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Editor's Column

I recently read Michael Lewis's book The Big Short, which is about the sub-prime mortgage fiasco. More specifically, it is about how some people reviewed the information available concerning the sub-prime mortgage-backed investments being peddled by Wall Street, decided that the investments would go into default, and then found a way to bet against them through derivatives. I found it interesting and engaging. Mr. Lewis is also the author of Moneyball, which is now a movie, the story of how careful analysis of the plentitude of statistical information that is available about baseball allowed Billy Beane, the general manager of the Oakland Athletics, to make better selections of talent for his team.

In a larger sense, both books are about the value of taking the time to ask questions, hunt up information, and then think about what the information can tell you. They are about people who did their homework. People who questioned conventional wisdom. People who felt that there was more to know and persisted in seeking greater understanding and knowledge and ultimately reaped substantial benefit from that effort. I think it is an inspiring message—that any of us can make a difference if we use our intelligence and we work at it. I also think you'll like both books.

Recently, the City of Chicago announced substantial rate increases for water customers. The City says the additional revenue is needed to repair and upgrade the water treatment and distribution system. Most of us don't realize that our water bills really pay only for the cost of treating and distributing water and don't include anything for the water itself. We get the H^2O for free. Given that water is not an unlimited resource, perhaps we should question that. If we want to be sure that we'll have enough water available ten or twenty years from now, perhaps we should start thinking about which uses are essential and consider ways to limit "nonessential" uses—whatever we decide those are. Next issue, we'll review a recent U.S. Supreme Court case concerning a water dispute between the states of Wyoming and Montana, which looks at one approach to dealing with conflicting demands on a limited supply of water.

***Andrew H. Connor**, Editor*

Seller Beware of Implied Warranties

In our last two issues we've had pieces about UCC sales warranties. Here's another, dealing with two implied warranties. *Ram Head Outfitters, Ltd. v. Mecham*, a recent federal case from Arizona, examines two implied warranties under the Uniform Commercial Code: the implied warranty of merchantability and the implied warranty of fitness for a particular purpose. Unfortunately (in our view), the court comes to some rather disquieting conclusions about those provisions.

Ram Head, the plaintiff, was a Canadian outfitting business—taking clients hunting and fishing in the remote areas of Canada's wilderness, using airplanes to access those areas. Gerald Mecham was a retired farmer and former cropduster, living in Arizona, who had a used Cessna 185 for sale. Stan Simpson, principal of Ram Head, learned of the plane, called Mecham to get more information, and then went to Arizona in March 2008 to meet Mecham and see the plane. Simpson was interested because a landing gear failure had caused substantial damage to his own Cessna 185 and he wanted to replace it. As it happened, Mecham's plane had also been in an accident in 1993, before Mecham owned it, and had been subsequently repaired and returned to service, facts disclosed by Mecham to Simpson. During Mecham's ownership, the plane had passed two annual inspections, the most recent being earlier in 2008.

Simpson explained to Mecham how Ram Head intended to use the plane—to take off and land on rough terrain (gravel beds and mountainsides) in connection with the outfitting business. Mecham told Simpson of his years as a cropduster and said that he understood the type of flying in question. They took the plane for a short flight. Then Simpson asked if he could have the plane inspected. Mecham agreed and recommended two local companies that could do the inspection. Simpson contacted one, Mace Aviation, and asked for a compression test on the engine and a prepurchase inspection of the plane, to be done over the weekend of March 22-24. The compression test was done and the engine passed.Mace, however, did not do the full prepurchase inspection, although it did not inform Simpson of this.

On March 24, after speaking with Mace personnel and spending approximately three hours of his own time inspecting the plane, Simpson agreed to purchase it from Mecham for $117,500. The deal closed a week later, and Mace was then engaged to do some work on the plane and to obtain a valid Export Certificate of Airworthiness, so that the plane could be reregistered in Canada. When the plane arrived in Edmonton, Alberta, in June, however, a Canadian Ministry of Transit inspector found many defects and refused to certify it as airworthy. Ram Head wound up paying over $110,000 for repairs and also had to rent another plane to use during its 2008 hunting season.

Ram Head sued Mecham and Mace Aviation on various theories, including implied warranty of fitness for a particular purpose and implied warranty of merchantability.

