ANOTHER CONSEQUENTIAL DAMAGES REDUX: A RESPONSE TO "CONSEQUENTIAL DAMAGES CLAUSES: ALIEN VOMIT OR INTELLIGENT DESIGN?"

GLENN D. WEST*

ABSTRACT

In "Consequential Damages Clauses: Alien Vomit or Intelligent Design," Professors Choi and Gulati (and their cast of co-authors) have produced an interesting piece examining, and attempting to explain, how and why one particular clause common in M&A agreements, the "Excluded Loss" provision, has evolved. Their findings are intriguing and generally consistent with my own anecdotal conclusions as someone who has extensively studied these provisions myself. But while there are many things they get right, they get some things wrong—which is not surprising given that they are not engaged in the practical and nuanced back and forth involved in the actual negotiation of private company acquisition agreements. This response is intended to add that perspective to the Professors' and their co-authors' findings.

* Glenn D. West is a retired partner of Weil, Gotshal & Manges LLP, and currently serves as an Adjunct Professor of Law at SMU Dedman School of Law.

TABLE OF CONTENTS

INTRODUCTION

When law professors theorize as to why practitioners are doing what they do, it seems, from the point of view of the practitioners, like the equivalent of ethologists studying the mating habits of orangutans. The ethologists/law professors have theories that explain the behavior based on limited observations, but because they are not orangutans/practitioners (and certainly haven't spoken to them, even though they could in the case of practitioners), they really don't know for sure why the orangutans/practitioners are actually doing what they do. Professors Choi and Gulati (together with their law student and recent law school graduate cast of co-authors) have attempted to break that mold in their recent article "Consequential Damages Clauses: Alien Vomit or Intelligent Design."[1] They still don't understand completely what they are observing, but they have at least spoken to some of the subjects responsible for negotiating the clauses they are studying—M&A lawyers.

There are many metaphors used to describe bad contractual boilerplate. "Alien vomit" is certainly an apt one for some "excluded loss" provisions that I have observed in private company acquisition agreements during my career. "Alien vomit" is a term that is used by some to describe carpet sea squirts—an invasive species that can destroy native shellfish.[2] A sea squirt begins life with a brain that functions to propel the sea squirt through the water until it finds a place to attach itself—a rock, a dock, something solid. Once it accomplishes that objective, it actually eats its brain and thereafter lives its life as a brainless water filter, wreaking havoc on the areas it

1. Tara Chowdhury, Faith Chudkowski, Amanda Dixon, Rishabh Sharma, Madison Sherrill, Hadar Tanne, Stephen J. Choi & Mitu Gulati, *Consequential Damages: Alien Vomit or Intelligent Design?*, 102 WASH. U. L. REV. (forthcoming 2024).

2. *See* Glenn D. West, *Do You Really Know What "Consequential Damages" Means?*, WEIL: GLOB. PRIV. EQUITY WATCH (May 18, 2020), https://privateequity.weil.com/features/do-you-really-know-what-consequential-damages-means/ [https://perma.cc/BZ7V-N8KZ].

invades. The carpet version of the sea squirt is a gross, yellowish glob of goo that resembles pancake batter or, as some locals have described it, "alien vomit."[3] But we should not lose sight of the creature's origins as having had a brain before it became brainless.

In like manner, bad contract boilerplate (and certainly the "alien vomit" version of an excluded loss provision) began its life because the brain of a smart lawyer perceived an issue and sought to address it in a clause that caught on because other smart lawyers saw its utility and wanted to solve the same problem. But once a clause catches on, it becomes "sticky"[4] or "encrusted"—i.e. much like the sea squirt attaches to the rock or dock, the good boilerplate provision becomes attached to contracts used in a certain industry, but then, over time, it invades contracts used in other industries, and the original reason for that provision, as well as the actual issues it was designed to solve, is lost. In other words, the brain gets eaten, but the attachment remains.

It is because bad boilerplate began as intelligent design that it is so difficult to change and the attachment is so fixed. After all, the assumption is that these boilerplate provisions have "become part of the marketplace because they were 'the result of the experience and prophetic vision of a great many able lawyers'"[5]—i.e., because they were the result of "intelligent design." And the truth is that, unlike orangutans, transactional lawyers are herd animals, and following the herd is always perceived as a safe course.[6]

WHAT PROFESSORS CHOI AND GULATI (AND THEIR CO-AUTHORS) GET WRONG

Professors Choi and Gulati (and their co-authors) are clearly on to something here. But what the Professors and their co-authors get wrong, although they hint at it in their article, is that excluded loss provisions (at least in the context of M&A transactions) are not either "intelligent design" *or* "alien vomit"—that is in fact a false dichotomy. Instead, excluded loss provisions, like other more standardized contractual boilerplate, are a combination of both. Because there are seldom rewrites of these provisions due to deal dynamics that dictate the use of market-based forms,

3. *Id.*

4. *See* Robert E. Scott, Stephen J. Choi & Mitu Gulati, Essay, *Revising Boilerplate: A Comparison of Private and Public Company Transactions*, 2020 WIS. L. REV. 629.

