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WHAT'S AMISS? THE LAWYERING INTEREST IN "MISCELLANEOUS" CONTRACT PROVISIONS

I. Introduction

A. Why Do Contracts Have "Miscellaneous" Provisions?

This basic question raises several subsidiary questions. First, what do we mean by "miscellaneous" provisions? How do we distinguish the miscellaneous from the "non-miscellaneous" parts? Second - and more importantly - how do we assess the merits of various miscellaneous provisions? What work - if any - do these provisions do in the contracts of which they are a part?

Miscellaneous provisions are generally the terms at the back of an agreement that deal with a variety of matters secondary to the "heart" of the contract (*e.g.*, the sale of stock or the granting of a security interest). Some address future disputes (choice of law; choice of venue). Others address more technical matters (rules of construction; notice provisions). These may (perhaps pejoratively) be characterized as boilerplate. Yet, they tend at bottom to deal with something vital to the deal, even as it may be ancillary: what happens if things change? Thus, miscellaneous provisions not only contemplate litigation (implying breach, certainly a kind of change), but also rules on the rights of successors and assigns, how the parties should interpret the language of the contract, and so on.

This brief essay argues that miscellaneous provisions exist as much to benefit lawyers as clients, reflecting a kind of "lawyering interest" in the design and execution of contracts. Although these provisions obviously exist for the benefit of the parties to the contract (that is, the clients), they nevertheless also serve the lawyers who draft them, for four reasons.

- First, miscellaneous provisions can be seen as forming a kind of lawyer's schema or checklist. This is important for transactional lawyers, who may not also be litigators, and thus not thinking about the finer points of how changes - especially a breach - would actually be resolved (in court or otherwise).

- Second, miscellaneous provisions reflect a kind of path dependence, a (possibly sensible) reluctance to deviate from received ways of expressing contract terms. Here, too, the lawyer benefits in important ways. Path dependence in the use of miscellaneous provisions reflects a deference to the accumulated experience (and perhaps wisdom) of those who toiled over the language currently considered state of the miscellaneous-provision-art which, in turn, can have important social and career-development consequences for lawyers.

- Third, they protect lawyers whose firms are increasingly modular in structure. That is, as firms grow in size, and practice areas increasingly specialize, it will be increasingly difficult for a given deal lawyer to know the various

problems that might arise in the future, and how they would be addressed. Miscellaneous provisions can, in effect, bridge siloed and remote practice areas.

***152** • Fourth, because miscellaneous provisions largely reflect the contingency of the main part of the deal, they anticipate future work for the drafting lawyer (or that lawyer's colleagues). Setting the miscellaneous provisions correctly enables the drafting lawyer to guide the trajectory of those contingencies, perhaps in ways that benefit the lawyer and her firm.

Miscellaneous provisions in negotiated agreements thus reflect a lawyering interest: a concern for the quality of the lawyering - and the welfare of the lawyers - enmeshed in the contracting process. There are, of course, many "interests" in contract law, the most famous being the "reliance" and "expectation" interests.[1] The "interest" analysis in contract law usually assumes that the interests in question are those of the parties. Yet, we know from years of post-realist scholarship that contracting in fact can deviate significantly from what formal law or theory would predict or contemplate.[2] This article advances interest analysis in contract law by recognizing that lawyers often have as much at stake in how particular contract terms are developed and deployed as does the client.[3] Nowhere is this lawyering interest more acute than in a contract's miscellaneous provisions.

This article has three subsequent parts. Part II. describes miscellaneous provisions and why they appear to be puzzling. Part III. provides a very cursory overview of certain dominant theories of the work that miscellaneous provisions do. Part IV. extends these theories by linking these provisions to the people who actually draft them and who thus, in the first instance, have the most immediate stake in their form and function.

II. **What are Miscellaneous Provisions?**

A. General Usage

In general usage, "miscellaneous" implies a collection of items that may or may not share common characteristics. Wiktionary - as good a source as any as to such issues[4] - tells us that "miscellaneous" means "Consisting of a variety of ingredients or parts[;] [h]aving diverse characteristics, abilities or appearances."[5] The term derives from the Latin "miscellaneus, from miscellus ("mixed"), from misceo ("mix")." It is synonymous with "sundry" and "various" but not necessarily "random."

In legal usage, "miscellaneous provisions" appear to be the common terms found at the back of most negotiated agreements pertaining to, among other things, choice of law, choice of jurisdiction, modification, and so forth. These may appear under a general heading of "miscellaneous" provisions, as is the case in Section 12 of the Revised Model Stock Purchase Agreement.[6] The form of All Assets Personal Property Security Agreement, developed by the American Bar Association's Task Force on Forms under [Uniform Commercial Code] Revised Article 9, by contrast, has a single paragraph on "miscellaneous" matters, although that paragraph is part of a larger series of paragraphs of seemingly comparable variety.[7]

Miscellaneous provisions will be those that stand substantively apart from the "heart" of the agreement. Business contracts, for example, often include provisions on choice of law, choice of forum, rules of interpretation, the effect of waivers, the use of a jury, and so on. We can think of these provisions as *secondary* or ancillary to the *primary* terms of the contract (the sale of assets, the loan of money) because they do not speak to the economic or other core aspirations of the parties as expressed in the substantive provisions on, for example, conveyance and payment, as well as the various status-related promises parties make in

their representations, warranties and covenants. Miscellaneous terms are ancillary because they deal with other things--chiefly what happens if something changes or goes wrong with respect to the main aspects of the deal.

B. Four Puzzles

Although secondary, miscellaneous terms present at least four puzzles. First, scholars sometimes wonder why sophisticated commercial actors use boilerplate, a term which would certainly describe many miscellaneous provisions.[8] "Why," ***153** Robert Ahdieh has asked, "do ... standard terms --a species of boilerplate--persist notwithstanding the ready opportunity of sophisticated parties to abandon them in favor of tailored terms more suited to their particular circumstances?"[9] Here, the question goes to the title of the program for which this article originally was prepared: *"Never really thought about it."* If lawyers do not think about miscellaneous provisions (a claim I will challenge below), why not? Is there not some advantage to be gained - for the lawyer, if no one else - in recrafting, bespoke, each piece of the contract, including those at the back of the agreement? Second, and more practically, miscellaneous provisions sometimes simply restate the obvious. Consider, for example, the "cumulative remedies" term in a form of security agreement: *"All rights and remedies of the Secured Party with respect to the Obligations or the Collateral, whether evidenced hereby or by any other instrument or papers, shall be cumulative and may be exercised singularly, alternatively, successively or concurrently at such time or at such times as the Secured Party deems expedient.."*[10] This is "obvious" because Uniform Commercial Code (UCC) Article 9 section 9-601 essentially says the same thing, providing that a secured party's enforcement rights "are cumulative and may be exercised simultaneously."[11] Because Article 9 has been enacted in all U.S. jurisdictions relevant to domestic personal property secured transactions, it is fair to ask: What work does this provision perform?