The implied warranty of fitness for a particular purpose is found in Section 2-315 of the UCC. It states that where the seller has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select the goods, there is an implied warranty that the goods shall be fit for such purpose. This implied warranty may be disclaimed by express language in the contract to that effect, but no such disclaimer had been made by Mecham.

The court first decided that Mecham knew of the particular purpose for which Ram Head required the plane, because Simpson had explained that to Mecham, both over the phone and when the two had met in Arizona, before Simpson agreed to buy the plane.

The court then found that Ram Head had relied on Mecham's skill or judgment to select the plane. That seems a bit of a stretch. Mecham did not profess to have ever flown into the Canadian wilderness. Cropdusting may entail frequent takeoffs and landings on rough ground, but it's hard to see how it would qualify Mecham to give advice to Ram Head with respect to choosing aircraft for landing on gravel bars or mountainsides. Moreover, Simpson already had been using a Cessna 185 in his outfitting business, which is why he was interested in Mecham's plane. And Simpson knew that Mecham's experience was limited to cropdusting. It seems to us that Simpson used his own judgment to select the plane, but the court thought otherwise.

Mecham also asserted UCC 2-316(C)(2) as a defense. It provides that if, before entering the contract, the buyer has examined the goods as fully as he desires, or has refused to examine the goods, then there is no implied warranty with regard to defects that an examination ought to have revealed. Simpson had personally examined and flown the plane, had had a compression test done, and had engaged Mace to do a complete prepurchase inspection. We that met the requirements of 2-316(C)(2) and should have protected Mecham from claims of implied warranty concerning defects that would have been found had Mace done the inspection as requested. There was no suggestion that Mace wouldn't have found the defects that the Canadian inspector subsequently found. Nor was there a finding that Mecham knew of any of the defects—in fact, the court held that Mecham believed that the plane was in good condition. It had, after all, just passed an annual inspection.

The court got around Section 2-316(C)(2) neatly by ignoring it, saying that Ram Head was relying on Mecham's skill and judgment. The only support the court cited for its conclusion was a 1937 pre-UCC case from Minnesota. That strikes us as bizarre. It eviscerates 2-316(C)(2)—by allowing the buyer to inspect and ignore the results (or to pass on inspection) and instead rely on the seller's expertise. The point of 2-316(C)(2) is to protect seller and buyer by creating an incentive to seller to allow inspection and an incentive to buyer to exercise the right to inspect diligently, by stating that there is no implied warranty with regard to defects that an examination ought in the circumstances to have revealed, if buyer is given the opportunity to inspect. In effect, the court said that, regardless of what the inspection found (or should have found), Ram Head could ignore that and rely upon Mecham's expertise to select the goods.

The court's handling of Ram Head's claim for violation of the implied warranty of merchantability is only slightly better, in our opinion. UCC Section 2-314(A) provides that unless excluded or modified, there is an implied warranty that the goods shall be merchantable if the seller is a merchant with respect to goods of that kind. To be "merchantable," goods must be fit for the ordinary purposes for which such goods are sold. Given that the Canadian inspector found the plane not to be airworthy, the conclusion that it wasn't fit for the ordinary purpose for which it was sold isn't without support. It is worth noting, however, that the plane passed U.S. inspection only months before the sale and conceivably was airworthy by U.S. standards at the time of sale. The court assumed, without discussing, that the determination that plan was not airworthy by

Canadian standards also means it was not airworthy by U.S. standards.

Where the implied warranty of merchantability claim should have run aground was on the requirement that the seller be a merchant with respect to goods of that kind. The UCC says that a "merchant" is a person who deals in goods of the kind or otherwise by his occupation "holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction."

The court acknowledged that Mecham was not a person who deals in "goods of the kind." Incredibly, it then decided that he was a person who by his occupation holds himself out as having knowledge or skill peculiar to the goods involved in the transaction. Mecham was a retired farmer and former cropduster. He was not an aircraft mechanic or inspector. He was not engaged in advising people about buying airplanes. Yet the court held that his telling Simpson about his cropdusting experience and his familiarity with the kind of flying that Ram Head would do with the plane somehow elevated him to the status of expert. We find that a bit much. Simpson himself chose not to rely on Mecham's opinions and to have the plane inspected. That Mace did not do a careful and competent inspection seems a poor basis for deciding that Mecham was a merchant as a matter of law. Using the court's logic, a casual seller of a used car could be held to have given implied warranties of merchantability and of fitness for a particular purpose simply by commenting about his driving experience with the car.

