The Word *Material* Is Ambiguous in Contracts, Why That's a Problem, and How to Fix It

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The adjective *material* (as in *There is no material litigation pending against the Company*) features prominently in contracts — particularly mergers-and-acquisitions contracts. So does the adverb *materially*, which is used to modify adjectival phrases (as in *at a price materially below Fair Market Value*) and verbs (as in *materially increase the Tenant's obligations*). Drafters use both *material* and *materially* to narrow an otherwise broad provision so that it covers only what matters.

The word *material* also features in the phrases *material adverse effect*, or *MAE*, and *material adverse change*, or *MAC*. (*MAE* and *MAC* are used to express the same meaning, but with a structural difference.[1] Unless referring to a MAE provision in a specific contract provision, this article uses *MAE* to refer to both MAE and MAC.)

The caselaw on materiality has attracted much attention, but it has largely unacknowledged and unaddressed the fact that *material* is ambiguous — it can be used to express alternative possible meanings.

This article attempts to remedy that inattention. It summarizes the meanings attributed to *material* in caselaw. It explains that *material* is not only vague but also ambiguous. It proposes that

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[1] *See* Kenneth A. Adams, *A Manual of Style for Contract Drafting* ¶¶ 9.103–.111 (5th ed. 2023) (*MSCD*) (comparing MAC and MAE and recommending MAC as being simpler and clearer); Robert T. Miller, *A New Theory of Material Adverse Effects*, 76 Bus. Law. 749, 750 n.1 (2021) ("The phrase 'material adverse effect' (MAE) has generally replaced the older 'material adverse change' (MAC), but the two are generally understood to be synonymous.").

the alternative meanings of *material* are best expressed by *nontrivial* and *dealbreaker*. It demonstrates how the ambiguity of *material* creates confusion. It shows that the meaning that would be reasonable to apply to a materiality provision depends on where it occurs in the contract. It explains that drafters unhelpfully favor *in all material respects* over *materially*. It suggests how to use *nontrivial* and *dealbreaker* instead of *material* and how to define *material* if you wish to retain it instead of using *dealbreaker*. And it explains that you'll look in vain for some shared understanding of what *material* means.

Although some aspects of this article pertain to mergers-and-acquisitions contracts, the recommendations apply to any contract that expresses materiality. That potentially includes every kind of business contract. But this article considers only the practice in the United States.

I. Meanings Offered by Caselaw

The Oxford English Dictionary says that *material* means "[o]f serious or substantial import; significant, important, of consequence."[2] But dictionary definitions are of limited value for resolving disputes over meaning — they're word museums,[3] or word zoos,[4] offering meaning devoid of context. An obvious place to look for meaning in context is caselaw.

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[2] *Material*, *Oxford English Dictionary*, https://www.oed.com/view/Entry/114923?isAdvanced=false&result=1&rskey=AxKwIR&.

[3] *See* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 Harv. J.L. & Pub. Pol'y 61, 67 (1994) (referring to a dictionary as "a museum of words, an historical catalog rather than a means to decode the work of legislatures").

[4] *See* A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 Harv. J.L. & Pub. Pol'y 71, 74 (1994) ("I think [dictionaries] are also like 'word zoos.' One can observe an animal's features in the zoo, but one still cannot be sure how the animal will behave in its native surroundings. The same is true of words in a text.").

A. Common-Law Material Breach

The general rule under common law is that an uncured failure by one party to perform can suspend or discharge the other party's duty to perform only if the failure is "material or substantial."[5] Generally, nonperformance is considered material at common law "only when it goes to the root, heart, or essence of the contract; or is of such a nature as to defeat the object of the parties in making the contract; or, as it has sometimes been said, when the covenant not performed is of such importance that the contract would not have been made without it."[6]

Although common-law material breach is a default rule, a contract might use the phrase *material breach* in stating grounds for termination. That's not surprising, since it's routine for contracts to make default rules explicit. One reason for doing so is to remind the parties of default rules. In particular, if a contract states various grounds for terminating the contract, it would seem unhelpful to make a point of excluding termination grounded in common-law material breach from an otherwise comprehensive provision. But because *material* is ambiguous,[7] you can't assume that every instance of the phrase *material breach* in a contract is intended to express the concept of common-law material breach.

