

Using *Shall* or *Will* to Create Obligations in Business Contracts

Once More unto the Breach

By Chadwick C. Busk

If “shall” didn’t exist in contract drafting,
I’d want to invent it.

—Ken Adams¹

[*Shall*] is like a chameleon: It changes its
hue sentence to sentence. Abjure it.
Forswear it. You shan’t regret it.

—Bryan Garner²

Consider this question: What verb—*shall* or *will*—should be used to create an obligation in a business contract, as in the following example in which Able and Baker are the contracting parties:

- “Able *will* pay \$500 to Baker on June 1, 2018.”
- “Able *shall* pay \$500 to Baker on June 1, 2018.”

The stakes are high because we don’t want a court refusing to enforce a contractual promise that we thought was binding. But doesn’t *shall* sound old-fashioned and stuffy? Do we want to use a verb that is used more than 6,000 times in the 400-year-old *King James Bible*³ when we can arguably convey the desired meaning by using *will*?

“Plain Language,” edited by Joseph Kimble, has been a regular feature of the *Michigan Bar Journal* for 33 years. To contribute an article, contact Prof. Kimble at WMU–Cooley Law School, 300 S. Capitol Ave., Lansing, MI 48933, or at kimblej@cooley.edu. For an index of past columns, Google “Plain Language column index.”

As evidenced by these antithetical opinions of drafting experts Ken Adams and Bryan Garner, when it comes to choosing between *shall* and *will* to create a contractual obligation, we’re faced with the vagaries of the English language. And the choice is further complicated by our profession’s failure to learn the discipline of legal drafting.⁴ But let’s draw a deep breath and enter the *shall*-versus-*will* fray.

Lawyers love to use *shall* when drafting contracts (and all other legal documents). As attorney Andy Mergendahl observes, they sprinkle *shall* around in documents like some sort of pixie dust, hoping the verb will magically make the documents seem more “lawyerly,” and therefore less likely to be challenged because of its meaning.⁵ But *shall* has multiple meanings apart from imposing an obligation. As Garner notes, every lawyer has heard that *shall* denotes a mandatory action, but very few consistently use it in that way.⁶ According to Garner, lawyers typically use *shall* in a variety of ways:

- As an equivalent for *may*, as in “no person shall [read *may*] . . .” This use of *shall* incorrectly negates an obligation when *may* properly negates permission.
- As an equivalent for *will*, as in “Able shall [read *will*] breach this agreement

if he doesn’t deliver the sum of \$500 to Baker on June 1, 2018.” This use of *shall* notes a possible future event.

- To express an entitlement and not an obligation, as in “The prevailing party *shall* be reimbursed by the other for all reasonable costs.”
- As a substitute for *should* (as often interpreted by courts), as in “all claimants *shall* request mediation.”
- To note a conditional obligation, as in “any objection by Baker to the proposed change order *shall* be sent to Able within five days.”⁷

Lawyers’ use and misuse of *shall* leads to litigation, as evidenced by more than 120 pages of small-type cases interpreting the word *shall* reported in *Words and Phrases*.⁸ Garner observes that the only way to validate *shall* is for lawyers to use it only to impose an obligation on the subject of the sentence, but he believes that the legal profession will remain unsensitized to the problems that *shall* causes.⁹ Thus, Garner recommends using *will* to create obligations in nonconsumer contracts when the parties are known to each other.¹⁰ And other prominent plain-language experts agree that using *will* to create a legal obligation is fine. Among them are Wayne Schiess,¹¹ Sarah Fox,¹² Barbara Child,¹³ and Andy Mergendahl.¹⁴ Professor D. C. Toedt III

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hedges his bet: he approves *will* if the term is defined in the four corners of the contract to mean “is required”; according to Toedt, this definition is “cheap insurance against a creative trial counsel.”¹⁵

Other plain-language advocates, including Tina Stark, George Kuney, and Kenneth Adams, argue that *shall* is the preferred approach. Stark and Kuney, though, allow that contract drafters may choose *will* instead of *shall* if they stick to their selection.¹⁶ Adams, on the other hand, contends that only *shall*, meaning “has a duty to,” is properly used to impose an obligation on a contractual party that is the subject of a sentence.¹⁷

Adams rejects using *will* to impose obligations on two grounds. First, he notes that in standard English, *will* primarily expresses future time rather than obligations.¹⁸ So Adams worries that in the statement that “Able will pay \$500 to Baker on June 1, 2018,” the use of *will* points only to a future event (i.e., Able’s payment of \$500 to Baker on June 1, 2018) without creating a legal obligation for Able to pay Baker \$500 on June 1, 2018. Adams’s second argument is that *will* can be used in multiple ways. So if you use *will* to impose an obligation on a party who is the subject of the sentence, you could also use *will* to impose an obligation on a nonparty (e.g., “Michigan law will govern this agreement”). These various uses of *will* create multiple—and thus confusing—meanings.¹⁹