Although we think the court was wrong in its rulings on the implied warranties claims, Ram Head also sued Mecham and Mace and won under breach of contract, consumer fraud, and professional negligence theories not discussed here, but which we found much more compelling. We would be happier with the decision if the court had limited it to those claims.

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Default by Payee?

A promissory note is a one-way undertaking. The maker promises to pay to the payee. There is nothing promised by the payee. The whole point of having a promissory note is to have a document that clearly states an obligation to pay. By contrast, most contracts are bilateral, meaning that each party promises to do something. And those promises are usually mutually dependent: if one party breaches, then the other may be excused from further performance. But that is not the case with a promissory note.

A recent case from the New York Bankruptcy Court is a reminder of the importance of careful drafting, even in a one-way contract. In re Indesco International involved a breach of contract dispute over six different contracts between the parties, including an unpaid promissory note.

Indesco International, Inc. ("Indesco"), was formed in 1997 as a holding company. It owned Continental AFA Dispensing Company and Continental Sprayers International Inc. (collectively, "Continental"). It also owned some shares of AFA Polytek B.V. ("Polytek"). In October 2000, Indesco sold the shares of Polytek and received cash and other consideration, including a note issued by Polytek payable to Continental for $350,000, plus interest. The note, then, was issued to evidence the remaining part of the purchase price owing by Polytek.

Not long thereafter, in November 2000, Indesco was forced into an involuntary Chapter 11 proceeding. Subsequently, a plan of reorganization was approved in January 2002, and in March of that year, Continental and Polytek entered into two new supply agreements, not related to the note, and also made certain modifications to the note and three other prebankruptcy agreements existing between them.

Polytek never made any payments on the note, and disputes arose between Continental and Polytek with respect to the other contracts. In August 2004 they sued each other, and of course Continental included a claim for the unpaid amounts owing under the note. After discovery, Continental moved for summary judgment on all of its claims.

Summary judgment will be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. In order to decide the motion in this case, the court had to consider the various claims on the contracts involved. With respect to the note, there did not appear to be any genuine issue of material fact and summary judgment would seem appropriate. The note clearly stated the obligation of Polytek to pay, and it was undisputed that Polytek had not paid. What else could be in question?

When the court examined the note, however, it found a problem, due to a cross-default provision. Section (A)(ii) of Article VI of the note provided, in pertinent part, that "failure to comply with any term or provision of this Note or any other agreement between the Maker and Payee" would be a "Default" under the note. Default by whom?

The note didn't say. And there were other agreements between the Maker (Polytek) and the Payee (Continental), which were bilateral agreements, so that either party could be in default under one or more of those other agreements. The court asked whether Section (A)(ii) applied only upon a default by Polytek, or whether it could be read as applying to Continental if there was a default by Continental under one of the other agreements. In other words, the court wondered if the wording could be read to mean that Continental could be in default under the note pursuant to the cross-default language in Section (A)(ii).

The general rule is that if a contract clearly states the agreement of the parties, then it will be enforced in accordance with its terms and a court won't go beyond the "four corners" of the document to determine its legal consequences. But when the language of the agreement is ambiguous, then extrinsic evidence may be considered in determining the parties' actual intent. And in this case, said the court, summary judgment would not be appropriate because genuine issues of fact may exist depending on what Section (A)(ii) meant. As the court described it,

> [on] the one hand, (A)(ii) says only "failure" not "Maker's failure." This suggests that the crossdefault applies to defaults by both Polytek and Continental.

The court contrasted the wording in Section (A)(ii) with wording in the other default provisions where the parties had included the word Maker and determined that the parties could easily have included Maker in Section (A)(ii) had they wanted to. Therefore, said the court, it was

> entirely possible that Continental [Payee] could have committed a default under another agreement...which would trigger (A)(ii).