5. Glenn D. West, *Consequential Damages Redux: An Updated Study of the Ubiquitous and Problematic "Excluded Losses" Provision in Private Company Acquisition Agreements*, 70 BUS. LAW. 971, 1005 n.165 (2015) (quoting Paul D. Cravath, *The Reorganization of Corporations*, in 1 SOME LEGAL PHASES OF CORPORATE FINANCING, REORGANIZATION AND REGULATION 153, 178 (1917), *quoted in* MITU GULATI & ROBERT E. SCOTT, THE THREE AND A HALF MINUTE TRANSACTION: BOILERPLATE AND THE LIMITS OF CONTRACT DESIGN 10 (2013)).

6. *See id.* at 1005.

modifications and additions to these clauses occur (sometimes very intelligently) in an effort to repair the defects that have been recognized in the clauses. In other words, in the transactional context (unlike brief writing for litigators), it is rare to have the opportunity to tear down and rebuild the defective contractual house; instead, one must be content with whatever patchwork repairs one can make consistent with the deal dynamics involved.

But it is also true that a clause that was originally the product of "intelligent design" can become unmoored from its original context and cease to function intelligently, as I have previously argued was the case in the use of some excluded loss provisions in the M&A context.[7] And sometimes, the otherwise intelligent patches made to these provisions in an effort to clarify these clauses do in fact result in something that looks very much like "alien vomit."

There are two more potential misperceptions that need to be addressed. The first is the apparent belief that the sample clause offered by Professors Choi and Gulati (and their co-authors) to perhaps illustrate contractual "gibberish" (or "alien vomit") really isn't. And the second is the assumption that *Hadley*'s[8] default rule would necessarily apply to the indemnification regime common in a private company acquisition agreement.

A. The Clause Used as a Foil Really Isn't Alien Vomit

The clause the Professors and their co-authors use as the setup for their article reads as follows:

> NOTWITHSTANDING ANYTHING TO THE CONTRARY IN THIS AGREEMENT, *NEITHER THE BUYER, THE SELLER NOR THEIR RESPECTIVE AFFILIATES SHALL BE LIABLE HEREUNDER* TO ANY INDEMNIFIED PARTY *FOR ANY* (I) PUNITIVE OR EXEMPLARY DAMAGES OR (II) *LOST PROFITS OR CONSEQUENTIAL, SPECIAL OR INDIRECT DAMAGES* ***EXCEPT, IN THE CASE OF THIS CLAUSE (II), TO THE EXTENT SUCH LOST PROFITS OR DAMAGES ARE (X) NOT BASED ON ANY SPECIAL CIRCUMSTANCES OF THE PARTY ENTITLED TO INDEMNIFICATION (IT BEING UNDERSTOOD AND AGREED THAT NOTHING RELATING TO THE NEW COMMERCIAL AGREEMENTS, INCLUDING***

7. Glenn D. West, *Excluded Loss Provisions and the Danger of Contractually Slaying Mythical Dragons*, WEIL: GLOB. PRIV. EQUITY WATCH (Dec. 13, 2021), https://privateequity.weil.com/glenn-west-musings/excluded-loss-provisions-and-the-danger-of-contractually-slaying-mythical-dragons/ [https://perma.cc/7F7L-TBFG].

8. Hadley v. Baxendale, 156 Eng. Rep. 145 (Ex. 1854).

> ***THE ENTRY INTO SUCH AGREEMENTS BY THE PARTIES THERETO SHALL CONSTITUTE SPECIAL CIRCUMSTANCES HEREUNDER) AND (Y) THE NATURAL, PROBABLE AND REASONABLY FORESEEABLE RESULT OF THE EVENT THAT GAVE RISE THERETO OR THE MATTER FOR WHICH INDEMNIFICATION IS SOUGHT HEREUNDER****, REGARDLESS OF THE FORM OF ACTION THROUGH WHICH SUCH DAMAGES ARE SOUGHT*, EXCEPT IN EACH CASE OF THE FOREGOING CLAUSES (I) AND (II), TO THE EXTENT ANY SUCH LOST PROFITS OR DAMAGES ARE INCLUDED IN ANY ACTION BY A THIRD PARTY AGAINST SUCH INDEMNIFIED PARTY FOR WHICH IT IS ENTITLED TO INDEMNIFICATION UNDER THIS AGREEMENT.

Before having the benefit of my response, the Professors (and their co-authors) apparently believed this clause was an illustration of the "alien vomit" version of an excluded loss provision. But to me, this is far from "alien vomit"; instead it appears to illustrate a real effort (albeit imperfect) to modify the standard excluded loss provision in an intelligent manner. In other words, the quoted clause is the product of sophisticated bargaining.

Note that this clause completely avoids the kitchen sink approach employed by many of the "alien vomit" versions of excluded loss provisions. In other words, this provision completely avoids many of the pitfalls commonly found in excluded loss provisions in use prior to the publication of the 2008 *The Business Lawyer* article, "Reassessing the 'Consequences' of Consequential Damage Waivers in Acquisition Agreements"[9]—i.e., there is no mention of waiving "diminution-in-value damages," "multiples of earnings," "incidental damages" or the like, all of which were described as gutting the benefit of the bargain in a typical M&A deal.[10] Indeed, this clause appears to have adopted much of the advice that was given in that 2008 article;[11] in fact, the clause appears to be modeled

---

9. Glenn D. West & Sara G. Duran, *Reassessing the "Consequences" of Consequential Damage Waivers in Acquisition Agreements*, 63 BUS. LAW. 777 (2008). This response assumes familiarity by the reader with the 2008 article.