B. TSC Industries

In 1976, the U.S. Supreme Court held in *TSC Industries, Inc. v. Northway, Inc.* that *material* means something different in securities-fraud cases:

> The general standard of materiality that we think best comports with the policies of Rule 14a-9 is as follows: An omitted fact is material if there is a substantial likelihood that a

[5] 14 *Williston on Contracts* § 43:5 (4th ed.).

[6] *Id.* § 43:6 (footnotes omitted); see also Restatement (Second) of Contracts § 241 (1981).

[7] *See* section II.A below.

> reasonable shareholder would consider it important in deciding how to vote. This standard is fully consistent with *Mills*' general description of materiality as a requirement that "the defect have a significant *propensity* to affect the voting process." It does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote. What the standard does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.[8]

This case involved alleged omissions and misstatements in a proxy statement, but the test has been applied to disclosure issues more generally[9] and to contracts.[10]

C. IBP

In mergers-and-acquisitions contracts, the phrase *material adverse change* plays an important role in statements of fact (known traditionally as "representations and warranties")[11] and in closing conditions, which give the buyer the right not to close

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[8] 426 U.S. 438, 449 (1976) (quoting *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 384 (1970)).

[9] *See Basic, Inc. v. Levinson*, 485 U.S. 224, 231–32 (1988) ("We now expressly adopt the *TSC Industries* standard of materiality for the § 10(b) and Rule 10b-5 context.").

[10] *See, e.g.*, *Frontier Oil v. Holly Corp.*, No. CIV.A. 20502, 2005 WL 1039027, at *38 (Del. Ch. Apr. 29, 2005) (applying the *TSC Industries* standard to a contract dispute).

[11] *See* Kenneth A. Adams, *Eliminating the Phrase* Represents and Warrants *from Contracts*, 16 Tenn. J. Bus. L. 203 (2015).

if any of the stated conditions to its obligation to close haven't been satisfied.[12]

In 2001, the Delaware Court of Chancery held in *IBP Inc. v. Tyson Foods Inc.* that a MAE closing condition "is best read as a backstop protecting the acquiror from the occurrence of unknown events that substantially threaten the overall earnings potential of the target in a durationally-significant manner."[13] (But a subsequent Delaware case proposes that a more precise alternative to "unknown events" would be "unspecified risks and events."[14]) The *IBP* reading added three glosses to materiality, in that a MAE closing condition will not be satisfied only if the event in question (1) lasts long enough to be meaningful, (2) is unexpected, and (3) is not otherwise addressed. The court also held that "a buyer ought to have to make a strong showing to invoke a Material Adverse Effect exception to its obligation to close."[15]

Delaware courts have stuck with the requirement expressed in *IBP* that anyone claiming a MAE must make a strong showing,[16] in one case referring to it as a "heavy burden."[17]

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[12] *See* Kenneth A. Adams, *The Structure of M&A Contracts* 57–70 (2011) (offering an overview of closing conditions).

[13] *IBP Inc. v. Tyson Foods Inc. (In re IBP, Inc. S'holders Litig.)*, 789 A.2d 14, 68 (Del. Ch. 2001).

[14] *See Bardy Diagnostics, Inc. v. Hill-Rom, Inc.*, No. CV 2021-0175-JRS, 2021 WL 2886188, at *23 n.225 (Del. Ch. July 9, 2021), *judgment entered* (Del. Ch. 2021).

[15] *See IBP*, 789 A.2d at 68.

[16] *See Channel Medsystems, Inc. v. Bos. Sci. Corp.*, No. CV 2018-0673-AGB, 2019 WL 6896462, at *24 (Del. Ch. Dec. 18, 2019); *Hexion Specialty Chems., Inc. v. Huntsman Corp.*, 965 A.2d 715, 738 (Del. Ch. 2008); *Frontier Oil v. Holly Corp.*, No. CIV.A. 20502, 2005 WL 1039027, at *34 (Del. Ch. Apr. 29, 2005).