The court conceded that it would be unusual for any party other than the maker to be in default under a promissory note, because a note imposes obligations only on the maker, not on the payee. A payee can't default because it has no obligation under the note to do anything. In fact, the court admitted, it would make little sense to say that if Continental breached some other obligation to Polytek, that would put Continental in default under the note. Nevertheless, said the court, it was still possible that that was what the parties inten led by the wording in Section (A)(ii).

Therefore, because Section (A)(ii) could be read either way, the court held that it was ambiguous. And because the meaning of Section (A)(ii) was being considered in light of a motion for summary judgment, all ambiguities had to be resolved against the moving party, which was Continental. If Continental could be in default under the note, then its right to payment could be affected. So the parties would have to provide evidence as to what they intended Section (A)(ii) to mean, and summary judgment was denied as to the note. Continental's claim to get paid on the note would have to go to trial.

We think that Section (A)(ii) in the note was intended to say that it would be a default by Polytek under the note if Polytek defaulted under any of its other agreements with Continental. That's the most plausible reading. But we also think the court's denial of summary judgment was understandable. It illustrates the sort of issue that can arise when a document isn't carefully written and winds up in court.

Thankfully, most contracts don't wind up in lawsuits. If the parties perform according to their expectations, it really doesn't matter much if their contract is less clear than it should be. It's only when there's a dispute that careful drafting of the contract may become critical as to whose expectations are met and whose are not. Without question, wording in a contract should not be susceptible to differing meanings in the eyes of different readers. That is exactly why contracts are written in the first place: to state clearly and definitely what the parties are agreeing to and not leave issues open to later argument. And, we venture to say, when the contract is really clear, the parties are less likely to have to resort to litigation over what it means. It's something for all of us to remember when writing or reviewing an agreement.

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ISDA and All That

Once upon a time, an interest rate swap was a simple transaction. Party A (aka the "Fixed Rate Payer") and Party B (aka the "Floating Rate Payer") would agree, in a relatively simple document, that each month they would pay each other amounts determined with reference to interest accruing on a nominal principal amount. The Fixed Rate Payer would pay the other party an amount equal to interest for the period on the nominal principal amount at an agreed-upon specified fixed rate. The Floating Rate Payer would concurrently make a payment to the Fixed Rate Payer of an amount equal to interest for the period on the nominal principal amount calculated based upon an agreed-upon rate (such as the prime rate) which could vary. This would go on for an agreed-upon number of months or years.

The arrangement did not require that either party actually have any corresponding debt, although usually at least one of the parties was protecting against the risk of interest rate increases. Thus, the Fixed Rate Payer could have a five-year $10 million term loan bearing interest at a floating rate (such as prime plus 1 percent) and be protecting itself against increases in the prime rate by swapping into a corresponding fixed rate transaction. Assuming a similar nominal principal amount for the swap, the Floating Rate Payer's payment to the Fixed Rate Payer would approximate the amount of interest that the Fixed Rate Payer had to pay to its lender on its term loan each month so that the Fixed Rate Payer would be assured that it would have to pay at the fixed rate for the period of the swap.

Variations on this arrangement were available, depending on the kind of loan, principal amortization, interest payment frequency, and some other factors. Collars and caps were common.[1]

There were, of course, some problems. Credit risk was a big one. Many of these transactions were for multiyear periods, and the financial health of a party could (and sometimes did) deteriorate over time, such that the other party found itself with a contract that might not be performed. A party's obligation could be secured by granting a lien on assets to the other party. But the party that found itself granting security might also laterfind that the grant was not necessary because rates had moved favorably to its position. And liquidity and value of the collateral could be issues. The party taking security wanted the collateral to be cash or cash equivalents or readily marketable securities, not real estate or other collateral that would take time to sell and have value that could change substantially.

Sometimes the credit risk issue was addressed by having one party make an up-front payment to the other. Thus, if Party A wanted to fix the rate on its $10 million term loan, Party B might insist on a flat payment up front as compensation for taking the floating rate risk. This was an acceptable solution if Party B was sufficiently creditworthy that Party A wasn't worried about Party B defaulting later, and if Party A had the funds to make the up-front payment, which could be sizable. It also depended on there being a Party B willing to agree to be paid a flat fee up front for taking the risk.