There are several ready responses, although they create other subsidiary questions. One is that a security agreement may also cover real estate or other property that might be outside the scope of Article 9. Different states have different rules about the election of remedies when enforcing real property mortgages. Perhaps a provision of this sort would protect a secured party whose transaction fell outside Article 9--and perhaps not.[12] The net result is that the most we can say about the problem this miscellaneous provision is meant to address is that existing, background law is either clearly favorable to the secured party (as in section 9-601) or is uncertain. But in either case, the provision itself is unlikely to do much work. If the law is clear then, as noted, it is simply restating the obvious. If the law is not clear, then this means that a court may or may not enforce the provision: Its mere presence at the back of the agreement does not, it would appear, assure the secured party the outcome it seeks as to this issue. Similar observations could be made about choice of law[13] and choice of forum clauses.[14]

Third, some miscellaneous provisions may be facially ineffective, at least if given an ordinary meaning. Consider the following "miscellaneous" provisions from the same form of security agreement:

> ***MISCELLANEOUS.*** *The headings of each section of this Agreement are for convenience only and shall not define or limit the provisions thereof .... If any term of this Agreement shall be held to be invalid, illegal or unenforceable, the validity of all other terms hereof shall in no way be affected thereby, and this Agreement shall be construed and be enforceable as if such invalid, illegal or unenforceable term had not been included herein. The Debtor acknowledges receipt of a copy of this Agreement.*[15]

This provision, conveniently enough, really does collect several miscellaneous points in one place. Start at the end. The "Debtor acknowledges receipt of a copy of this Agreement." What work does this provision do? If the debtor's signature is authentic and authorized, will that not be good evidence of "receipt" by the debtor? If, by contrast, the debtor's signature is not authentic (or authorized), does the recitation to the contrary here make any difference? Delivery and receipt of the contract may be predicates to enforceability, but does saying it happened actually make it so?

Next, consider the "savings" provision, which tells us that a lousy slice of pizza should not taint the whole pie. But that cannot really mean what it says. If, for example, the debtor's signature (or the acknowledgment of receipt) is held invalid, does that mean the rest of the agreement remains in force? Not likely.

Finally, consider the first sentence--that headings are for convenience, and shall not define or limit the provisions of the agreement. The goal here seems to be that if a drafting glitch creates an inconsistency between a heading and the content, the content wins. Fair enough. But are courts likely to feel themselves bound? Probably not. In any case, what is the difference between "convenience" and "definition"? ***154** At the risk of sounding trite, isn't it always inconvenient to define terms?

Fourth, miscellaneous provisions, like boilerplate generally, do not fit comfortably into our conceptions of the meaning and role of contract law. Contract law is typically organized around the belief that contracts express the intentions of the parties to them.[16] Among other things, this will tend to give courts comfort that in enforcing contracts (or not), they are simply doing what the parties wanted. They are advancing legitimate social goals of autonomy, agency, and private ordering.[17]

Yet, we have good reason to doubt that parties form an "intent" about miscellaneous provisions. What, realistically, could parties to the contract "intend" with respect to things like choice of law, choice of forum, or jury waivers? If they think about them at all, they are likely to intend to defer to their lawyers' judgments about what is best. It is certainly plausible that sophisticated clients review and comment on the primary terms of a contract, such as the conveyancing and pricing provisions. This was, for example, my experience in private practice. But I recall no client calling with comments or questions about miscellaneous provisions. No client asked whether the jury waiver was enforceable or advisable. No client expressed the slightest interest in the choice-of-law clause. Except perhaps for assuring that the notice provisions were correct, there was very little, realistically, that a lay client would gain from laboring over those parts of the contract. If intent refers to anything remotely cognitive, it would not have been the parties' intent that mattered, but the lawyers'.

C. So What is the Purpose?

The point here is not to quibble with the legitimacy or enforceability of these or similar miscellaneous provisions. Nor is the point to suggest that lawyers are ill-advised to include them. Rather, the point is simply to illustrate that the purpose of these provisions may not be quite as obvious as convention and doctrine would predict. In short, these and other miscellaneous provisions likely do some work, but what is it, and does it matter?

III. The Function of Miscellaneous Provisions: Conventional Explanations

A. Two Related Explanations

Conventional academic wisdom offers two related explanations for the value of miscellaneous contract provisions: (1) these provisions are "economically efficient" in the sense that they create affirmative value for the parties or are too costly to remove; and (2) lawyers are cognitively conservative - "we fear change," in the famous words of Garth Algar[18] - and so simply adopt (and adapt) the language received from some prior authority.

B. Transaction Cost Engineering

1. Gilson Hypotheses

Most explanations - especially the first - owe a debt to Professor Ronald Gilson, whose article, *Value Creation by Lawyers*, asked the unsettling question: How, if at all, do lawyers in private transactions justify their cost?[19] Gilson began by considering and rejecting two common hypotheses about the value that business lawyers might create: (1) that a lawyer may improve her

client's deal, even at the expense of the other party, by "redistributive bargaining"; and (2) that lawyers reduce costs associated with the regulatory structure that is often in play in many large and complex transactions.[20]

Gilson rejected the first because he (optimistically) observed that the important economic question was not whether business lawyering increased a particular party's share, but whether the overall value of the transaction was increased due to the lawyer's contributions: Does the lawyer enlarge the whole pie, or only her client's slice? If business lawyers engaged only in redistributive bargaining, rational clients would choose not to use lawyers at all because "net of lawyers' fees, the surplus from the transaction to be divided between the clients would be smaller as a result of the participation of the lawyer, rather than larger."[21] He rejected the second explanation - regulatory arbitrage - because "it does not get us far enough."[22] There are simply too many lawyered transactions in which regulation plays little role for this to be persuasive.[23]

Gilson argued instead that business lawyers are "transaction cost engineers" who, in a variety of ways, reduce the gap between the value that rights (viewed as "capital assets") would command in a perfect market (*i.e.*, on the capital-asset pricing model)[24] and the price actually agreed to in the imperfect world we all occupy:

> ***155** Lawyers function as transaction cost engineers, devising efficient mechanisms which bridge the gap between capital asset pricing theory's hypothetical world of perfect markets and the lessthan-perfect reality of effecting transactions in this world. Value is created when the transactional structure designed by the business lawyer allows the parties to act, for that transaction, as if the assumptions on which capital asset pricing theory is based were accurate.[25]

Gilson argued that business lawyers reduce information asymmetries (and therefore produce value) in two important ways by: (1) producing information; and (2) providing a bonding mechanism by which the information can be verified.

2. Information Production

Often, the parties will be the best producers of information about themselves. Thus, the seller of a business will know a great deal (or at least more than the buyer, ex ante) about the value of the business. But Gilson recognized that the "[p]roduction of certain information concerning the character of the seller's assets and liabilities simply requires legal analysis."[26]

> For example, determination of the seller's proper organization and continued good standing under state law, the appropriate authorization of the transaction by seller, the existence of litigation against the seller, the impact of the transaction on the seller's contracts and commitments, and the extent to which the current operation of the seller's business violates any law or regulation, [all] represent the production of information which neither the buyer nor the seller previously had, by a third party - the lawyer - who is the least-cost producer [of the information].[27]

Information production should not, Gilson thinks, be adversarial because "reducing the cost of information necessary to the correct pricing of the transaction is beneficial to both buyer and seller."[28] Rather than argue about many of the things that in fact concern lawyers who assist in transactions - concealing potentially embarrassing information, creating needlessly lengthy documents - lawyers should principally be concerned with "the cost of producing the information" required by the transaction.[29]

3. Verification--Reputation Bonding

Lawyers also act as reputational intermediaries, placing their own credibility at risk in order to assure the other party that the client and the deal are legitimate. Traditionally, certain common contract provisions have been thought to do this. Thus, indemnification provisions, purchase-price hold-backs, and earnouts are all thought to signal the veracity of the information the seller gives to the buyer (and on which the buyer bases the purchase decision). These contract provisions work because, the thinking goes, if the seller's promises about the business are wrong, she doesn't get paid (or is paid less than the buyer originally promised).