[17] *Snow Phipps Grp., LLC v. KCAKE Acquisition, Inc.*, No. CV 2020-0282-KSJM, 2021 WL 1714202, at *29 (Del. Ch. Apr. 30, 2021) ("Kohlberg bore the initial, heavy burden of proving that an event had occurred that had or would reasonably be expected to have a material adverse effect on DecoPac.").

D. Akorn

The merger agreement at issue in a 2018 opinion of the Delaware Court of Chancery, *Akorn, Inc. v. Fresenius Kabi AG*,[18] expressed materiality using both MAE and the adjective *material*.

Two conditions (the court called them the "General MAE Condition" and the "Bring-Down Condition") were expressed using MAE. The contract also made it a condition to the buyer's obligation to close that Akorn, the seller, "complied with or performed in all material respects its obligations required to be complied with or performed by it at or prior to the Effective Time." The court called this the "Covenant Compliance Condition." To establish that Akorn had not satisfied the Covenant Compliance Condition, the buyer (Fresenius) contended that Akorn had not fulfilled its obligation to "use its . . . commercially reasonable efforts to carry on its business in all material respects in the ordinary course of business." The court called this the "Ordinary Course Covenant."

Akorn responded by arguing that under the Covenant Compliance Condition, a failure to comply with its obligations "in all material respects" should be interpreted as a failure to comply that would rise to the level of a material breach under common law.[19]

The *Akorn* court rejected that argument:

> Treatises on M & A agreements suggest a different purpose for including the phrase "in all material respects." Drafters use this language to eliminate the possibility that an immaterial issue could enable a party to claim breach or the failure of a condition. The language seeks to exclude small, *de minimis*, and nitpicky issues that should not derail an acquisition. . . . Based on these authorities, the plain meaning of "in all material respects" in the Covenant Compliance

[18] No. CV 2018-0300-JTL, 2018 WL 4719347 (Del. Ch. Oct. 1, 2018), *aff'd*, 198 A.3d 724 (Del. 2018).

[19] *See* text accompanying notes 5–6.

> Condition and the Ordinary Course Covenant calls for a standard that is different and less onerous than the common law doctrine of material breach. . . . It strives to limit the operation of the Covenant Compliance Condition and the Ordinary Course Covenant to issues that are significant in the context of the parties' contract, even if the breaches are not severe enough to excuse a counterparty's performance under a common law analysis.[20]

In support of this definition of *materiality*, the court cited, among other materials, an earlier Court of Chancery decision, *Frontier Oil*, that relied on the *TSC Industries* standard when interpreting the phrase *in all material respects*.[21] The *Akorn* court said that the *Frontier Oil* standard "fairly captures what I believe the 'in all material respects' language seeks to achieve."[22]

E. Other Caselaw

The caselaw discussed above consists of scattered pieces of a puzzle — it doesn't offer a coherent understanding of what *material* means for other courts to build on.

Consistent with that approach is a 2022 opinion of the Delaware Superior Court, *Schneider National Carriers, Inc. v. Kuntz*.[23] At issue was an obligation that the court called "the Material Asset Covenant":

> [T]he Buyer shall not, and shall not permit any of the Acquired Companies to reorganize, consolidate or otherwise take steps to sell, dispose or otherwise transfer any material portion of the assets of the Acquired Companies to an entity other than an Acquired Company.[24]

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[20] *Akorn*, 2018 WL 4719347, at *86 (footnotes omitted).

[21] *Id.* (quoting *Frontier Oil*, 2005 WL 1039027, at *38).

[22] *Id.*

[23] No. CV N21C-10-157-PAF, 2022 WL 1222738 (Del. Super. Ct. Apr. 25, 2022).

[24] *Id*. at *16 n.18.

The court noted, "A key term of this covenant is the word 'material,'"[25] but the court didn't consider the caselaw discussed above or attempt to address issues discussed in this article. Instead, it just looked to dictionary definitions of *material* and noted that materiality "is a context-specific determination."[26]

In terms of understanding what *material* means, that's just a starting point.