Another problem was early termination. If one Payer became insolvent or otherwise defaulted, the other Payer might want to terminate the transaction. This required some method of determining the liabilities of the parties if the transaction was terminated. It was relatively simple to come up with the liability of the Fixed Rate Payer if that was the side that was under water on the swap, but when the floating rate side was out of the money, determining the liability of the Floating Rate Payer was more troublesome.

And the parties could differ over what constituted an acceptable basis for early termination. If a party's position was in the money, could it intentionally default in order to terminate the swap and collect? And what if a parent guarantor had problems and filed bankruptcy but the actual party to the swap was not consolidated into the bankruptcy and not otherwise in default?

All of this led to the creation of ISDA, the International Swap and Derivates Association, and to ISDA's plethora of forms, the most significant of which is the Master Agreement. Although the issues continue to be part of swap transactions, the ISDA documents provide a standardized approach to the means for setting forth the parties' understandings.

The Master Agreement constitutes the foundation upon which any number of potential transactions can be based. Before two parties actually agree upon a swap or other derivatives transaction, they will negotiate and sign the Master Agreement and the Schedule thereto. If security is to be provided, they will also negotiate and sign the Credit Support Annex. If either party is required to provide a parent or affiliate guaranty, that will also be executed and delivered. These steps provide a framework under which any swap or other derivative transaction can be entered into by the parties.

The Master Agreement sets out provisions that would apply to any interest rate swap transaction, such as netting of payments, gross up for taxes, specified representations by each party, covenants of each party to furnish specified information to the other (such as financial reports and authorizing resolutions), events of default and termination events, early termination provisions (including valuation and settlement procedures), restrictions on transfer, contract currency provisions, definitions, and miscellaneous boilerplate. The variables in the deal—the terms that get negotiated—are covered in the Schedule to the Master Agreement, and in the Confirmations of specific "Transactions," and in any supplemental documents, such as the Credit Support Annex. In effect, these documents amend or supplement the Master Agreement.

In our next issue of Business Law Quarterly, we'll talk about what provisions you may want to negotiate over when and if the ISDA Master Agreement comes into your life.

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Lost Profits as Damages

We've often seen provisions in contracts that purport to limit damages, usually including a reference to lost profits. Here's a sample of that kind of wording:

> **Limitation on Damages.** Notwithstanding anything to the contrary contained herein, neither party shall be liable to the other for any consequential damages, including damages for lost profits or loss of opportunity, suffered by the other party.

If you've encountered such language in a contract, you may have wondered what it's for and whether it's effective. The purpose of such a provision is to explicitly exclude the parties to the contract from claiming certain kinds of damages for breach.

Suppose that I had a store and a windstorm damaged the roof so severely that I couldn't open for business until it was repaired. And suppose that I hired a roofer to put on a new roof and the contract called for the work to be completed by a certain date. And, for the sake of the story, suppose that the deadline was the day before Thanksgiving because I wanted to be open the day after Thanksgiving, which is a very big day for holiday sales. But my roofer is late starting and finishing, so my store isn't open on the Friday after Thanksgiving. Can I sue and collect for lost profits?

It is a general principle of contract law that damages for breach of contract should put the innocent party in the same economic position that he would have been in if the other party had fulfilled the contract. An example would be that if B doesn't deliver the widgets he contracted to sell to A, then A buys the same quantity of widgets from another supplier and if A has to pay more for the widgets, then B is liable to A for the difference paid by A. Likewise, if my roofer failed to perform, I could hire another and if I had to pay more, sue the first roofer for the difference. But because of my roofer's breach of contract, my store wasn't open the day after Thanksgiving and I have lost profits. Shouldn't I be able to recover those, too?

Maybe. The law makes a distinction between "general damages" and "consequential damages." Lost profits are treated as consequential damages when, as a result of the breach of contract, the innocent party has a loss on other business arrangements. But when the innocent party is seeking to recover money that the breaching party agreed to pay under the contract, any lost profits involved will be general damages.