10. Compare the clause criticized as potential "gibberish" above to one in use pre-2008 and which was criticized as effectively waiving all meaningful damages:

> No Consequential Damages. Notwithstanding anything to the contrary contained in this Agreement or provided for under any applicable Law, no party hereto shall be liable to any other Person, either in contract or in tort, for any consequential, incidental, indirect, special or punitive damages of such other Person, [including] [or any] loss of future revenue, [or] income or profits[, or any diminution of value or multiples of earnings damages] relating to the breach or alleged breach hereof, whether or not the possibility of such damages has been disclosed to the other party in advance or could have been reasonably foreseen by such other party.

Id. at 778; *see also* West, *supra* note 5, at 973–74 (noting a similar example still in use in 2015).

11. *See* West & Duran, *supra* note 9, at 805–07.

after a clause that was used by this author in his 2015 *The Business Lawyer* article, "Consequential Damages Redux: An Updated Study of the Ubiquitous and Problematic 'Excluded Losses' Provision in Private Company Acquisition Agreements,"[12] as an example of real progress being made in making excluded loss provisions actually make some sense in the M&A context since 2008.[13] And it is worth noting that the quoted clause came from a 2012 agreement—i.e., it was negotiated and executed after the 2008 article and the subsequent CLE programs that began to highlight the problems with some of these clauses in the M&A context.[14]

To be sure this clause still has issues, and the 2015 article points to other post-2008 clauses that do a better job of resolving those issues. But, unlike the true "alien vomit" from pre-2008 that was still in use in 2015, this clause shows that the drafters had an apparent understanding of the issues and represents an intelligent (although imperfect) bargain. In addition to avoiding the "use of 'diminution in value,' 'multiples of earnings,' or any similar terms that could potentially affect the basic market measure of damages for direct claims" by a buyer against a seller for breach of the seller's representations and warranties concerning the purchased business,[15] this clause demonstrates that the drafters had an understanding that not all lost profits are consequential damages, and allows recovery for any otherwise excluded lost profits or consequential damages (whatever that term may actually mean) that are the "natural, probable, and reasonably foreseeable result of the breach"[16] (i.e., any damages that would fall under the first limb of the *Hadley* damages limitation regime), as long as they are not the result of special circumstances (which is the traditional province of *Hadley*'s second limb). It also makes clear that there are no limitations on recovery of any of the otherwise excluded damages to the extent they arise from third-party claims (i.e., where the buyer must pay a third party for a claim made by that third party that arose as a result of one of the seller's representations and warranties having been inaccurate, as opposed to a circumstance where the buyer is asserting a direct claim for loss of value as a result of a breach of a seller's representation and warranty).

But, as noted in the 2015 article discussing a similar clause, "this provision also appears to exclude damages based on special circumstances giving rise to those losses, even if those losses were otherwise the natural,

12. West, *supra* note 5.
13. *Id.* at 1001.
14. *Unit Purchase Agreement by and Among Chesapeake Midstream Development, L.L.C., and Access Midstream Partners, L.P.* Section 8.4.7 (Dec. 11, 2012), https://1.next.westlaw.com/Xhtml/I149cb9d6bcd811e398db8b09b4f043e0?transitionType=PLDocumentLink&ppcid=ac7ad3563aba455bb19a911be9178432&contextData=(sc.Search)#section8-4-7 [https://perma.cc/3TSE-8DBS].
15. West, *supra* note 5, at 1002.
16. *Id.*

probable, and reasonably foreseeable result of the breach."[17] And "[a] waiver of any damages that depend on special circumstances means that only losses that come within the first prong of the *Hadley* rule would be recoverable, even though the losses that depend on special circumstances may have otherwise been foreseeable under the enhanced foreseeability standard required under the second prong of the *Hadley* rule" (i.e., even if those special circumstances were actually known by the parties at the time of contracting).[18]

The problem with the *Hadley* rule, of course, is that it allows damages for special circumstances if they were in fact known and communicated to the parties at the time of contracting.[19] But sophisticated parties hate anything that can be the subject of who said what to whom and who knew what when—they prefer the written contract to contain all that one needs to know about the responsibilities of the parties. That may help explain the persistence of consequential damages waivers—i.e., an effort to avoid importing information that may have been communicated outside the contract into the contract.

Unlike the clause that was discussed in the 2015 article, however, the clause quoted by Professors Choi and Gulati (and their co-authors) actually contemplates some "special circumstances" that the parties are willing to include as recoverable damages—i.e., those arising from the "New Commercial Agreements." Thus, while the parties have generally excluded any damages arising from "special circumstances," whether or not known to the parties at the time of contracting (and even if those special circumstances otherwise were the "natural, probable, and reasonably foreseeable result [of the breach]"), they have specifically bargained for these specific "special circumstances" (those arising from the New Commercial Agreements, whatever they may be) to be included in calculating potential damages, as long as they otherwise constitute "the natural, probable, and reasonably foreseeable result [of the breach]."[20]