II. Shortcomings in the Current Understanding

The legal profession's understanding of what *material* means is built on a foundation of caselaw. But caselaw is an unpromising source for guidelines on the clearest way to say in a contract whatever you want to say. For one thing, courts are in the messy business of resolving disputes over dysfunctional contract language. That bears little relation to how to draft contracts clearly. In particular, replicating ostensibly "tested" contract language — contract language that was sufficiently confusing that the parties had to ask a court to decide what it means — is unlikely to lead to clear contracts.[27]

Furthermore, although caselaw offers more context than do dictionaries, the coverage is necessarily patchwork. That's particularly so with caselaw on materiality, with different courts considering materiality in unrelated contexts.

So in terms of what's required if contracts are to address materiality clearly, the current approach falls short.

A. The Word Material *Is Ambiguous*

The words *material* and *materially* are vague — there's no clear boundary between what's material and what isn't. And whether something is taken to be material in a given circumstance depends on whether a reasonable person would consider it

[25] *Id*. at *16.

[26] *Id*. at *17, *18.

[27] *See MSCD* at xxxvii.

material.[28] Any effort to explain what *material* means will also be vague. For example, the *TSC Industries* standard uses three vague words — *substantial*, *reasonable*, and *significantly* — to explain what *material* means.[29]

Yet the caselaw shows that *material* is not only vague, but also ambiguous — it expresses alternative meanings.[30]

Material isn't the only vague word expressing importance that's also ambiguous. *The Oxford English Dictionary* offers two contrasting definitions of *significant*, the first being "[s]ufficiently great or important to be worthy of attention; noteworthy; consequential, influential," the second being "[i]n weakened sense: noticeable, substantial, considerable, large."[31] An example of the first meaning might be *a significant piece of legislation*. An example of the second meaning might be *It was significant that her first stop was Rome*, with *significant* in effect expressing the meaning "not insignificant."

B. Expressing the Two Meanings of Material

The challenge is to find other ways to express the alternative meanings of *material*.

Vague words expressing importance generally fall at or near one or the other end of a spectrum. At the lower end you have, for example, *minor*. What's at issue is whether something is insufficiently important to pay attention to: *It's a minor blemish. It's a minor asset.* At the higher end you have, for example, *significant*, *important*, *substantial*, *essential*, and *major*. The magnitude of something is confirmed: *It's a major blemish. It's a major asset.*

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[28] *See id.* ¶¶ 7.42–.51 (describing use of vagueness in contracts); Kenneth A. Adams, *What "Vague" Means in the Context of Interpreting Contracts*, Adams on Contract Drafting (Mar. 13, 2022), https://www.adamsdrafting.com/what-vague-means-in-the-context-of-interpreting-contracts/.

[29] *See* text accompanying note 8.

[30] *See MSCD* ¶¶ 7.12–.15.

[31] *Significant*, *Oxford English Dictionary*, https://www.oed.com/view/Entry/179569?redirectedFrom=significant#eid.

But the vague words offered as examples in the previous paragraph aren't suited to use in contracts. They exhibit what I call "free-floating vagueness" — vagueness considered in the most general sense. One problem they pose is uncertainty over the quantum involved. How far down from the maximum can you go before something stops being substantial? How far up from the minimum can you go before something stops being minor? Even if you think you know the answer, there's no guarantee that the other party feels the same way.

Free-floating vagueness allows one to indulge in the notion of a hierarchy of two or more levels of importance — for example, positing that *major* expresses greater importance than does *substantial*. That would be unworkable, just as the notion of a hierarchy of *efforts* standards is unworkable[32] and the notion of degrees of negligence is unworkable.[33]

Contracts call for a different kind of vagueness, one that ties an increase in importance to a change in incentives — what I call "inflection-point vagueness." One such inflection point arises when something becomes important enough that it would matter to a reasonable person in the position of the party in question. Establishing whether that point has been reached is less uncertain than determining whether something is important. (I'm not aware that anyone else has suggested a distinction between free-floating vagueness and inflection-point vagueness.)

A vague word that could be used to express that meaning is *significant*, but because it's ambiguous,[34] it wouldn't be a suitable choice. The obvious alternative is *nontrivial*, with *trivial* expressing the obverse.

Because the *TSC Industries* standard treats a fact as material if it would have been worth paying attention to, whether or not it

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[32] *See* Kenneth A. Adams, *Interpreting and Drafting Efforts Provisions: From Unreason to Reason*, 74 Bus. Law. 677 (2019).

[33] *See id.* at 695–96.