Garner responds to these two arguments by pointing out that in American English, *will*—not *shall*—is the ordinary verb of promise.²⁰ And he quotes literary scholar Gustave Arlt that the distinction between *shall* and *will* to designate futurity “is a superstition that has neither a basis

in historical grammar nor the sound sanction of universal usage.”²¹ Garner concludes that “there’s simply no reason to hold on to *shall*. The word is peripheral in American English.”²²

But Adams would respond to Garner’s arguments by suggesting that *shall*—archaic or not—has its place in contracts as distinctive syntax that serves a useful function.²³ Adams stops short of declaring that *shall* should be recognized as a legal term of art, but he’s heading in that direction. The question is whether courts will go down that path, elevate *shall* to a term of art meaning “has a duty to,” and impose it on a party who is the subject of a sentence. So far they haven’t.

Lawyers will undoubtedly continue the practice of misusing *shall* contrary to Adams’s sage recommendation for its “disciplined use,”²⁴ but they may be reluctant to join Garner in his commendation of *will*. Courts must sort out disputes when this word choice is arguably significant in creating—or not creating—an obligation. Yet they should avoid the temptation to become preoccupied with verb structures in selected provisions and instead look at the parties’ relationship stated in the contract taken as a whole. The court took this approach in *Lubbock County Water Control & Improvement District v Akin LLC*,²⁵ finding that the failure to create a contractual obligation was determined by the relationship between the landlord, the tenant, and the marina customers, rather than by the drafter’s use of *will* instead of *shall* in the contractual provision at issue.

In the end, the best advice in deciding whether to use *shall* or *will* in your business contracts may be this: choose one or the

other, stick to it, define your selection in the contract as imposing an obligation on the appropriate party,²⁶ and leave it at that. ■



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Thanks to my colleague Michael Braem for his valuable editorial suggestions.

ENDNOTES

1. Ken Adams (@KonciseD), Twitter (January 7, 2017).
2. Garner, *Ax These Terms from Your Legal Writing*, ABA Journal (April 2014) <http://abajournal.com/magazine/article/ax_these_terms_from_your_legal_writing/>. All websites cited in this article were accessed September 17, 2017.
3. King James Bible Online <<https://www.kingjamesbibleonline.org/search.php?hs=1&q=shall>>.
4. Kimble, *The Many Misuses of Shall*, 3 Scribes J Legal Writing 61 (1992), p 77.
5. Andy Mergendahl, Lawyerist.com, *Thy Legal Writing Shall Not Include “Shall”* <<https://lawyerist.com/28922/thy-legal-writing-shall-not-include-shall/>> (posted June 12, 2011).
6. Garner, *Garner’s Dictionary of Legal Usage* (New York: Oxford University Press, 3rd ed, 2011), p 952.
7. *Id.*; see also Garner, *Shall We Abandon Shall?*, ABA Journal (August 2012) <http://www.abajournal.com/magazine/article/shall_we_abandon_shall/>.
8. *Id.* at 953; see also Kimble, *Lessons in Drafting from the New Federal Rules of Civil Procedure*, 12 Scribes J Legal Writing 25, 79 (2008–2009) (noting that *Words & Phrases* cites more than 1,600 appellate cases).
9. *Id.*
10. Bryan Garner (@BryanAGarner), Twitter (February 2, 2017). “When the two parties are known to each other, yes [in reply to author’s question about preferring *will* over *shall* to create a mandatory obligation in a contract]. If it’s a consumer contract, the consumer’s obligations should be ‘must.’” Tweet to author (on file with author); see also Garner, *The Redbook: A Manual on Legal Style* (St. Paul: West Academic Publishing, 3rd ed, 2013), § 25.3(b) (“Generally speaking, contractual promises are well expressed with *will* <Grogan will pay \$25,000 to Jensen upon delivery of the piano>. Where a mandatory word is needed for a non-obligation-bearing subject, use *must* <each order must be signed>.”).