Nevertheless, Gilson argued that these types of contract provisions "are imperfect because they do not entirely eliminate the potential for opportunism inherent in one-time transactions," such as asset sales.[30] The solution, he suggested, lies in the reputational bond posted by the lawyer in various ways (*e.g.*, delivering a third-party closing opinion). Unlike the parties (who may expect no future involvement with one another, and for whom final-period opportunism may be quite attractive) Gilson argued that professionals reliably post their reputation as a bond - act as "reputational intermediaries"[31] - because they expect future play. "If the intermediary cheats in one transaction - by failing to discover or disclose seller misrepresentations - its reputation will suffer and, in a subsequent transaction, its verification will be less completely believed."[32]

Although Gilson was talking about the economic value created by lawyering per se in private transactions, the analysis easily maps onto questions presented by common miscellaneous provisions in business contracts. The list of standard terms at the back of the agreement in effect forces parties to produce information about the transaction that will, on this model, more accurately price the deal. If, for example, one state's law provides materially better treatment for the deal (or a party in it), that would be chosen, and the benefit shared by the parties in some way. Miscellaneous provisions also perform an indirect verification function, as they signal threats about how the deal will be litigated if it turns out one side concealed something important.

Like lawyering in general, miscellaneous provisions are not exclusively explained by the value they add. Another economic reality appears to be that, like many legal practices, change is costly. In academic terms, we would say that miscellaneous provisions are susceptible to the problem of "path dependence." Path dependence simply means that where we are today on a given path - say, the path that reflects a chosen form of contract - is really the product of a much longer chain of events that creates a particular vector with a particular velocity. One can deviate from the path - change ***156** its direction or step off it entirely - but it can be extremely costly to do so.[33]

Thus, miscellaneous contract provisions become a bit like barnacles. "Encrusted" on documents, they are hard to remove, but may house various life-forms over time.[34] Individually, they may be innocuous - harmless to the hull of the ship, so to speak - but in the aggregate may cause it to decay or otherwise fail. Path dependence may explain why some miscellaneous provisions are "second best" choices that, in Herbert Simon's terms "satisfice,"[35] but they also imply a rather dim view of lawyers' roles in drafting them. On this view, miscellaneous provisions persist despite, not because of, the contributions of lawyers.

C. *Cognitive Conservatism*

A second - and perhaps more controversial - explanation is that lawyers are cognitively biased in ways that make it difficult for them to imagine removing or materially altering miscellaneous provisions.[36] Consider, for example, the "status quo bias." The status quo bias, which sometimes elides with the "endowment effect,"[37] stands for the proposition that, other things equal, we prefer a familiar state to one that is unknown.[38] This questions a conventional tendency (*e.g.*, in the Gilson model) to assume that the initial distribution of rights (*e.g.*, ownership) will not affect their ultimate disposition, because rights will always come to rest with the highest valuing user.

The problem, as Professor Russell Korobkin has observed, is that "the initial allocation of legal entitlements can affect preferences for those entitlements."[39] Donald Langevoort has identified a variant of this bias, which he characterizes as

"cognitive conservatism,"[40] and which may help to explain certain aspects of business lawyering that the rational actor/transaction cost engineer model cannot. Cognitive conservatism, Langevoort argues, is an "extremely robust behavioral construct showing that people change their views slowly even in the face of persuasive evidence."[41]

Cognitive conservatism posits that managers who operate in "noisy informational environments" adopt simplifying heuristics in order to protect against information overload.[42] A manager does this, Langevoort argues, by developing "schemas" or "scripts" that enable the rapid assimilation of information into what the manager believes to be the "best available" interpretation.[43] While this is an understandable and frequently healthy feature of behavior, it has a potentially troublesome side-effect: bias against revising the schema or script. "The normal cognitive strategy," Langevoort argues, "is to construe information and events in such a way as to confirm prior attitudes, beliefs, and impressions."[44]

A second and related phenomenon that draws into question the transaction cost engineer model would derive from the "availability heuristic." This holds that people assess probabilities based on the ready availability of memorable examples of similar circumstances.[45] When similar examples do not come to mind, however, they may substitute examples that are not appropriately analogous. If, for example, we know that snipers are on the loose in and around Washington, D.C. (as actually happened several years ago), we might overestimate the risk of being shot, even though the real risk of being shot remained quite low.[46] The salient or memorable event dominates our thoughts, and perhaps clouds judgment.

Cognitive theory offers an alternative explanation of miscellaneous contract provisions. Lawyers seem to be especially conservative cognitively - some would say that's what clients pay us for - and miscellaneous provisions may simply be an extension ***157** of that professional temperament. Law is a business that depends heavily for its effectiveness on "authority," a surprisingly tricky concept. In transactional practice, authority often comes from perceptions about the lineage and quality of a given form of document. The "best" form, we say, is the one laboriously developed by an American Bar Association committee of experts in the field. We are biased toward the status quo because the status quo is, in a sense, the authority (precedent) on which we rely.

The availability heuristic has comparable explanatory power here: We use standard miscellaneous provisions because they are (literally) what is available in the form we choose (or were given) to use.

IV. The Lawyering Interest in Miscellaneous Provisions

A. A Third Explanation

Conventional academic explanations of miscellaneous provisions certainly make sense. The provisions likely exist as they do for some economic reasons. Moreover, it is not hard to imagine that we are biased in some ways that permit (or require) us to use miscellaneous contract terms as we do.

I would offer a third, related, class of explanations, which is that they exist to benefit lawyers. Miscellaneous provisions persist in negotiated business agreements not just because of what they tell the parties (or a court asked to interpret the parties' agreement). We also use them because they help business lawyers do a better job and do better for themselves.

B. Miscellaneous Provisions: Check-Listing the Possible

There is a tendency to think that lawyers ignore miscellaneous provisions. They are at the back of the agreement for a reason: they appear literally to be an afterthought. There is a similar tendency to treat miscellaneous provisions as "boilerplate," provisions that seem more a product of word processing convenience than legal analysis.[47] While it may be true that lawyers spend less

time on miscellaneous provisions than they do on the primary terms of the contract, they nevertheless can perform at least two related, and important, functions.

First, and consistent with Professor Langevoort's views about cognitive conservatism, miscellaneous provisions function as schemas. We know other professionals - doctors, for example - use schemas as templates or mental checklists of important matters to consider in diagnosing and solving a problem.[48] We are - or should aspire to be - a checklist nation, in Atul Gawande's estimation.[49] Although the provisions at the back of the agreement are primarily for the benefit of (and presumably bind) the parties, my claim here is that they also function to benefit the lawyers, by forming a checklist of important issues that good lawyers should at least consider before letting the client sign on.[50]

Thus, in the same way that a prudent lawyer will work methodically and diligently through a closing checklist to make sure the various components of the deal are present, she will also review the miscellaneous provisions in the various contracts to make sure that they will work for the client. They may resemble boilerplate, in the sense that they will appear to be similar across broad ranges of transactions. They may (or may not) be heavily negotiated. And, as noted at the outset, they may (or may not) be binding on the parties. But what they really do is help the lawyer organize her thoughts about the deal.