---

17. *Id.*

18. *Id.*

19. While that is a classic understanding of the *Hadley* rule, Professor Victor Goldberg has suggested we have gotten that wrong and that the actual rule requires more than knowledge of the special circumstances to impose liability arising from them; instead, what is required is something more akin to the "tacit assumption" of the increased risk by the party sought to be charged. *See* VICTOR P. GOLDBERG, RETHINKING THE LAW OF CONTRACT DAMAGES 167–70 (2019). But Professor Goldberg appears to be in the minority in this view. *See* West, *supra* note 5, at 982 n.58; *see also* Jeremy Telman, *Teaching Assistants: Victor Goldberg on Tacit Assumptions and Consequential Damages*, CONTRACTSPROF BLOG (Feb. 21, 2022), https://lawprofessors.typepad.com/contractsprof_blog/2022/02/teaching-assistants-victor-goldberg-on-tacit-assumptions-and-consequential-damages.html [https://perma.cc/MQ7T-8VMQ] ("Everybody hates the tacit assumption doctrine, except for New York State (sort of), three of the Law Lords in *The Achilleas*, Oliver Wendell Holmes, and Professor Goldberg.").

20. Chowdhury et al., *supra* note 1.

Of course, by focusing on "special circumstances" as being the sole interpretation of the meaning of "consequential damages," the quoted provision also fails to negate other interpretations courts have given to that term (thus still leaving much ambiguity as to what is and is not excluded here).[21] But, while the sample provision used by the Professors and their co-authors may be inartfully drafted and difficult to read for the uninitiated, it is far from "gibberish" and is certainly not "alien vomit."

B. Indemnification Could Potentially Override Hadley

Professors Choi and Gulati (and their co-authors) also fail to appreciate that simply relying on the *Hadley* default rule in private company acquisition agreements is potentially problematic because remedies for breach of representations and warranties are typically styled as "indemnification," not traditional damages. Indeed, "Losses" typically cover every conceivable loss that could result from a breach, not just the traditional limited remedies available under the common law for an award of damages. Thus, even while criticizing the sometimes ridiculous loss exclusions that had found their way into M&A deals over the years, I still cautioned that it might be advisable to specifically limit "Losses" to those that were otherwise available at the common law for breach of contract (which would of course include both direct/general damages and consequential/special damages, in each case to the extent reasonably foreseeable).[22] In other words, it might be advisable to specifically make *Hadley*'s foreseeable rule applicable to the indemnification regime. And, in the 2015 article, I even cited to a number of clauses from post-2008 acquisition agreements that appeared to do just that.[23] Thus, in the M&A context, where contractual indemnification is the remedy, some kind of "excluded loss" provision limiting indemnification recoveries to damages recoverable for breach of contract may still be appropriate.

OBSERVATIONS ABOUT THE FINDINGS THEMSELVES

Professor Choi and Gulati (and their co-authors) basically conclude that excluded loss clauses were more intelligently drafted (from the point of view of the buyer) post-2015 than before 2015. The fact is my own examination of available publicly filed private acquisition agreements from 2009–2014 revealed that drafting had improved somewhat after the publication of the 2008 article—i.e., many M&A lawyers had altered their

21. West, *supra* note 7.
22. *See* West & Duran, *supra* note 9, at 786–88; West, *supra* note 5, at 998–1001.
23. West, *supra* note 5, at 1003 n.159.

brainless copying of the pre-2008 alien vomit version of the excluded loss provision. But not enough progress had been made, and that prompted me to publish the 2015 article. And my own anecdotal observations and discussions with practitioners indicate that there was an accelerated pace of improvement to these clauses from the buyer's perspective following the publication of the 2015 article. Curiously, however, I heard many stories of transactional lawyers who, trying to convince a reluctant counterparty to make changes to an overly broad "alien vomit" version of an excluded loss provision, sent the counterparty a copy of the 2008 article, not the 2015 article, to augment their arguments. So, the story of what exactly caused the accelerated change is more complicated than simply the publication in 2015 of a renewed call to stop the madness.

The Professors and their co-authors point to a number of potential accelerators of change post-2015. Notably, the number of highly regarded M&A practitioners that began to take up the mantle of educating the transactional bar on the importance of carefully negotiating these provisions—folks like Rick Climan, Keith Flaum, and Joel Greenberg, who are well-known for engaging in entertaining mock negotiations of a number of important provisions of private company acquisition agreements at CLE programs across the nation. Prior to them having made this part of their programs, I was just "a lone voice in the wilderness";[24] I was certainly speaking on this issue and others at CLE programs myself, but it apparently had limited effect until others started piling on. And, including this particular issue as part of Rick Climan's much touted 2017 Buyer Power Ratio Deal Points Study[25] certainly had an impact—demonstrating that, in deals involving public company serial acquirers of private companies of a certain size, a substantially greater percentage of buyers were able to negotiate favorable changes to overly-broad excluded loss provisions than was the case generally. Rick Climan and Keith Flaum even illustrated how this Buyer Power Ratio Study could be used to favorably negotiate an excluded loss provision in one of their many programs.[26] And in doing so they used a hypothetical that had originally appeared in the 2008 article (thereby giving it a boost it had not enjoyed while it languished in an academic piece).[27]

---

24. Not suggesting I was a prophet, but this is an obvious reference to *Isaiah* 40:3.

25. RICK CLIMAN ET AL., AMERICAN BAR ASS'N MERGERS & ACQUISITIONS COMMITTEE & SRS ACQUIOM, IMPACT OF "BUYER POWER RATIO" ON SELECTED M&A DEAL TERMS IN ACQUISITIONS OF PRIVATELY HELD TARGET COMPANIES BY PUBLICLY TRADED BUYERS (2017), https://info.srsacquiom.com/2017_ABA_SRSA_Buyer_Power_Ratio_Private_Target.pdf [https://perma.cc/AAL3-FSCM].