[34] *See* text accompanying note 31.

would have caused a reasonable investor to change their vote,[35] it's reasonable to equate that standard with *nontrivial*. One can also equate with *nontrivial* using *material* to exclude "small, *de minimis*, and nitpicky issues," a use recognized by the court in *Akorn*.[36] Attributing that meaning to *nontrivial* is consistent with the *Akorn* court's citing an earlier Court of Chancery opinion that relied on the *TSC Industries* standard.[37]

Nontrivial and *trivial* are in general usage. By contrast, the other obvious inflection point for establishing importance relates to transactions, and it occurs when something is important enough that the deal depends on it. To express that meaning, I propose *dealbreaker*.

Given what's required to establish material breach under common law,[38] it's reasonable to equate that standard with *dealbreaker*. The same goes for the *IBP* standard because it requires "a strong showing" to invoke a MAE exception.[39] After all, the urge to terminate a contract is analogous to the urge not to consummate a transaction — either way, you want out. (If there's a difference between common-law breach and relying on MAE to get out of a deal, it's that invoking MAE was seen as a less cumbersome remedy. That's unrelated to the urgency required to invoke MAE.)

Delaware courts have in effect applied the "dealbreaker" meaning to *material* only in the context of MAE,[40] but that doesn't prevent ambiguity. Although the Delaware Court of Chancery has said that "the concept of 'Material Adverse Effect' and 'material' are analytically distinct,"[41] there's no basis in

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35 *See* text accompanying note 8.

36 *See* text accompanying note 20.

37 *See* text accompanying notes 21–22.

38 *See* text accompanying notes 5–6.

39 *See* text accompanying note 15.

40 *See* section I.C above.

41 *Frontier Oil v. Holly Corp.*, No. CIV.A. 20502, 2005 WL 1039027, at *38 (Del. Ch. Apr. 29, 2005).

semantics for precluding the meaning of *material* in the former context from being applied to *material* in the latter context, unless in the latter context the "trivial" meaning applies. And because the *dealbreaker* standard applies to material breach under common law, the *dealbreaker* standard isn't limited to MAE.

C. Where a Materiality Provision Occurs in a Contract Suggests What It Might Mean

To use materiality provisions sensibly, you cannot ignore what's at stake in the different parts of a contract. Context matters.

The statement of fact *Alpha is not in material breach of any Gamma Contract* pertains to the economic bargain of the parties. If that statement of fact is inaccurate, the other party would have a remedy, whether it's a remedy available under law or an exclusive remedy under the contract (presumably indemnification). A drafter might use *material* in this context to express the meaning "dealbreaker" from the perspective of the other party, but it would be odd if the other party were willing to ignore — and potentially be responsible for — all breaches other than dealbreaker breaches. It would make more sense if *material* expressed the meaning "nontrivial": to facilitate the deal, the other party is willing to ignore trivial breaches.

And consider this obligation:

> Lender shall [deliver certain forms] unless doing so would result in the imposition on the Lender of any additional material legal or regulatory burdens, any additional material out-of-pocket costs not indemnified hereunder, or be otherwise materially disadvantageous to the Lender.

The lender probably didn't intend that it would be reimbursed only if the burdens, costs, and disadvantages imposed on the lender were sufficiently significant to put them at the *dealbreaker* end of the spectrum. *Nontrivial* would make more sense.

By contrast, the termination provision, *Alpha may terminate this agreement on material breach by Beta of any of its obligations under this agreement*, addresses the viability of the deal. If Beta is committed to getting the deal done, it would not want to give Alpha the opportunity to terminate the contract for trivial breaches — in this context it would want *material* to mean "dealbreaker" from Alpha's perspective.

And in a contract between Charlie and Delta, one that provides for a delayed closing, consider the bringdown condition, which allows one side to use inaccuracy in the other side's statement of facts to relieve it of its obligation to close:[42]

> Delta's obligation to consummate the transaction contemplated by this agreement is subject to satisfaction of the following conditions: . . . that individually and in the aggregate, the statements of fact made by Charlie in article 2 were materially accurate on the date of this agreement and are materially accurate at Closing . . . .[43]

As with a termination provision, if Charlie is committed to getting the deal done, it would not want to give Delta the opportunity to refuse to close the transaction for breaches that are nontrivial but not material — in this context it would want *material* to mean "dealbreaker" from Delta's perspective.