But this begs a question: Thoughts about what aspect of the deal? The answer reflects the second function of miscellaneous provisions: They are largely about anticipating how changes or problems will be resolved should they develop. Thus, in the case of a security agreement, they include: rules on how to understand a party's rights to enforce the security interest if there is a default (cumulatively, not alternatively); how to figure out which state's law will (likely) apply if there is litigation; where to send notice so that it is legally effective; whether, through a power of attorney, one party has the power to further bind the other; how to interpret the terms if there is a later dispute about their meaning (the headings don't count), and so on.[51] In the case of a stock purchase agreement, they may include: provisions in which the parties (or a party) agree on how the agreement can be modified in the future; the effect of an assignment of the agreement; and that third parties will have no rights in the agreement or transaction.[52]

These sorts of miscellaneous provisions are ancillary to the primary terms because they will largely matter only if there is some change or problem with the primary term (the security interest or stock sale). Miscellaneous provisions are necessarily ancillary because they are largely about what happens if *this* deal does not work and some other transaction (or action) is sought or warranted.[53] They are an attempt to anticipate and manage the possible, prepared by (but not exclusively for) a group of lawyers ***158** who may not be involved in those future developments (*e.g.*, litigation).[54]

The claim here is not that miscellaneous provisions fully predict the outcome of a dispute about the primary contract terms. We know that at least some miscellaneous terms may not be enforced, so fortune-telling cannot be the work that they do.[55] Rather, they remind the lawyers - who are likely to be transactional lawyers, and who do not necessarily spend a great deal of time in court - that it is important at the outset to anticipate how disputes are likely to be resolved should they arise.

As a schema, miscellaneous provisions perform what some academics call a “reflexive” function: They lead the lawyers - not necessarily the parties - to reflect on what a future legal process might look like.[56] The idea that law performs a “reflexive” function is somewhat controversial. It refers to the idea that law “attempts to influence decision-making and communication processes with required procedures.”[57] Reflexive views of law “capitalize on the idea that if we are forced to tell the world what we are doing, we may reflect more carefully on our actions than would otherwise be the case.”[58] This theory about the function of law is often advanced to explain (or justify) reporting regimes under, for example, the federal securities and environmental laws.[59]

Contracts are typically not presumped to be disclosed publicly, and, in any event, the important point about their reflexive function is not about the world's view of miscellaneous terms in any given contract. Rather, the idea is that by channeling and standardizing certain promises about how future problems will be resolved, the lawyers who draft contracts that include miscellaneous provisions will be cautioned in how they approach the deal. Because large-firm transactional lawyers may have little day-to-day experience with litigation, the litigation-related provisions may prove especially important. With the aid of miscellaneous provisions, transactional lawyers will consider, at least to some extent, the implications that flow from a failure of the deal. That is a possibility which, if realized, will likely not involve the lawyer who drafted the provision.

C. A Few (More) Miscellaneous Words About Path Dependence

I noted above that path dependence is a conventional explanation for the presence of various form terms in contracts.[60] We (sometimes legitimately) fear change, and so stray from the path on which we travel only warily. Conventional explanations tend to imply that this ill-serves lawyers and clients: Path dependence implies a model of a lawyer better versed in word processing than transaction-cost engineering.

Yet, there is a strong lawyering interest in adhering to the path, or at least taking great care before deciding to deviate from it. As Claire Hill has elegantly explained, many contract provisions - certainly including the miscellaneous ones - exist because they were received in the "form." The "form," we know, is the template from which lawyers in any given transaction will craft their specific agreement. If well chosen at the outset, it will cover most of the important questions in the transaction, leaving the close work to negotiation and drafting skill.[61]

As Hill explains, for a variety of structural and psychological reasons lawyers resist deviating from the form they receive. Given the organizational dynamics of law firms and the economics of law practice, a junior attorney working on a deal would likely receive (or choose) a form the firm has used in the past. Being junior, the attorney - who will only prepare a first draft of the document - is likely to be highly cautious about removing provisions. For lawyers trained in a system based on the authority of precedent, it is extremely daunting to contemplate removing something without good reason.[62] We might tinker, customize and extend by parity of reasoning. But we will do all of these things at our peril, because three years of law school (and the lore of however many year of practice) have taught us to expect the worst -- even though it rarely happens.[63] We fear change because we fear being yelled at for making changes.

If we spend less time thinking about miscellaneous provisions than the primary terms, then it makes sense that we would spend less time thinking ***159** about whether to remove some of those provisions, even if they do not make a great deal of sense. Do we really need to be reminded that the contract is gender neutral? Probably not, but removing that provision confers no benefit on the client, and creates some risk for the lawyer.[64]

The risk is not that a court would conclude that a contract that used the pronoun "he" without an explicit gender neutralizer would somehow fail to bind Carly Fiorina. Rather, the concern is that among his or her peers, the lawyer who deleted boilerplate of this sort would transgress the unspoken bounds of drafting convention. You would, in simple terms, look odd for deleting a miscellaneous provision that had somehow adhered, barnacle-like, to the hull of the form. In whatever crude calculus we perform when making social and professional decisions, it is unlikely that we will spend much time challenging any but the most outlandish miscellaneous provisions.

The lawyering interest recognizes that we perform our work in a social environment in which our decisions are judged formally or informally by our peers. We may be able to marshal arguments for (or against) adhering to (or changing) miscellaneous contract terms. But in part, that decision - and how it is treated - will be made in the context of a professional culture that is largely suspicious of, and resistant to, change. The path dependence of miscellaneous provisions, in other words, serves lawyers' social, reputational and related interests.

D. Modularity in Miscellany and the Practice of Law

Any discussion about lawyers who draft contracts should also consider the (rapidly changing) market in which they practice. The private practice of law has undergone - and continues to undergo - profound change. In recent years, some firms have grown huge, with over 1,000 lawyers; others just as quickly collapsed in the credit crisis of 2008.[65] Firms have dissolved, merged and acquired one another with astounding frequency.[66]

Yet, throughout these changes, one trend has continued seemingly unabated: increasing specialization.[67] Specialization in the practice of law has no precise definition[68] yet captures the increasingly complex and arcane nature of many fields of practice. Thus, corporate departments fragment into groups dedicated to, for example, public companies, private companies, hedge funds, corporate finance and so on. Complicating matters is the fact that some substantive fields cross areas of practical specialization. Lawyers with expertise in intellectual property, environmental or bankruptcy law, for example, may be transactional lawyers or litigators, but not likely both. Utility players - the ERISA or blue sky expert - may be attached to any number of practice groups, and yet have no real home in the firm at all.