26. *See* Rick Climan and Keith Flaum, *Using "Buyer Power Ratio" to Negotiate Consequential Damages Exclusions in M&A Deals*, YOUTUBE (July 16, 2019), https://www.youtube.com/watch?v=MKfzYnDJJeI [https://perma.cc/G5X6-BR67] (excerpt from a Hogan Lovells M&A forum).

27. *See* West & Duran, *supra* note 9, at 800–04.

It is important to note that the Buyer Power Ratio Study looked at deals from 2012–2016 (a period that included many transactions signed before 2015) and, in addition to publicly filed agreements, it included over 400 non-publicly available agreements made available from SRS Acquiom's database of deals where SRS Acquiom served as a shareholder's representative.[28] The bottom line is that, at least anecdotally, I am confident that there was substantial change in the drafting practices of M&A lawyers post-2008, whereby buyer's counsel sought to mitigate the overly broad excluded loss provisions in use in M&A deals—I certainly demonstrated that trend in the 2015 article. But after 2015, that trend clearly went into overdrive and the reason is fairly straightforward—more people were talking about it, and it became a thing. Not a very statistically demonstrable conclusion perhaps, but it is what it is.

MY OWN BRIEF NEW STUDY

Professors Choi and Gulati's (and their co-authors') study includes publicly available documents filed between 2010 and 2023. It does not include the additional non-publicly available agreements that Climan's Buyer Power Ratio Study included from SRS Acquiom's database of acquisition agreements in which SRS served as a shareholders' representative, nor does it include the many other agreements that would have neither been publicly filed nor involved SRS Acquiom as a shareholder representative—an obvious limitation on the reliability of statistical research that is based upon such incomplete data.[29] Nonetheless, the available data is what the available data is and, as long as we appreciate its limitations, it can show us likely trends in the documentation of M&A deals, at least when that limited data is coupled with a practitioner's own observations, CLE, and experience. And I have certainly used that limited data set myself to show trends.[30]

So, as part of my response, I decided to take a look at the publicly available private company acquisition agreements in Thomas Reuters Practical Law database for the period January 5, 2024, through April 18, 2024, a period after the data set used by Professors Choi and Gulati (and their co-authors) and before the completion of the initial draft of this article.

28. CLIMAN ET AL., *supra* note 25.

29. It is one of the reasons I have cautioned against over-reliance on market studies as a basis for negotiating acquisition agreements. *See* Glenn D. West, *Your Mother Was Right: Following Your Friends (or Market Studies) Off a Bridge is a Bad Idea*, WEIL: GLOB. PRIV. EQUITY WATCH (Jan. 28, 2020), https://privateequity.weil.com/glenn-west-musings/your-mother-was-right/ [https://perma.cc/TY2D-DBSN].

30. *See* Glenn D. West, *Fraud Carve-Outs Come of Age*, WEIL: GLOB. PRIV. EQUITY WATCH (Nov. 1, 2021), https://privateequity.weil.com/glenn-west-musings/fraud-carve-outs-come-of-age/ [https://perma.cc/PKR2-GQPR].

This data set includes a total of fifty-eight agreements. Here is what I found (and there will be no charts, formulas, or regression analysis—just experienced observations).

A significant portion of the agreements contained no excluded loss provision at all (meaning neither a clause limiting indemnifiable losses or damages, nor a definitional limitation on recoverable damages or losses). Most of the agreements without an excluded loss provision could be explained on the basis that they were "no indemnity" deals—i.e., the seller had no liability for a breach of the representations and warranties in the agreement following the closing and the buyer was assuming the risk or had limited recourse to Representations and Warranty Insurance. However, that did not explain all of the omissions of excluded loss provisions. There were in fact a few examples of standard indemnity deals that had no excluded loss provision—this may be evidence that drafters appreciated that with caps on recoverable losses in the context of a private company acquisition agreement, it really is not necessary to add additional restrictions on what gets included in available losses (some of which are inherently ambiguous).[31]

With respect to the agreements that did contain some kind of loss exclusion provision or loss definitional limitation, many of those agreements limited the excluded losses to punitive or exemplary damages only. Here is an example:

> Notwithstanding anything in this Agreement or in any other Transaction Agreement to the contrary, in no event shall either Party have any Liability under any Transaction Agreement (including under this Article XII) for any punitive damages (except to the extent paid to any third party pursuant to a Third Party Claim).[32]

And this delightful example illustrates a real effort by the drafters to get away from overly broad excluded loss provisions by expressly including in

---

31. *See, e.g.*, *Asset Purchase Agreement by and Among Cleveland Hospital Company, LLC and Cleveland Tennessee Hospital Company, LLC and Cleveland Medical Clinic, LLC and Skyridge Clinical Associates, LLC and CHS/Community Health Systems, Inc. and Bradley Medical Center, LLC and Bradley Physician Services, LLC and Hamilton Health Care System, Inc.* Section 11 (Apr. 18, 2024), https://1.next.westlaw.com/Xhtml/Iefc4cdef017f11ef8921fbef1a541940?transitionType=PLDocumentLink&ppcid=f69c629c350a49c885afb145b08d67e4&contextData=(sc.Search) [https://perma.cc/RN59-ZT8A?type=standard]; *Agreement and Plan of Merger, by and among Vivakor, Inc., a Nevada corporation, Empire Energy Acquisition Corp., a Delaware corporation, and Empire Diversified Energy, Inc., a Delaware corporation* Section 8.01 (Feb. 26, 2024), https://1.next.westlaw.com/Xhtml/I4ea317e5dd7f11ee8921fbef1a541940?transitionType=PLDocumentLink&ppcid=bdf4f7796aa74a93aaf24dca1eb742b4&contextData=(sc.Search)#section8-01 [https://perma.cc/JY6Q-2L47].

