benefits of plain English sufficient to overcome the risk of making a

Clause from Hell	Original Translation	Revised Translation
<p>8. Indemnification</p> <p>....</p> <p>(c) Promptly after receipt by an indemnified party under Section 1(g), 8(a) or 8(b) hereof of notice of the commencement of any action, such indemnified party shall, if a claim in respect thereto is to be made against an indemnifying party under such section, give notice to the indemnifying party of the commencement thereof, but the failure so to notify the indemnifying party shall not relieve it of any liability that it may have to any indemnified party except to the extent the indemnifying party demonstrates that the defense of such action is prejudiced thereby. If any such action shall be brought against an indemnified party and it shall give notice to the indemnifying party of the commencement thereof, the indemnifying party shall be entitled to participate therein and, to the extent that it shall wish, to assume the defense thereof with counsel satisfactory to such indemnified party and, after notice from the indemnifying party to such indemnified party of its election so to assume the defense thereof, the indemnifying party shall not be liable to such indemnified party under such Section for any fees of other counsel or any other expenses, in each case subsequently incurred by such indemnified party in connection with the defense thereof, other than reasonable costs of investigation. If an indemnifying party assumes the defense of such an action, (i) no compromise or settlement thereof may be effected by the indemnifying party without the indemnified party's consent (which shall not be unreasonably withheld) and (ii) the indemnifying party shall have no liability with respect to any compromise or settlement thereof effected without its consent (which shall not be unreasonably withheld). If notice is given to an indemnifying party of the commencement of any action and it does not, within ten days after the indemnified party's notice is given, give notice to the indemnified party of its election to assume the defense thereof, the indemnifying party shall be bound by any determination made in such action or any compromise or settlement thereof effected by the indemnified party.</p> <p>[342 words, average sentence length: 57, reading level: 61.8]</p>	<p>8. Indemnification</p> <p>....</p> <p>8.3 Legal Action Against Indemnified Party</p> <p>a. Notification</p> <p>A party that seeks indemnification under Section 1(g), 8(a), or 8(b) must promptly give the other party notice of any legal action. But a delay in notice does not relieve an indemnifying party of any liability to an indemnified party, except to the extent the indemnifying party can show that the delay prejudiced the defense of the action.</p> <p>b. Participation in or Assumption of Defense</p> <p>The indemnifying party may participate in or assume the defense. If the indemnifying party elects to assume the defense, then:</p> <p>(1) the indemnifying party:</p> <p>A. must give the other party notice of its election;</p> <p>B. may select counsel satisfactory to the other party;</p> <p>C. is not liable to the other party for any fees of other counsel or any other expenses incurred by the other party in defending the action, other than reasonable investigation costs; and</p> <p>D. must not compromise or settle the action without the other party's consent; and</p> <p>(2) the indemnified party:</p> <p>A. must not unreasonably withhold its consent to any proposed settlement; and</p> <p>B. has no liability with respect to any compromise or settlement effected without its consent.</p> <p>c. Failure to Assume Defense</p> <p>If an indemnifying party doesn't give notice of its election to assume the defense of an action within 10 days after it receives notice of the action, then the indemnifying party is bound by any determination made in the action or by any compromise or settlement that the other party may effect.</p> <p>[231 words (excluding headings), average sentence length: 17.8, reading level: 22.2]</p>	<p>8. Indemnification</p> <p>....</p> <p>8.3 Legal Action Against Indemnified Party</p> <p>a. Notice</p> <p>A party that seeks indemnification under 1.7, 8.1, or 8.2 must promptly give the other party notice of any legal action. But a delay in notice doesn't relieve an indemnifying party of any liability to an indemnified party, except to the extent the indemnifying party shows that the delay prejudiced the action's defense.</p> <p>b. Participating in or Assuming Defense</p> <p>The indemnifying party may at any time participate in the defense, or assume the defense by giving the other party notice. Once the indemnifying party assumes the defense, then:</p> <p>(1) the indemnifying party:</p> <p>A. must choose counsel reasonably satisfactory to the other party;</p> <p>B. isn't liable for any further attorney's fees or other expenses the other party incurs;</p> <p>C. must not compromise or settle the action without the other party's consent; and</p> <p>(2) the indemnified party must not unreasonably withhold consent to any proposed compromise or settlement.</p> <p>c. Failing to Assume Defense</p> <p>If an indemnifying party fails to assume the defense within 10 days after receiving notice, then it will be bound by any determination made in the action or by any compromise or settlement the other party may effect.</p> <p>[169 words (excluding headings), average sentence length: 13.0, reading level: 18.6]</p>

mistake in translation? I think they are. Plain English is better than legalese because it's easier to read, it contains a third less words, and can be read in half the time. This saves lawyers, judges, clients—just about everybody—time, money, and filing space. But the biggest benefit of revising documents in plain English is that the effort almost always results in improving the document's substantive content.

The Benefits of Cleaning House

Whenever I clean up clutter around my house or garage, I find that, for every 20 things I discard, I'll later regret having thrown one of those items away. But I also find three useful things I had lost. So I figure it's a net gain of two, plus I get the benefit of an uncluttered house or garage.

The same principle applies to eliminating clutter in a legal document. You may accidentally throw out a point now and then, but the process of revising usually improves the substance. Let's look at just a few items hidden in the clutter of the

	Clause from Hell (if read literally)	Plain-English Version
1.	Requires the indemnifying party to choose counsel satisfactory to the indemnified party, without any reasonableness requirement.	Requires the indemnifying party to choose counsel <i>reasonably</i> satisfactory to the indemnified party.
2.	Apparently allows the indemnifying party to assume part but not the whole defense of an action (see the words "to the extent it shall wish").	Avoids this interpretation.
3.	Arguably makes the indemnifying party's right to participate in the defense contingent upon the indemnified party's having given notice.	Avoids this interpretation.
4.	Arguably makes it optional for the indemnifying party to choose counsel satisfactory to the indemnified party (see the words "to the extent it shall wish").	Avoids this interpretation.
5.	Arguably requires the indemnifying party to engage counsel acceptable to the indemnified party merely to participate in the defense.	Avoids this interpretation.
6.	Doesn't make clear—at least without considerable study—that the indemnifying party may assume the defense at any time.	Makes this explicit.

"Clause from Hell" that were improved in plain English.

In addition, your letter indicated that the "Clause from Hell" might not be appro-

priate if the indemnifying party was not collectible. A busy lawyer might miss this issue if their time and attention were consumed by trying to figure out what the "Clause from Hell" was supposed to mean. The plain-English version leaves the lawyer more time to think about issues like this.

Summary—Kill the Beast!

Thanks again for your letter and for your interest in plain English. With the help of your comments, the revised translation of the "Clause from Hell" contains improved substantive content, but is written in normal college-level English, with less than half the number of words.

So go ahead—Kill the Beast! Next time you see a clause written in hellish legalese, be a hero and rewrite it. Putting documents in plain English is a good bet, since the benefits of writing in plain English—including both ease of reading and the probability of substantive improvement—almost always outweigh the risk of making a mistake in translating. ■

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