Specialization can, in many respects, be seen as a way of "modularizing" law practice. "Modularity" is a fancy term for grouping: If we put like things together (in "modules"), and separate them from different things (in "other modules"), and control the relationships between them ("interaction effects") we can realize organizational efficiencies otherwise unavailable in a world inattentive to these sorts of patterns.[69] "Modularity" in this sense is really the domain of cognitive science, computer code and informational sciences (and arts generally).[70]

Henry Smith has argued that contract boilerplate is an example of modularity because boilerplate terms are comparatively self-contained elements in a contract, which can be added, subtracted, modified and so on with little direct effect on the balance of the agreement.[71] We can substitute one choice-of-law provision for another based on the needs of the parties without having to re-write the entire contract or reinvent choice-of-law terms.[72] Miscellaneous provisions tend also to be "portable" in the sense that they can be moved from one agreement to another with relatively little change. Their "off-the-rack" nature is evidence of their modularity.[73]

***160** But miscellaneous contract provisions may also be important because of the modular character of law firms. The specialization and compartmentalization of practice is itself a kind of modularity. Particular practice groups are modules within the larger firm. They can interact with the other elements to greater or lesser degrees. In extreme cases, the departure of one module (practice group) may spell the demise of the whole firm.[74]

Modularity in this context has both benefits and costs. The benefits of modularity are that firms can specialize more efficiently and in greater depth. While the departments may change content, shape and relationships over time, the deal lawyers are not usually going to be grouped with the trial lawyers. Modularity helps lawyers develop expertise at comparatively low cost, because they need not worry about the details of practice in other groups. The tax lawyers need to know when to ask securities lawyers questions, but they do not need to worry about the finer points of Sarbanes-Oxley.

Yet, modularity can also present problems, especially if practice groups do not speak to one another effectively. Limiting communication among elements is a central feature of modularity.[75] The very efficiencies created by practice-group specialization can also isolate lawyers from one another. The lawyers opining on a client's litigation status, for example, may not know that another department in the firm is on the cusp of major litigation for that firm.[76]

The modularity of miscellaneous provisions may help to manage these costs. Transactional lawyers may have no detailed knowledge of the effectiveness of a choice-of-law clause; they may not know whether a court will respect a jury waiver. But

they do not have to, because these provisions can be broken off, given to the litigators for analysis, and returned when properly adapted to the deal. The modularity of boilerplate may, in simple terms, be a way for lawyers to enjoy the benefits, and manage the costs, of increasing firm specialization.

E. Contingency and Miscellany

If miscellaneous provisions chiefly contemplate some form of change in the underlying deal, then these provisions implicitly recognize the inherent contingency of all contract terms. Contingency in contract is not new. In many respects, it has roots in Holmes's observation that a contract presents the option to perform or pay damages.[77]

The difference here is that, while primary terms may be coy about their optionality - the seller "shall" deliver the promised property at closing - the miscellaneous provisions are not. They tell it like it is--or might be. The fact that they recognize the possibility that the world - and the parties' views of the deal - may change necessarily means that miscellaneous provisions embed contingency into the transaction. We recognize flux, and try to manage that through miscellaneous provisions which, in part, speak to the problems that arise when change is conceivable.

Thus, terms on successors, assignability - even the seemingly mundane provisions on who gets notice of a claim of breach - are really about anticipating the possibility (contingency)--that one party will move on, and someone else will step into place.

Contingency in contracting may be a perfectly reasonable choice. We usually call that "optionality," and we make explicit to the client that they are getting (or giving) an option to do (or refuse to do) something.[78] The optionality (contingency) implied by miscellaneous terms is necessarily a bit more opaque. These provisions do not affirmatively grant a right to change course (as an option contract would). Instead, they tell the parties how to reckon with various contingencies, should they arise. Thus, a provision choosing the law of a particular state will tell the parties that if they end up in a dispute there is a good chance that the law of that state will be used to resolve it. If one party wants to assign the contract, a provision on successors and assigns will indicate how that contingency will be addressed (probably as a breach).

The lawyering interest here reflects a hope that, should a contingency come to pass, the drafting lawyer, or at least her firm, will be involved in that future bit of business.[79] Thus, it is not surprising that notice provisions in contracts may require official correspondence to be delivered not only to the client but also to the attorneys involved in the deal. The entire edifice of powers-of-attorney may similarly may be seen as assuring that someone with legal stature (*e.g.*, the last lawyer known to have touched the deal) has the authority to approve some change to it. Indeed, something as seemingly mindless and mundane as the notice provision may spell the difference between whether a firm has future work or not.

This may also explain why provisions on legal fees are typically found in the miscellaneous section. These provisions will determine who pays the lawyers for this (or possibly future) matter(s) involving the transaction. It will likely ***161** deviate from the default rule (*i.e.*, each party pays its own lawyer), so that the debtor in a secured transaction will, per the miscellaneous term on attorneys' fees, have to pay the secured party's lawyers if the secured party enforces the security interest. While this may not be in the interest of all lawyers involved in the transaction, it certainly reflects a particular expression of the lawyering interest: the lawyer's interest in being paid.

Of course, simply having a power of attorney, or an entitlement to notice of a problem or change in the deal, does not assure the lawyer that she or her colleagues will have work in the future (indeed, there is no reason that the power of attorney need be exercised by an attorney at all). But choosing the law of a state where the drafting lawyer practices, a forum where the lawyer's firm has an office, and so on, must reflect, in part, a decision by the lawyer to maintain a stake in the transaction even as it may change. Indeed, the mere possibility of change presents opportunities for future work. Miscellaneous provisions can help the lawyer determine whether (or to what extent) she will be part of that change (or not).

V. Conclusion

What is missing from our understanding of miscellaneous provisions, therefore, is an appreciation of the lawyering interests they advance. This is not to say that lawyers draft these or other contract provisions out of narrow self-interest. Rather, as I have argued elsewhere, lawyers are not so much transaction cost engineers as they are informational intermediaries: They translate the (private) aspirations and expectations of the parties into terms that (public) fora (*e.g.*, courts) will recognize.[80] One side's lawyer may err - she may choose the "wrong" law, or include a forum selection clause that, ex post, is held unenforceable - but in the first instance, these miscellaneous provisions are guiding the lawyers to make standardized decisions about the information that the parties should consider if they want the deal - including its ancillary change - and dispute - anticipating features-to work as expected. My claim, therefore, stands in opposition to the sub-title of the program for which it was originally prepared, *"Never really thought about it."* Such a title reflects a view that lawyers robotically cut and paste miscellaneous provisions from one deal to the next. While it may be - indeed, should be - true that these sorts of provisions receive less attention than the primary terms of the deal, it ill-serves lawyers to suggest that they are not really thinking about miscellaneous provisions. My claim is that their presence in standardized form, across transactions, forces lawyers to think about them and their implications for the deal more than they would if they relied simply on background (*e.g.*, statutory or common) law. In so doing, these provisions enable lawyers to advance not only their clients' interest, but their own.

Footnotes

a1 **Jonathon C. Lipson** is Foley & Lardner Professor of Law at the University of Wisconsin Law School. The author thanks Claire Hill, Dave Hoffman, Stewart Macaulay and Bill Whitford for their comments, Paris Glazer and Greg Lockwood for research help, and Norm Powell for organizing the program for which an earlier version of this article was solicited: *Never Really Thought About It: Understanding Miscellaneous Provisions and Other Background Text in Agreements* (American Bar Association Annual Meeting, August 6, 2010).

1 Lon L. Fuller & William Purdue. *The Reliance Interest and Contract Damages* (pt. l), 46 Yale L.J. 52. 60-66 (1936).

2 *See. e.g.*, Stewart Macaulay. *An Empirical View of Contract*, 1985 Wis. L. Rev. 465; Stewart Macaulay. *Elegant Models. Empirical Pictures, and the Complexities of Contract*, 11 Law & Soc'y Rev. 507 (1977); Stewart Macaulay. *Non-Contractual Relations in Business: A Preliminary Study*, 28 Am. Soc. Rev. 55 (1963). *See generally* Stewart Macaulay, John Kidwell & William Whitford, 1 Contracts: Law in Action (2d ed. 2003).