11. Wayne Schiess, Legalwriting.net, “shall” vs. “will” <<https://law.utexas.edu/faculty/wschiess/legalwriting/2005/05/shall-vs-will.html>> (posted May 16, 2005).
12. “I tend to use must or will.” Fox (@500wordlawyer), Twitter (February 4, 2017) (on file with author).
13. Child, *Drafting Legal Documents* (2nd ed., 1992), pp 204–206, 383–384, quoted in *The Many Misuses of Shall* (noting that “[Child] recommends will instead of shall in contracts”).
14. Andy Mergendahl, Lawyerist.com, *Thy Legal Writing Shall Not Include “Shall”* (“So what to use in place of ‘shall’? If you are trying to express that one must do something, try ‘must.’ Simple, eh? Some find ‘must’ too pushy, so ‘will’ may be more palatable while still being clear.”).
15. Toedt, *Common Draft—A Contracts Deskbook* (2016), § 25.94 <<http://www.commondraft.org/#ShallAsMustDefn>> (“I still prefer using the term will, not shall, for contract obligations”).
16. Stark & Kunej, *Transactional Skills Training: Contract Drafting—The Basics*, 10 Tenn. J. Bus. Law 139, 150 (2009) <<http://trace.tennessee.edu/cgi/viewcontent.cgi?article=1162&context=transactions>>.
17. Adams, *Banishing Shall from Business Contracts: Throwing the Baby Out with the Bathwater*, 24 Australian Corporate Lawyer 12, 13 (September 2014) <<http://www.adamsdrafting.com/wp/wp-content/uploads/2014/09/Banishing-Shall-from-Business-Contracts-ACLA.pdf>>.
18. Adams, *A Manual of Style for Contract Drafting* (Chicago: ABA Publishing, 3rd ed., 2013), § 3.69.
19. *Id.*
20. *Shall We Abandon Shall?* And by inference, there’s no difference between a contractual obligation and a contractual promise.
21. Garner, *Garner’s Modern English Usage* (New York: Oxford University Press, 4th ed., 2016), pp 824–825.
22. *Id.*
23. Ken Adams, Adams on Contract Drafting, “Shall” Versus “Will” in Business Contracts—An Exchange of Emails <<http://www.adamsdrafting.com/shall-will-must-exchange-emails/>> (posted November 18, 2008).
24. *Id.*
25. *Lubbock Co Water Control v Akin LLC*, 442 SW3d 297 (Tex., 2014).
26. Professor Toedt suggests this definition: “Unless the context clearly and unmistakably requires otherwise: (a) Terms such as ‘Party A shall take Action X’ mean that Party A is required to take Action X. (b) Likewise, terms such as ‘Party B shall not take Action Z’ mean that Party B is prohibited from taking Action Z.” Toedt, § 25.94.

The Old Contest

Below is a sentence that Justice Scalia used as an example in *Barnhart v Thomas*, 540 US 20, 27–28 (2003). Parents who are leaving for the weekend warn their son:

You will be punished if you throw a party or engage in any other activity that damages the house.

Justice Scalia, applying the weak doctrine of the last antecedent, asserted that the sentence is not ambiguous. I believe that it presents a textbook case of syntactic ambiguity.

I asked readers to rewrite the sentence, twice, to resolve the ambiguity—first according to one interpretation, and then according to the other. There were two rules: (1) use one sentence only for each revision and (2) just to make it a little more challenging, do not use a list. There were a number of possible revisions, not all of which are shown in the following bullet dots.

These sentences call for punishment if the son throws a party, regardless of whether the house is damaged:

- You will be punished if you engage in any activity that damages the house or if you throw a party. [This just reverses the two items.]
- You will be punished if you throw a party or if you engage in any other activity that damages the house. [Adding *if you* starts the syntax over again.]

These sentences call for punishment only if the son engages in activity that damages the house:

- You will be punished if you engage in any activity—including throwing a party—that damages the house.
- You will be punished if you engage in any activity that damages the house.
- You will be punished if you damage the house [either] by throwing a party or by engaging in any other activity. [This moves the damage-the-house modifier to the front, but it’s wordier than need be.]

I received some good entries that put the independent clause last, as in “If you engage in any activity that damages the house or if you throw a party, you will be punished.” (Some of the early ones came from Jason Killips, Chad Busk, Daniel Booher, and Kary Frank.) While it’s certainly debatable, I think the emphasis is better placed on the prohibited activities, by putting them at the end of the sentence—the stress point. The contests always involve some close calls.

One other observation. I would not try to fix the ambiguity with a single comma: “You will be punished if you throw a party, or engage in any other activity that damages the house.” Too risky. A pair of commas would probably do it (for the interpretation that requires damage): “You will be punished if you throw a party, or engage in any other activity, that damages the house.”

The first winner is Abigail Elias, chief assistant city attorney for Ann Arbor. Her revisions:

You will be punished if you throw a party, or if you engage in an activity that damages the house. [The comma probably isn’t needed.]

You will be punished if you, or you and others, engage in any activity that damages the house.

The other winner is Aaron Mead, an assistant prosecutor in Berrien County. His revisions were essentially the same as the two above. Always remember, though, that flipping the order is also a solid fix when you don’t want the trailing modifier to reach the first item.

Each winner will receive a copy of my new book, *Seeing Through Legalese: More Essays on Plain Language*.

Watch for a new contest next month. The column first appears online, and I try to send a tweet when it does. You can follow me @ProfJoeKimble.

—JK