32. *Asset Purchase Agreement by and Between Elancoanimal Health, Inc., as Seller and Intervet International B.V., as Buyer* Section 12.08 (Feb. 5, 2024), https://1.next.westlaw.com/Xhtml/Ibe903622c5d911ee8921fbef1a541940?transitionType=PLDocumentLink&ppcid=a986af4b5fbf47b984cf845f578e508b&contextData=(sc.Search)#section12-08 [https://perma.cc/H3VJ-V2YX].

the definition of "Damages" for purposes of the indemnification provision some of the typical exclusions while only excluding "punitive" damages (although what "exemplary" damages are if they are not "punitive" damages is a mystery to me):

> "Damages" means any losses, damages, awards, judgments, costs and expenses (including reasonable and documented fees and expenses of counsel and other professionals and expenses of investigation incurred therewith) asserted against, relating to, imposed upon, actually suffered, incurred or sustained by such Person, ***including any damages that are incidental or indirect, consequential, special or exemplary (solely to the extent reasonably foreseeable)****; provided that "Damages" shall not include punitive damages (except to the extent paid or payable by an Indemnitee to a third party in connection with a third party claim)*.[33]

Given the significant number of agreements that limited the excluded losses to just punitive or exemplary damages, this may be evidence of a real trend—limiting the exclusion to something that really doesn't matter in direct claims for contractual indemnification.[34]

---

33. *Agreement and Plan of Merger among: Century Therapeutics, Inc., a Delaware corporation; Clarent Intermediate Sub, Inc., a Delaware corporation; Clarent Merger Sub, Inc., a Delaware corporation; Clade Therapeutics, Inc., a Delaware corporation; and Fortis Advisors LLC, as the Securityholders' Agent* Exhibit A Certain Definitions (Apr. 11, 2024), https://1.next.westlaw.com/Xhtml/Ib02cdd0afc0c11ee8921fbef1a541940?transitionType=PLDocumentLink&ppcid=3a87e804ab534dd18fcbff6f1a077349&contextData=(sc.Search) [https://perma.cc/C8WD-QLN8]. Interestingly, there was one agreement in my 2024 database that actually defined the traditional "alien vomit" laundry list of excluded losses as all being "Exemplary Damages." *Asset Purchase Agreement, by and Among EMI Acquisition Company Inc., EMI Industries, LLC, and the Members of Seller Made Parties Hereto* Section 1.1 (Apr. 18, 2024), https://1.next.westlaw.com/Xhtml/I164d382b046911ef8921fbef1a541940?transitionType=PLDocumentLink&ppcid=7753e416793a4e0ea327a84ab7e12bfb&contextData=(sc.Search)#loss [https://perma.cc/28QB-CKMA]. Defining a list of excluded losses as "Exemplary Damages" may have simply been an effort to use the defined term as a convenient moniker for these listed exclusions (although it is not clear how this term was subsequently used). But if the drafters thought that these listed excluded losses were in fact "exemplary" damages, which they aren't, then that many be evidence of the continued trend of some in the M&A deal world to see these damages as extraordinary damages, not normal, actual damages arising from the breach of representations and warranties in an acquisition agreement—i.e., this may be continued evidence of efforts to "slay mythical dragons." *See* West, *supra* note 7.

34. *See* West & Duran, *supra* note 9, at 789–90. Although excluding punitive damages can have benefits to the sellers in the tort context (so buyers should be aware that excluding punitive damages, while of little moment in the contractual indemnity context, may have some real effect if there is an available tort claim such as "fraud" that could be entertained and the exclusion applies to both tort and contract claims). *See* Glenn D. West, *Contracting to Avoid Tort-Based Punitive Damages Awards*, WEIL: GLOB. PRIV. EQUITY WATCH (Feb. 20, 2019), https://privateequity.weil.com/glenn-west-musings/contracting-to-avoid-tort-based-punitive-damages-awards/ [https://perma.cc/ZM7E-4E9S]. An example of a clause that appears to apply in both the tort and contract context in excluding punitive damages is the following:

Notwithstanding the positive trends, there were a few of the "alien vomit" versions of excluded loss provisions spewed about in my 2024 data set, but even those showed evidence in many cases of efforts to carve them back. A good example is the following:

> *The Indemnifying Party shall not be liable* under Section 10.01 *for any* (i) Damages relating to any matter to the extent that such matter has been (or will be) taken into account in the adjustment of the Purchase Price under Section 2.04, (ii) *Damages that constitute consequential, indirect, incidental, special, exemplary, punitive or other similar damages or (iii) Damages for lost profits or diminution in value,* ***in each case of clause (ii) and clause (iii), except to the extent that such Damages*** (A) are awarded by a judgment or order against or part of a settlement involving an Indemnified Party pursuant to a Third Party Claim or (B) ***[are] damages (other than punitive damages) that are the probable and reasonably foreseeable consequence of the relevant breach or action.***[35]