3 Although contract literature does not directly acknowledge a lawyering interest as such, some writers have begun to recognize that how deals are put together may have a branding effect that can benefit both the lawyers and the parties. *See* Victor Fleischer. *Brand New Deal: The Branding Effect of Corporate Deal Structures*, 104 Mich. L. Rev. 1581 (2006).

4 *See. e.g.*, Lee F. Peoples. *The Lawyer's Guide to Using and Citing Wikipedia*, 81 Okla, B. Assn. J. 2437 (2010).

5 Wiktionary: A Wiki-based Open Content Dictionary. http:// en.wiktionary.org/wiki/miscellaneous (visited June 21, 2010).

6 *See* Committee on Mergers and Acquisitions of the Business Law Section of the American Bar Association. Model Stock Purchase Agreement, Revised (2010). According to the table of contents of this work, miscellaneous provisions are the following:
12. MISCELLANEOUS
12.1 Expenses
12.2 Public Announcements
12.3 Disclosure Letter
12.4 Nature of Sellers' Obligations
12.5 Sellers' Representative
12.6 Further Assurances
12.7 Entire Agreement
12.8 Modification
12.9 Assignments and Successors

12.10 No Third-Party Rights
12.11 Remedies Cumulative
12.12 Governing Law
12.13 Jurisdiction; Service of Process
12.14 Waiver of Jury Trial
12.15 Attorneys' Fees
12.16 Enforcement of Agreement
12.17 No Waiver
12.18 Notices
12.19 Severability
12.20 Time Of Essence
12.21 Counterparts and Electronic Signatures

7 *See* Uniform Commercial Code Committee, Forms Under Revised Article 9 (2nd ed. C Chernuchin, ed. 2009) [herinafter Article 9 Forms].

8 Although boilerplate is usually a somewhat derisive term (akin to "adhesion contracts"), implying terms that a powerful seller foists on a weak consumer, there is much thoughtful scholarship on the role that boilerplate plays in more sophisticated commercial contracting. *See. e.g.*, Robert B. Ahdieh. *The Strategy of Boilerplate*, 104 Mich. L. Rev. 1033. 1037 (2006); Omri Ben-Shahar & James J. White. *Boilerplate and Economic Power in Auto Manufacturing Contracts*, 104 Mich. L. Rev. 953 (2006); William W. Bratton, Jr.. *The Economics and Jurisprudence of Convertible Bonds*, 1984 Wis. L. Rev. 667; Stephen J. Choi & G. Mitu Gulati. *Innovation in Boilerplate Contracts: An Empirical Examination of Sovereign Bonds*, 53 Emory L.J. 929 (2004); Claire A. Hill. *Why Contracts Are Written in "Legalese"*, 77 Chi.-Kent L. Rev. 59 (2001) [hereinafter Hill, "Legalese"]; Tal Kastner, *The Persisting Ideal of Agreement in an Age of Boilerplate*, 35 J. Law & Soc. Inq. 793 (2010); Henry E. Smith. *Modularity in Contracts: Boilerplate and Information Flow*, 104 Mich. L. Rev. 1175 (2006). *See also* authorities cited *infra* at note 33.

9 *See*, Ahdieh, *supra* note 8, at 1034.

10 *See* Article 9 Forms, *supra* note 7.

11 U.C.C. § 9-601 (c). Comment 5 explains that this section "permits the simultaneous exercise of remedies if the secured party acts in good faith." *Id.* cmt. 5.

12 *Cf.* ESPN, Inc. v. Office of the Commissioner of Baseball, 76 F. Supp. 2d 383, 390 (S.D.N.Y. 1999) ("Put simply, an election is not a waiver of rights but an exercise of rights. As a result. I conclude that a standard "no-waiver" provision does not immunize or excuse parties from the requirements and consequences of election.").

13 *See, e.g.*, Commercial Credit Group, Inc. v. Falcon Equip.. LLC, 2010 U.S. Dist. LEXIS 1385, *9 (W.D.N.C Jan. 8, 2010) ("The parties' choice of law is generally binding on the interpreting court as long as the parties had a reasonable basis for their choice and the law of the chosen state does not violate a fundamental public policy of the state or otherwise applicable law." The court, however, declined to apply the chosen law to claims of conversion or fraudulent transfer.).

14 *See* Boutte v. Cenac Towing, Inc., 346 F. Supp.2d 922.925 (S.D. Tex. 2004) ("A choice of forum agreement is unenforceable if (1) enforcement of the clause would effectively prevent the plaintiff from having his day in court; (2) the forum agreement was procured by overreaching or fraud; or (3) the Court's enforcement of the forum selection clause would violate a strong public policy.").

15 *See* Article 9 Forms, *supra* note 7.

16 Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 Yale L.J. 541, 568-569 (2003) (courts should enforce the agreement that "the parties intended to enact").

17 *See* Kastner. *supra* note 8. at 797 (in classic understanding contract was "[a] sign of emancipation ... an obligation resulting from a freely entered bargain struck by individuals who were, at least formally, equal and autonomous"). Of course, few disagree with Holmes' view that intent is to be determined objectively, not subjectively. *See* Oliver Wendell Holmes. Jr., *The Path of the Law*, 10 Harv. L. Rev. 457. 464 (1897) ("the making of a contract depends not on the agreement of two minds in one intention, but on the

agreement of two sets of external signs--not on the parties having meant the same thing but on their having said the same thing.") (emphasis omitted).

18 IMDB: Internet Movie Database. *Memorable quotes for Wayne's World (1992). available at* http://www.imdb.com/title/tt0105793/quotes (visited June 22, 2010).

19 Ronald J. Gilson. *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 Yale. L. J. 239. 274-77 (1984).

20 *Id.* at 245-246.

21 *Id.* at 245-46.

22 *Id.* at 247.

23 *See id.* ("business lawyers frequently function in a world in which regulation has made few inroads."). I have argued elsewhere that this explanation may be incomplete for a variety of reasons, including that lawyers in private ordering transactions generally perform an intermediating function between (private) parties' aspirations and (public) judicial (or regulatory) views about how those transactions should be treated. *See* Jonathan C. Lipson. *Cost-Benefit Analysis and Closing Opinion Practice*, 63 Bus. Law. 1187 (2008). Steve Schwarcz has similarly challenged this aspect of Gilson's hypothesis. *See* Steven L. Schwarcz, *Examining the Value of Transactional Lawyering*, 12 Stan. J.L. Bus. & Fin. 486 (2007).

24 The "capital asset pricing model" (CAPM) posits, in part, that markets will, over time, always correctly price assets. Gilson. *supra* note 19. at 251. If the theory held, "business lawyers cannot increase the value of a transaction. Absent regulatory-based explanations, the fees charged by business lawyers would decrease the net value of the transaction." *Id.* As Gilson acknowledges, the CAPM is not without its critics, who question many of its assumptions, including that its two parameters--risk and return--are the only ones of significance. *Id.* at 251. n. 31 (collecting citations of criticisms of the CAPM). Nevertheless. Gilson argues, the value of the CAPM is "normative: It describes why the factors it specifies [*i.e.*, risk and return) should count.'" *Id.*

25 *Id.* at 255.