So in those provisions that relate to the economic bargain of the parties — statements of fact and obligations — it makes sense for parties to use *material* meaning "nontrivial" to fine-tune their risk and their commitment. But provisions that allow a party to call the whole deal off — closing conditions and termination provisions — offer a different context. If a party is committed to the transaction, it would want to allow the other party to activate that

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[42] *See* Adams, *Structure of M&A Contracts* at 62–69 (discussing the bringdown condition).

[43] *See id.* at 62 (containing the form of bringdown condition that this example is based on).

option only when the basis on which they entered into the transaction is called into question, such that *material* expresses the "dealbreaker" meaning.

But because *material* is ambiguous, it's impossible to be certain what drafters had in mind in a given contract.

D. Confusion over What Material *Means*

Because *material* is ambiguous, one can expect readers to be confused, potentially leading to additional caselaw on what *material* means. Consider this clause from Salesforce's main services agreement,[44] a contract I examined at the suggestion of others (when it was called the "master subscription agreement"):[45]

> SFDC will not materially decrease the overall security of the Services . . . .

Actual and potential customers of Salesforce, and even Salesforce itself, might wonder what is meant by *will not materially decrease*. Does it mean "will not decrease, except for changes that are trivial"? Or does it mean "will not decrease to a dealbreaker extent"? Salesforce might feel constrained by the former, since it would limit them to tinkering. Salesforce customers might be alarmed by the latter, since it would allow Salesforce to make whatever changes it wants, short of bringing into question the entire arrangement. If neither appeals, Salesforce would have to get more specific.

If you think that one or the other meaning in the Salesforce sentence prevails, you're not relying on the plain meaning of the sentence — it has no plain meaning. And if you wish to apply

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[44] Salesforce Main Services Agreement, https://www.salesforce.com/content/dam/web/en_us/www/documents/legal/salesforce_MSA.pdf.

[45] *See* Kenneth A. Adams, *My Analyses of the Salesforce Master Subscription Agreement, Just a Click Away*, Adams on Contract Drafting (May 17, 2021), https://www.adamsdrafting.com/my-analyses-of-the-salesforce-master-subscription-agreement/.

some third meaning, there's no basis for thinking that any such other meaning exists.

Using vagueness as an alternative to being precise can help speed negotiations,[46] but in the case of the Salesforce sentence, ambiguity on top of vagueness helps hide the implications. Knowingly opting for vagueness is one thing; being blindsided by ambiguity is quite another.

E. Using Materially *Instead of* In All Material Respects

In the Covenant Compliance Condition and the Ordinary Course Covenant at issue in *Akorn*, materiality was expressed with the phrase *in all material respects*.[47] You can express the same meaning in one or two other ways, but commentary tends to limit itself to using *in all material respects* to express that meaning.[48] To avoid attributing undeserved significance to *in all material respects* over other ways of saying the same thing, it's best to recognize that one has a choice.

When materiality relates to a noun (in this case, *compliance*), you have three alternatives, with the adverb *materially* being the simplest:

- is in all material respects in compliance with
- is in material compliance with
- is materially in compliance with

When materiality relates to an adjective (in this case, *accurate*), the one alternative is the adverb *materially*:

- is accurate in all material respects

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[46] *See MSCD* ¶ 7.49 ("Vagueness might also be expedient if addressing an issue precisely would make negotiations longer or more contentious than one or both parties want.").

[47] *See* text accompanying note 18.

[48] *See, e.g.*, Lou R. Kling & Eileen T. Nugent, *Negotiated Acquisitions of Companies, Subsidiaries and Divisions* § 14.02 (2023) (using *in all material respects* nine times and not using *materially*).

- is materially accurate

And in some contexts, *in all material respects* doesn't work. In the phrase *at a price materially below Fair Market Value*, it wouldn't make sense to use *in all material respects* instead of *materially*: that would suggest, illogically, that a price might be below fair market value in different ways instead of simply being a lower price.