And another one is the following:

> Notwithstanding anything to the contrary in this Article IX, in no event shall an Indemnifying Party have liability to any Indemnified Party for any consequential, special, incidental, indirect or punitive damages, lost profits or similar items, in each case except as actually paid to a claimant in a Third Party Claim, **provided, however, that**

> "Notwithstanding anything to the contrary contained in this Agreement (including this Article IX), neither party hereto shall be liable to the other party hereto or its Affiliates, whether in contract, tort (including negligence and strict liability) or otherwise, at law or in equity, and 'Covered Losses' shall not include[,] any amounts for any punitive damages, except to the extent payable to a third party."

Stock and Asset Purchase Agreement by and Among Tempo Acquisition, LLC, Axiom Buyer, LLC, Axiom Intermediate 1, LLC (for the Limited Purposes Set Forth Herein), and Alight, Inc. (for the Limited Purposes Set Forth Herein) Section 9.7(a) (Mar. 20, 2024) (emphasis added), https://1.next.westlaw.com/Xhtml/Id1dee7c8e87811ee8921fbef1a541940?transitionType=PLDocumentLink&ppcid=634e8e4904a347d28e49631a703633de&contextData=(sc.Search)#section9-7a [https://perma.cc/UWL5-X52Y].

35. *Equity Interest Purchase Agreement dated as of February 20, 2024 by and Among Trident Butterfly Investor, Inc., Panther Blocker I, Inc., Panther Blocker II, Inc., Truist Bank, Truist TIH Holdings, Inc., Truist TIH Partners, Inc., TIH Management Holdings, LLC, TIH Management Holdings II, LLC and Truist Insurance Holdings, LLC* Section 10.04(b) (Feb. 20, 2024) (emphasis added), https://1.next.westlaw.com/Xhtml/I97e859f6d75611ee8921fbef1a541940?transitionType=PLDocumentLink&ppcid=a4f127cb5d1a44ee9d5cf7b0eae1916c&contextData=(sc.Search)#section10-04b [https://perma.cc/G6CX-KVXZ].

> **the foregoing shall not limit recovery for diminution in value of an asset as a result of a breach.**[36]

And yet another one; this one distinguishing between lost profits that constitute direct damages and lost profits that are consequential damages:

> Notwithstanding anything to the contrary contained in this Agreement, in no event shall Sellers or Buyer ever be liable for, and each Party releases the other from, any consequential, special, indirect, exemplary or punitive damages or claims relating to or arising out of the Contemplated Transactions or this Agreement; provided, however, that any consequential, special, indirect, exemplary or punitive damages recovered by a Third Party (including a Governmental Body, but excluding any Affiliate of any Group member) against a Person entitled to indemnity pursuant to this Article 9 shall be included in the Damages recoverable under such indemnity. **Notwithstanding the foregoing, lost profits shall not be excluded by this provision as to recovery hereunder to the extent constituting direct Damages.**[37]

My point is not that these provisions remove all the harmful effects of the alien vomit, but simply that they evidence some progress in recognizing that the alien vomit may in fact be harmful from the buyer's perspective, and that it needs to be mitigated to the extent possible.

The fact that it took almost sixteen years after the publication of the original 2008 article to get here is shocking of course, and there are certainly those who apparently remain oblivious to the potential harm the alien vomit version of excluded loss provisions can cause. But progress has been made.[38]

---

36. *Purchase and Sale Agreement by and Among Shenandoah Mobile, LLC ("SM"), the Sale Subsidiary that Becomes a Party Hereto (the "Sale Site Subsidiary"), and Vertical Bridge Holdco, LLC ("Buyer")* Section 9.5 (Feb. 29, 2024) (emphasis added), https://1.next.westlaw.com/Xhtml/I4ea31675dd7f11ee8921fbef1a541940?transitionType=PLDocumentLink&ppcid=a62bfb47532e404a88b536b10002f9f9&contextData=(sc.Search)#section9-5c [https://perma.cc/H9UZ-DXQB].

37. *Purchase and Sale Agreement by and Between RevolutionResources II, LLC, Revolution II NPI Holding Company, LLC, JonesEnergy, LLC, NosleyAssets, LLC, NosleyAcquisition, LLC, and Nosley Midstream, LLC as Sellers, and BE Anadarko II, LLC as Buyer* Section 9.11 (Feb. 16, 2024) (emphasis added), https://1.next.westlaw.com/Xhtml/I92eff831d19011ee8921fbef1a541940?transitionType=PLDocumentLink&ppcid=2e2bd72800e44b5a81c9ce0f4ddaec77&contextData=(sc.Search) [https://perma.cc/M7FV-WQHR].

38. My study of the limited 2024 data set also revealed that the overwhelming majority of agreements contained the seller friendly definition of "fraud" for the purposes of the "fraud carve-out" from the exclusive remedy provision that I had long recommended. This is another area on which I have written extensively and for which Professors Choi and Gulati (and other co-authors) have studied why clauses in M&A agreements evolve. *See* Stephen J. Choi, Mitu Gulati, Matthew Jennejohn & Robert E. Scott, *Contract Production in M&A Markets*, 171 U. PA. L. REV. 1881 (2023).