The classic case on this issue is *Hadley v. Baxendale*, an English case decided in 1854. Hadley ran a grain mill. The crankshaft on the steam engine that turned the mill broke, and he ordered a replacement from a supplier who required that the broken shaft be provided in order to make sure the replacement would be fabricated to the correct dimensions. Baxendale was hired to deliver the old shaft to the supplier by a certain date but was late with delivery. Accordingly, Hadley was delayed in receiving the replacement shaft, and during that time he couldn't operate and he lost business. He sued Baxendale for the lost profits. The court ruled against Hadley, saying that the lost profits were not a reasonably foreseeable result of Baxendale's failure to perform.

So when would lost profits be recoverable? A more recent case discussing this issue is *Tractebel v. AEP Power*, from the U.S. Court of Appeals, Second Circuit, decided in 2007. The facts were that AEP had contracted to build a co-generation plant, where steam would be produced and first used to generate electric power which would then be sold to a customer for use in industrial production. Tractebel had agreed to purchase the electric power output of the plant for twenty years. The power purchase contract was signed in late 2000, just before construction began. During construction, open market power prices dropped, so that Tractebel could purchase a similar amount of power from other sources at lower prices. So Tractebel repudiated the contract. The parties wound up in court, where it was held that Tractebel's repudiation was wrongful (i.e., Tractebel was in breach of the contract).

AEP sought damages for the breach, which included lost profits. Tractebel objected, arguing that such damages were consequential and speculative due to the number of assumptions that would be necessary to establish them—assumptions about the price of electricity over the twenty-year contract period, as well as assumptions for the life of the contract about costs of operating the plant, possible changes in regulatory climate, demand for power, and advances in technology.

The court acknowledged that when lost profits are characterized as consequential damages, the plaintiff has a higher burden of proof. He has to demonstrate that the existence of damage is reasonably certain and that the damages were foreseeable and within the contemplation of both parties, and he must prove the amount thereof with reasonable certainty. But, said the court, when the lost profits are general damages, the injured party only has to show a reasonable basis for estimating the loss. Here, the court held, the lost profits damages sought by AEP were a claim for general damages, not consequential damages:

The profits are precisely what the nonbreaching party bargained for, and only an award of damages equal to lost profits will put the non-breaching party in the same position he would have occupied had the contract been performed...AEP seeks only what it bargained for—the amount it would have profited on the payments TEMI [Tractebel] promised to make for the remaining years of the contract. This is most certainly a claim for general damages.

The court went on to state that when lost profits are general damages, the burden of uncertainty as to the amount of the lost profits is on the party in breach: “A person violating his contract should not be permitted entirely to escape liability because the amount of the damage which he has caused is uncertain” and when the fact of general damages is certain and the only uncertainty is as to the amount, the innocent party only has to provide a “stable foundation for a reasonable estimate of damages.”

As a result, the court did not agree with Tractebel that the number of variables involved in assessing AEP’s claim made any measure of lost profits inherently speculative or provided a sufficient reason to deny relief. Instead, the court said:

The variables identified...exist in every longterm contract. It is not the case that all such contracts may be breached with impunity because of the difficulty of accurately calculating damages.

Accordingly, the court said reasonable assumptions about the open issues could be made, taking into account any evidence introduced and an estimate of the lost profits made based on those assumptions. The risk that the future might show such assumptions to be mistaken, said the court, is appropriately borne by Tractebel as the breaching party.

Turning back to the question posed at the beginning of this article—“Can I recover lost profits because my store wasn’t open due to the roofer’s breach?”—it seems likely that the answer is no; I bargained for a roof, not sales to customers so such lost profits would be considered consequential damages. Therefore, I could recover such lost profits only if the contract actually provided for them.

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It's Greek to Me

It is common to find agreements prepared by lawyers, and many legal briefs, to be liberally sprinkled with Latin words and phrases that probably are unclear, and in some cases inscrutable, to the businesspeople for whom or on whose behalf they are prepared. Why, then, do lawyers so frequently employ these words and phrases in their writings? Is it because we wish to demonstrate our erudition or to draft agreements that we know will confuse the reader in order to make ourselves indispensable? More probably, it is because we seek to be as clear, precise, and concise as possible, and these words and phrases, because of their long-standing usage and clear meaning, contribute to that objective.

That being the case, it is likely that we’ll see this practice continue. Therefore, to be helpful (and entertaining) to our readers, we thought we’d provide a glossary of some of the more common ones.