Given that *in all material respects* is wordier and more legalistic than *materially*, and given that *materially* always works, it would make sense for drafters and commentators to use *materially* and not *in all material respects* as the adverbial form of *material*.

III. Alternatives to *Material*

Ambiguity creates confusion and causes fights.[49] Because the word *material* is ambiguous,[50] it would be best to omit it from contracts. That leaves two ways to express materiality — the *nontrivial* standard and the *dealbreaker* standard. The simplest way to express those meanings would be to use exactly those words — *nontrivial* (and *trivial*) and *dealbreaker*.

To express the *nontrivial* standard, you could use *nontrivial* in the context of negation. The first example in the first paragraph of this article would read as follows:

> There is no ~~material~~ nontrivial litigation pending against the Company.

The two negatives might sound awkward, but one could quickly get used to *no nontrivial*, particularly because it can equate to two different positive forms. Here are two positive versions of the previous example:

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[49] *See MSCD* ¶ 7.1.

[50] *See* text accompanying notes 28–44.

> There is only trivial litigation pending against the Company.
>
> There is no litigation pending against the Company.

To avoid having to check, for every contract, which of the previous two sentences would be appropriate, you could use this more complex sentence:

> There is either only trivial litigation pending against the Company or no litigation pending against the Company.

Compared with checking which of the shorter sentences is suitable or using the longer sentence, using *no nontrivial* seems a legitimate alternative.

And here's how one might adjust the example from the Salesforce main services agreement to make clear one of the two possible meanings:[51]

> SFDC will not ~~materially~~ more than trivially decrease the overall security of the Services . . . .

Regarding the "dealbreaker" meaning, the word *dealbreaker*, meaning "a factor or issue which, if unresolved, would cause one party to withdraw from a deal,"[52] expresses what's at stake better than, say, *major* or *substantial*. You wouldn't even have to use it as a defined term. Using *dealbreaker* is novel, and it might seem awkward or insufficiently sober, but given the pervasive legalistic blather long inflicted on readers of traditional contract drafting, you should at least consider deploying a no-nonsense neologism.

The bringdown condition offered above[53] could be expressed in one of the following ways, depending on whether Charlie is less committed or more committed to closing the transaction:

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[51] *See* text following note 44.

[52] *Deal Breaker*, *Oxford English Dictionary*, https://www.oed.com/view/Entry/249707?redirectedFrom=deal+breaker#eid.

[53] *See* text accompanying note 43.

Less Committed

> Delta's obligation to consummate the transaction contemplated by this agreement is subject to satisfaction of the following conditions: . . . that individually and in the aggregate, the statements of fact made by Charlie in article 2 were ~~materially~~ accurate on the date of this agreement except for trivial inaccuracies and are ~~materially~~ accurate at Closing except for trivial inaccuracies . . . .

More Committed

> Delta's obligation to consummate the transaction contemplated by this agreement is subject to satisfaction of the following conditions: . . . that individually and in the aggregate, the statements of fact made by Charlie in article 2 were ~~materially accurate~~ not dealbreaker inaccurate on the date of this agreement and are ~~materially accurate~~ not dealbreaker inaccurate at Closing . . . .

Unlike *trivial*, *dealbreaker* doesn't have a negative form, so it would have to be used with a negative structure to express a negative meaning.

Those familiar with Delaware law could be confident that a court would interpret MAE provisions as expressing the "dealbreaker" meaning. But you can't assume that all readers would be familiar with Delaware law, and it would be confusing to use both *material* (in MAE) and *dealbreaker* (elsewhere) to express the same meaning.[54] Instead, one could use either *nontrivial adverse effect* or *dealbreaker adverse effect*.

But given that MAE is entrenched in mergers-and-acquisitions drafting, it's unlikely that anyone would be willing to switch to the defined term *Dealbreaker Adverse Effect*. If *dealbreaker* is too novel or not sober enough, your best bet would be to stick with *material*, but used as a defined term, with the definition expressing the *dealbreaker* standard (either using that word or

[54] *See MSCD* ¶¶ 9.24–.30 (on creating a definition for *material*).

not using it), to preclude ambiguity. The following definitions of *material* would apply to the buyer in an acquisition:

***With* Dealbreaker**

> "**Material**" and "**Materially**" refer to a dealbreaker level of significance — one that would have affected the decision of a reasonable person in the Buyer's position regarding whether to enter into this agreement or would affect the decision of a reasonable person in the Buyer's position regarding whether to consummate the transaction contemplated by this agreement.