A PROPOSAL FOR A NEW LAW SCHOOL COURSE TO ADDRESS ENCRUSTED BOILERPLATE

Bryan Garner is a renowned legal writing guru. In 2013, he authored an article entitled "Why lawyers can't write."[39] In that article, Bryan suggested that "transactional lawyers go through their professional lives blithely unaware of the land mines they're inadvertently planting in their documents—at least until litigation over those land mines ensues."[40] His criticism of transactional lawyers' drafting skills was basically focused on their apparent lack of linguistic competency. He places the blame for this primarily on law schools and their focus on the caselaw method to the exclusion of courses that teach contract drafting skills.

While the lack of linguistic competency is certainly a contributing factor to some contract drafting errors, a transactional lawyer drafting a contract is not the same as a litigator drafting a brief. Briefs are not negotiated—instead, they can be edited and re-edited by the authors to perfect their persuasive power and prose, without interference from their opponents. Contracts, on the other hand, at least those involving sophisticated parties, as is the case in the M&A context, are negotiated between at least two parties, each seeking to evidence a deal favorable to them in the most efficient and non-confrontational manner possible. Deal dynamics and market forces dictate the use of certain forms—i.e., transactional lawyers almost never write on a blank page. And many forms used as the baseline for a negotiated contract contain boilerplate clauses that simply have not been routinely updated to keep pace with the interpretive decisions of the courts likely to decide any dispute arising under that contract. It is in this area that some, but certainly not all, transactional lawyers merit criticism.

Although law professors might rightly assume that transactional lawyers regularly "study past disputes in order to draft contractual provisions that will avoid similar disputes in the future,"[41] there is in fact little "evidence of transactional lawyers engaged in a dynamic process of regularly reading cases and incorporating that learning into novel innovations in subsequent contracts."[42] Instead, boilerplate changes only when there are enough practitioners sounding the alarm about a particular problem in a boilerplate clause that it is virtually impossible to ignore. In the push to get a deal done,

---

39. Bryan A. Gardner, *Why Lawyers Can't Write*, ABA JOURNAL (May 1, 2013, 9:00 AM), https://www.abajournal.com/magazine/article/why_lawyers_cant_write [https://perma.cc/U75K-GHHT].

40. *Id.*

41. GLENN D. WEST, CONTRACT DRAFTING 101: A CHECKLIST DERIVED FROM RECENT CASELAW 1 (2016) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2805481 [https://perma.cc/6P68-TL9Z] (quoting GULATI & SCOTT, *supra* note 5, at 4).

42. GULATI & SCOTT, *supra* note 5, at 4.

there is little time or incentive to focus on perfecting the form. Rather, transactional lawyers focus only on those changes that seem most important to the deal at the time—and what may happen when there is a post-signing dispute over that deal (particularly if that risk has not previously manifested itself in a prior deal involving that lawyer or their firm—or there are no trumpets blaring in the CLE realm) is not always part of that focus.

Teaching better writing skills is always a good thing. But better linguistic competency for transactional lawyers will not solve the problem. In other words, simply saying things clearer is not enough. Lawyers need to be taught what boilerplate clauses were originally intended to accomplish and how they have been interpreted; they need to know what words make a difference in forum selection and governing law provisions to actually accomplish their objectives; they need to understand what a standard no-third-party beneficiary cause does and what exceptions should be built in to avoid causing more harm than good; they need to appreciate the nuances of liquidated damages provisions; they need to understand why and how no reliance clauses work to eliminate potential extra-contractual fraud claims in many states; they need to understand how courts have interpreted the supposed hierarchy of "efforts" clauses; they need to be able to confidently review an anti-assignment or change of control clause and advise on whether the contemplated deal needs consent based upon applicable caselaw; they need to understand the courts' interpretation of standard material adverse change clauses; and yes, they need to know what each type of damage or loss included in a typical excluded loss provision might actually mean.

When I teach my M&A Contract Drafting course at SMU Dedman School of Law, I cover all these subjects and more based on a combination of caselaw and drafting exercises. This is not a course designed to teach a document processor how to assemble a contract, but a course designed to produce real contract draftspersons that know both the how and the why of contract drafting.[43] And I have made my syllabus publicly available, along with a link to my blog posts that address many of the topics covered by the Syllabus.[44] Courses like this, without taking away any of the traditional curriculum, could go a long way in eliminating the "black holes"[45] and landmines that sometimes unknowingly lurk in the forms used as a baseline

43. *See* WEST, *supra* note 41, at 1 (describing the importance of maintaining traditional law school teaching of doctrinal courses, coupled with practice skills courses that tie into that doctrinal teaching).

44. Glenn D. West, Teaching Contract Drafting through Caselaw—A Syllabus and a Collection of My Musings About Contract Drafting Based upon Recent Cases (2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3028971 [https://perma.cc/6J8N-MFG2].

45. *See* Stephen J. Choi, Mitu Gulati & Robert E. Scott, *The Black Hole Problem in Commercial Boilerplate*, 67 DUKE L.J. 1 (2017).

of all contract drafting. And if enough law schools began teaching such a course, perhaps there would be a subsequent study to determine the favorable impact on drafting that hopefully would result.