26 *Id.* at 274.

27 *Id.* at 275.

28 *Id.* at 275-76.

29 *Id.* at 276.

30 *Id.* at 288-89.

31 *Id.* at 290.

32 *See id.*

33 Leading academic works on the role of path dependence in transactional practice include: Marcel Kahan & Michael Klausner. *Standardization and Innovation in Corporate Contracting*, 83 Va. L. Rev. 713 (1997) (hereinafter *Standardization]:* Marcel Kahan & Michael Klausner. *Path Dependence in Corporate Contracting: Increasing Returns, Herd Behavior, and Cognitive Biases*, 74 Wash. U. L. Q. 347 (1996) [hereinafter *Path Dependence*].

34 *See* Jonathan C. Lipson, *Price. Path & Pride: Third-Party Closing Opinion Practice Among U.S. Lawyers (A Preliminary Investigation)*, 3.1 Berkeley Bus. J. 59. 113-14 (2005).

35 Nobel prize-winning social scientist Herbert Simon coined the term "satisficing." which is generally taken to be a mash-up of "satisfy" and "sufficient." Satisficing implies that, in many cases, it will not be rational to seek an optimal, or perfect, solution to a problem. *See, e.g.*, Herbert A. Simon, Models of man: Social and rational (1957). Instead, it may make more sense to satisfice--to accept a second-best, but nevertheless reasonably effective, solution.

36 The legal literature that develops these insights tends to draw from the work of Kahneman and Tversky. *See. e.g.*, Amos Tversky & Daniel Kahneman. *Judgment Under Uncertainty: Heuristics and Biases*, 185 Sci. 1124 (1974). *reprinted in* Judgment Under

Uncertainty: Heuristics and Biases (Daniel Kahneman. Paul Slovic & Amos Tversky eds. 1982). Although there is much to be said for the intuition behind this work, its development in the legal literature has been controversial. *See. e.g.:* Charles R. Plott and Kathryn Zeiler. *The Willingness to Pay-Willingness to Accept Gap. the "Endowment Effect." Subject Misconceptions, and Experimental Procedures for Eliciting Valuations*, 95 Am. Econ. Rev. 530 (2005) (questioning the empirical basis of claims about certain forms of cognitive bias): Charles R. Plott & Kathryn Zeiler. *Asymmetries in Exchange Behavior Incorrectly Interpreted as Evidence of Endowment Effect Theory and Prospect Theory?*, 97 Am. Econ. Rev. 1449 (2007).

37 *See, e.g.* Donald Langevoort. *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 Vand. L. Rev. 1499. 1503-04 (1998) (calling the endowment effect "manifestation of" the status quo bias). *See also* Russell Korobkin. *The Endowment Effect and Legal Analysis*, 97 Nw. Univ. L. Rev, 1227. 1227-31 (2003) [hereinafter Korobkin. *Endowment*]. The "endowment effect" reflects the tendency for individuals to value items more when they own them than when they do not. *See* Richard Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. Econ. Behav. & Org. 39.44(1980).

38 *See. e.g.*, William Samuelson & Richard Zeckhauser. *Status Quo Bias in Decision Making*, I J. Risk & Uncertainty 7 (1998): Russell Korobkin, *Behavioral Economics, Contract Formation and Contract Law*, in Behavioral Economics, 116. 118 ("individuals favor maintaining the status quo of affairs to adapting to alternative states, assuming all other things are equal.") [hereinafter Korobkin, *Formation*].

39 Korobkin. *Formation, supra* note 38. at 116.

40 Donald C. Langevoort. *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (and Cause Other Social Harms)*, in Behavioral Law and Economics 144. 147-49 (Cass R. Sunstein ed. 2000). [hereinafter Langevoort. *Illusions*].

41 Donald C. Langevoort. *Taming the Animal Spirits of the Stock Markets: A Behavioral Approach to Securities Regulation*, 97 Nw. U. L. Rev. 135.144 (2002) ("In other words, people cling as long as possible to what they previously believed.") [hereinafter Langevoort. *Animal Spirits*].

42 Langevoort. *Illusions, supra* note 40. at 147.

43 *Id.* at 148. I use the term "schema" loosely, and in essence by analogy. Strictly speaking, schemas are mental-not physical-structures. *See* William F. Brewer & Glenn V. Nakamura. *The Nature and Functions of Schemas*, in I Handbook of Social Cognition 119, 140 (Robert S. Wyer. Jr. & Thomas K. Srull eds., 1984) (schemas are "unconscious mental structures and processes that underlie the molar aspects of human knowledge and skill"). *See also* Ronald Chen & Jon Hanson. *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. Cal. L. Rev 1103. 1131 n. 111 (2004) (collecting descriptions of "schemas").

44 Langevoort, *Illusions, supra* note 40, at 147.

45 *See* Cass R. Sunstein. *What's Available? Social Influences and Behavioral Economics*, 97 Nw. L. Rev. 1295. 1297(2003) [hereinafter Sunstein. *Available*] (citing Amos Tversky & Daniel Kahneman. *Judgment Under Uncertainly: Heuristics and Biases*, in Judgment and Decision Making: An Interdisciplinary Reader 38. 46-49 (Hal R. Arkes & Kenneth Hammond eds. 1986).

46 Sunstein. *Available, id.* at 1296-97.

47 *See* authorities cited *supra* at note 8.

48 *See* Mark P. Higgins & Mary P. Tully, *Hospital Doctors and Their Schemas About Appropriate Prescribing*, 39 Med. Educ. 184, 185-86(2005).

49 Atul Gawande, The Checklist Manifesto: How to Get Things Right (2010).

50 *See* Hill, "Legalese" supra note 8, at 63 ("Given the complex nature of the task [of drafting contracts], and the quick turnaround time typically required, even the most experienced lawyer would have difficulty remembering every step and detail; the form is a useful reminder. The form also preserves the benefits of experience with its provisions, both in the transacting community and. sometimes, in judicial decisions. The form simplifies the mechanical task as well: a lawyer "marks up" a form, using the existing structure and changing only what's needed.").

51 *See* discussion *supra* this text at note 10.

52 *See* discussion *supra* this text at note 6.

53 For an argument that lawyers anticipate these problems through the strategic use of contractual ambiguity, *see* Claire A. Hill, *Bargaining in the Shadow of the Lawsuit: A Social Norms Theory of Incomplete Contracts*, 34 Del. J. Corp. L. 215 (2009) ("By leaving inartful language and ambiguity in the agreement, parties are bonding themselves not to seek precipitous recourse to litigation. The contracting process, and the contract that results, thus serves importantly to create the parties' relationship and to set the stage for dispute-resolution consistent with preserving the relationship ....") [hereinafter Hill. *Bargaining];* Claire A. Hill., 4 *Comment on Language and Norms in Complex Business Contracting*, 77 Chi.-Kent L. Rev. 29 (2001) [hereinafter Hill. *Comment*].

54 *See* Hill. *Comment, supra* note 53. at 192 ("Parties bargain in the shadow of the lawsuit as much as the law: that enforcement will be costly and uncertain affects how. and how much, they bargain.").