Ab initio: This is not an injunction to begin an abdominal muscle strengthening program. Rather, it means “from the beginning.”

Ad hoc: Literally, “for this.” Generally used to denote a thing developed to meet a specific situation as opposed to a generalized application.

Ad hominem: Not an advertisement intended only for men. Literally, “at the person.” An attack against a person as opposed to his or her argument. For example, “You can’t trust a thing that a guy says.”

A fortiori: A conclusion dictated by a stronger argument. If the temperature is in excess of 100 degrees, a fortiori a snow shovel likely will not be needed.

Alter ego: Nothing to do with adjusting one's ego. It means "the other I." Used to denote two apparently distinct entities that, in fact, are one.

Arguendo: You probably can guess this one. "For the sake of argument." Used to assume that a condition or argument is correct without conceding the fact.

Bona fide: Literally, "in good faith." Used to communicate sincere intention rather than a fraudulent or deceptive intention.

Caveat emptor: Not an empty cave. Literally, "buyer beware." Used to exonerate the seller or vendor of goods or property from responsibility for defects.

Corpus delicti: Commonly thought to mean a dead body. But not really. Literally, "evidence of the crime." Confirms the obligation to prove that a crime, in fact, has been committed even though circumstances clearly suggest it.

De facto: Unrelated to "Da Bears." Literally, "by the fact." Used to distinguish something that exists by factual circumstances, or in actuality, as opposed to that which is required by a law. One who exercises certain authority, even though not officially holding the position, may be said to be the de facto official. Mr. Putin, who officially is the president of Russia, is commonly thought to be its de facto premier.

De jure: Not related to the soup of the day. Literally, "from the law." That which is required by the law, as opposed to that which is a matter of fact.

De novo: Though it sounds like it could be the title of an underworld kingpin, actually, it means "anew." A reexamination of a matter as opposed only to an examination of the standard by which the manner initially was decided.

Ex officio: This term is commonly misunderstood. It does not denote less than full membership. Literally, it means "from the office" and confers a right to participate by reason of being the holder of another position. For example, the president of a company may be an ex officio member of its board of directors.

Ex parte: "From one party." A decision or communication involving only one, not all, of the parties to the matter.

In camera: Nothing at all to do with cameras. Literally, "in the chambers." Private, not public.

In rem: Literally, "against a thing." An action directed against a thing as opposed to a person. As an example, a proceeding to enforce a mortgage is an in rem proceeding against real estate, even though there also may be relief sought against the person granting the mortgage.

Inter alia: Literally, "among other things." Used to make clear that the description that follows the phrase is not intended to be exhaustive of the category being described.

Nexus: It may be a hair product, but in this context, not. Literally means "bound together." Used to describe a connection between two things.

Non sequitur: Literally, "does not follow." Used to denote a conclusion that does not follow from its premises. As an example, this article is intended to be humorous, so readers probably will agree that it is.

Per stirpes: Literally, "by roots." Used to describe a scheme of allocation by which shares are distributed to or among descendants of a deceased beneficiary in the aggregate amount that would have been distributed to the deceased beneficiary if he were living at the date of distribution. For example, if there was a bequest to "my two children, per stirpes," and one child was deceased at the date of distribution, the shares bequeathed to the deceased child would be distributed not to his or her sibling(s) but to the children of the deceased child, in equal shares.

Pro tanto: Not the Lone Ranger's sidekick turned professional. Means "as far as it goes" or "for as much as may be."

Sic: A mistake not of one's own making. Used to identify an incorrect usage not made by the author. Sui generis: It means "unique."

We wish to acknowledge that certain definitional assistance was rendered by Black's Law Dictionary and by Wikipedia in the preparation of this article.

As other Latin words and phrases come to our attention, we'll update our glossary for you, and if you're wondering about a phrase or term we haven't mentioned, please let us know.

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[1] In a "collar" transaction, the Floating Rate Payer would pay only if the floating rate went above a certain level and the Fixed Rate Payer would pay only if the floating rate went below a certain level. In a "cap," the floating rate side of the transaction is subject to a maximum rate, effectively capping the exposure of the Floating Rate Payer.

Attorneys

Diana Y. Tsai

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