***Without* Dealbreaker**

> "**Material**" and "**Materially**" refer to a level of significance that would have affected the decision of a reasonable person in the Buyer's position regarding whether to enter into this agreement or would affect the decision of a reasonable person in the Buyer's position regarding whether to consummate the transaction contemplated by this agreement.

The first incorporates the "dealbreaker" concept, to make the intended meaning more accessible. The second does not, making it the simpler but not necessarily the clearer alternative. By referring to both entry into the contract and consummation of the transaction, the definition addresses circumstances relating to the periods before and after signing.

So to summarize:

- To express the "nontrivial" meaning, use *nontrivial* (and *trivial*) instead of *material*.
- To express the "dealbreaker" meaning (in MAE provisions and elsewhere), use *dealbreaker* or instead use *material* as a defined term.

IV. There Is No Shared Understanding of Materiality That Circumvents Ambiguity

This article might meet with resistance from those who think transactional lawyers in fact have a shared understanding of the different meanings of *material* in contracts. But that's a problematic notion.

If there were a shared understanding of how to use *material* in contracts in a way that avoids the issues discussed in this article, why hasn't someone written about it? The legal profession is generally quick to disseminate practice pointers, but this article is the first attempt to discuss the ambiguous *material* in any detail. Sharing a hidden meaning that's opaque to outsiders would make the legal profession something of a cabal. A simpler explanation is that lawyers are unaware that *material* is ambiguous.

And short of conducting a broad and detailed survey, it's not clear how one determines who shares a given unwritten understanding.

Furthermore, the notion of the legal profession's being astutely alert to what *material* means in different contexts is at odds with the pervasive dysfunction of traditional contract drafting. My analyses of other key building blocks of traditional contract drafting, notably *efforts* standards[55] and the phrase *represents and warrants*,[56] refute the conventional wisdom. In recent blog posts, I have pointed out other glitches in mergers-and-acquisitions drafting.[57] And in two other blog posts, I offer a general critique of the

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[55] *See* Adams, 74 Bus. Law. 677; *see also AB Stable VIII LLC v. Maps Hotels & Resorts One LLC*, No. CV 2020-0310-JTL, 2020 WL 7024929, at *91 n.299, *92 (Del. Ch. Nov. 30, 2020) (describing this article as "[t]he most thorough analytical treatment of efforts clauses" and referring to this author as "[t]he leading commentator on efforts clauses").

[56] *See* Adams, 16 Tenn. J. Bus. L. 203.

[57] *See* Kenneth A. Adams, *M&A Drafting: Here's a Clearer Way to Modify the Bringdown Condition by MAE*, Adams on Contract Drafting (Apr. 14, 2022), https://www.adamsdrafting.com/heres-a-clearer-way-to-modify-the-bringdown-condition-by-mae/; Kenneth A. Adams, *M&A Drafting: The Redundant*

drafting in two acquisition contracts.[58] Drafters' using *material* without being aware that it's ambiguous would be consistent with that dysfunction.

But the simplest obstacle to the notion of a shared understanding of how to use *material* without risking confusion is that *material* is ambiguous. Confusion is unavoidable.

Reference-Point Exception in the Bringdown Condition, Adams on Contract Drafting (Feb. 15, 2022), https://www.adamsdrafting.com/the-redundant-reference-point-exception-in-the-bringdown-condition/.

[58] *See* Kenneth A. Adams, *"Dear Mr. Bezos": An Open Letter to Jeff Bezos About Suboptimal Drafting in the Washington Post Contract*, Adams on Contract Drafting (Aug. 12, 2013), https://www.adamsdrafting.com/an-open-letter-to-jeff-bezos-about-the-washington-post-contract/; Kenneth A. Adams, *Shortcomings in the Drafting of the Google–Motorola Merger Agreement*, Adams on Contract Drafting (Aug. 22, 2011), https://www.adamsdrafting.com/shortcomings-in-the-drafting-of-the-google-motorola-merger-agreement/.