55 *But see* Kahan & Klausner. *Standardization, supra* note 33. at 722 ("A related attraction of a term commonly used in the past is that such a term may have been litigated and ruled upon by courts. Judicial opinions can reduce uncertainty regarding the validity and meaning of a term and the interaction of the term with relevant legal requirements, such as those contained in corporate, securities, and bankruptcy laws.").

56 *See* Jonathan C. Lipson. *Secrets and Liens: The End of Notice in Commercial Finance Law*, 21 Emory Bankr. Dev. J. 421, 506.(2005).

57 David Hess. *Social Reporting: A Reflexive Law Approach to Corporate Social Responsiveness*, 25 J. Corp. L. 41. 51 (1999) (citing J. Bregman & Arthur Jacobson. *Environmental Performance Review: Self-Regulation in Environmental Law*, in Environmental Law and Ecological Responsibility 211 (Gunther Teubner. *et al.* eds., J. Wiley & Sons 1994)).

58 Lipson. *supra* note 56. at 507.

59 *See* Hess, *supra* note 57; Cynthia A. Williams. *The Securities and Exchange Commission and Corporate Social Transparency*, 112 Harv. L. Rev. 1197 (1999).

60 *See* discussion *supra* at Part III.B.

61 As Hill explains:
The form design enables the product to be produced by lower-paid, less-senior and less-experienced lawyers. Given the complex nature of the task, and the quick turnaround time typically required, even the most experienced lawyer would have difficulty remembering every step and detail: the form is a useful reminder. The form also preserves the benefits of experience with its provisions, both in the transacting community and. sometimes, in judicial decisions. The form simplifies the mechanical task as well: a lawyer "marks up" a form, using the existing structure and changing only what's needed. A contract for client *#2* is created quickly from client #1's contract; global searches change the names and some other words. The remaining changes are input mechanically, and the new contract quickly emerges from the laser printer.
Hill. *"Legalese," supra* note 8. at 63.

62 *Id.* at 67 ("deleting a provision is an affirmative act. Why do it without a good reason?").

63 *Id.* at 73 ("Lawyers overestimate the probability that: (a) they have made a mistake: (b) the mistake will be detected (since, they believe, their supervisors have near-superhuman powers); (c) the mistake will have really bad consequences for them: (d) the mistake will have really bad consequences for the client; and/or (e) they're less competent than their peers.").

64 Indeed, imagine the hand-wringing involved in first introducing a gender-neutralizing provision. It must, first, have required the presence of at least enough female lawyers or clients to point out that gendered terms-- "his." "he," "him"--were problematic in a world where at least some lawyers and some clients would fail that category. In a world that increasingly emphasizes the "plain meaning" of legal language, "he" would most assuredly not imply "she." So. someone (for example, the woman attorney in the deal) had to take the leap and add a blanket provision covering the possibility that a disgruntled female party to the contract might have been a student of Justice Scalia's, and would argue that masculine terms did not apply to her, thus (potentially) freeing her (or her company) from whatever other terms the contract later brought her (or her company) to regret. At the end of the day, it is implausible that contract readers who actually care about contract language and law would hoist their (or others) petards on gender in this way. But you never know. Which is the point.

65 Larry E. Ribstein, *The Death of Big Law*, 2010 Wis. L. Rev. 749, 751 -52 (2010) ("Few industries have suffered more visibly from the financial meltdown of 2008-2009 than the nation's largest law firms ... After a half century of rapid growth, many large and established firms have dissolved or gone bankrupt since 2000, and others have significantly downsized .... Big Law is suffering not merely from a short-term decline in the general economy or in the overall demand for legal services. Indeed, the rise in litigation and regulation signal an increasing need for lawyers. Rather. Big Law's problems are long-term, and may have been masked until recently by a strong economy, particularly in finance and real estate. The real problem with Big Law is the non-viability of its particular model of delivering legal services."). *See also. 2009 NLJ 250*, Natl. L.J., *available al* http:// www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202435254583.

66 Ribstein. *supra* note 65. at 751.

67 Harry Trueheart. *The Future of Law Practice: The Gravity of Market Forces--A Global Firm Leader's Take on the Trends That Will Reshape Law Firms*, 36 A.B.A. L. Prac. 52, 52 (Jan/Feb. 2010) (The trend in firm structure "is now playing out in the form of larger diversified firms and larger specialized boutiques. For many larger firms, it is playing out in more focused practices, driven by the market demand for expertise and depth, so that fewer "fringe" practice areas are maintained in those firms.").

68 "Specialization might be defined by substantive practice areas or by market segment--by industry or type of client." Ward Bower. *Make More Money: Ten Action Steps for More Profitable, Productive Practices*, 25 A.B.A. L. Econ. 30. 30 (April 1999).

69 In order to understand the "modular" nature of miscellaneous provisions, it is first necessary to understand the term "modularity." This is a term associated with Herbert Simon, who Professor Smith paraphrased as follows:
Modularity allows complexity to become manageable by interrupting information flow within the system. Forming a modular system involves partially closing off some parts of the system and allowing these encapsulated components to interconnect only in certain ways. This allows work to go on in parallel and facilitates certain kinds of innovation and evolution for a simple reason: adjustment can happen within modules without causing major ripple effects. More sweeping change can call for remodularization, but much can be accomplished without altering the modular setup. Crucially, human understanding of any system is enhanced by breaking it up ("decomposing" it) into modules.
Smith, *supra* note 8. at 1180.

70 *Id.* at 1177 (computer languages have allowed for increasing modularity) and 1181 (people working on IBM OS).

71 *Id.* at 1191.

72 *Id.* at 1193-94.

73 *Id.* at 1197.

74 Consider, for example, the case of Hill & Barlow. This hundred-plus-year old Boston Brahmin firm was forced to dissolve after its most profitable group, the real estate lawyers, left to become the Boston office of what was then known as Piper Rudnick (now DLA Piper). *See* Lincoln Caplan, *ESQ., RIP*, Legal Aff. May/June 2003 *available at* http://www.legalaffairs.org/issues/May-June-2003/editorial_mayjun03.msp. In the interests of disclosure. I was. several years before the collapse, an associate with Hill & Barlow, although not in the real estate department. To my knowledge, my departure to become an academic had nothing to do with the real estate group's decision to join another firm, or the rest of the firm's demise.

75 Smith argues that modularity "allows complexity to become manageable by interrupting information flow within the system. Forming a modular system involves partially closing off some parts of the system and allowing these encapsulated components to interconnect only in certain ways." Smith *supra* note 8, at 1179.

76 *See* Nat'l Bank of Canada v. Hale & Dorr. No. 2000000296. 2004 WL 1049072, at *4-7 (Mass. Super. Ct. Apr. 28, 2004). *See also* Lipson. *supra* note 34. at 78-79 (discussing the *Hale & Dorr* case).

77 *See Holmes, supra* note 17. at 462 ("The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it []--and nothing else.").

78 The leading work on option theory is Fischer Black & Myron Scholes. *The Pricing of Options and Corporate Liabilities*, 81 J. Pol. Econ. 637.649-54 (1973). A helpful analysis for lawyers appears in Alvin C. Warren. Jr., *Financial Contract Innovation and Income Tax Policy*, 107 Harv. L. Rev. 460.465-70 (1993).

79 *See* Hill. *Comment, supra* note 53.

80 *See* Lipson. *supra* note 34.

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