

- After completion of Licensee's work, Licensee shall have the duty to restore the License Area to its former condition, as it was before the Licensee's entry into the License Area.
- The sender shall have fully complied with the requirement to send notice when the sender obtains electronic confirmation.

Intermediate

In the following extract from a licensing agreement, count the various ways in which duties are stated. Edit the passage for consistency.

- 7.3 **Ownership and Use of the Marks and Copyrights.** Licensee shall not claim any title to or right to use the Marks except pursuant to this Agreement. Licensee covenants and agrees that it shall at no time adopt or use any word or corporate name or mark that is likely to cause confusion with the Marks.
- 7.4 **Compliance with the Law.** Licensee will use the Marks and copyright designation strictly in compliance with all applicable and related legal requirements and, in connection therewith, shall place such wording on each Licensed Item or its packaging as Licensee and Licensor shall mutually agree on. Licensee agrees that it will make all necessary filings with the appropriate governmental entities in all countries in which Licensee is selling the Licensed Item or using the Marks to protect the Marks or any of Licensor's rights.
- 7.5 **Duty of Cooperation.** Licensee agrees to cooperate fully and in good faith with Licensor for the purpose of securing, preserving, and protecting Licensor's rights in and to the Marks. Licensee must bear the cost if Licensee's acts or negligence have in any way endangered or threatened to endanger such rights of Licensor.

Advanced

In a contract formbook, find a document in which *shall* appears inconsistently. On a photocopy, highlight every *shall*, as well as every other verb or verb phrase that seems to impose a requirement—such as *must*, *will*, *is obligated to*, *agrees to*, *undertakes to*, and *has the responsibility to*. If you're part of a writing group or class, bring a highlighted copy for each colleague. Be prepared to discuss (1) how serious the inconsistencies are, (2) how you think they might have come about, and (3) how easy or difficult you think it would be to cure the problem in your document.

§ 36. Don't use provisos.

Legal-drafting authorities have long warned against using *provided that*.¹ The phrase has three serious problems: (1) its meaning is often unclear, since it can create a condition, an exception, or an add-on; (2) its reach is often unclear, especially in a long sentence; and (3) it makes your sentence sprawl and creates more margin-to-margin text. You're better off never using the phrase. You can always find a clearer wording.

Since *provided that* has as many as three meanings, the phrase is com-

¹ § 36 1. See, e.g., Thomas R. Haggard, *Legal Drafting in a Nutshell* 129–31 (1996); G.C. Thornton, *Legislative Drafting* 79–81 (4th ed. 1996); Bryan A. Garner, *A Dictionary of Modern Legal Usage* 710 (2d ed. 1995); Barbara Child, *Drafting Legal Documents* 322 (2d ed. 1992); Michele M. Asprey, *Plain Language for Lawyers* 107–09 (1991); E.L. Piesse, *The Elements of Drafting* 67–71 (J.K. Aitken ed., 7th ed. 1987); Reed Dickerson, *The Fundamentals of Legal Drafting* § 6.9, at 128–29 (2d ed. 1986); Robert C. Dick, *Legal Drafting* 92–100 (2d ed. 1985); John A. Bell, *Prose of Law: Congress as a Stylist of Statutory English* 10–12 (1981); Reed Dickerson, *Materials on Legal Drafting* 194 (1981); Elmer A. Driedger, *The Composition of Legislation* 86, 110–20 (1956).

monly ambiguous.² It has been said to be equivalent to *if*,³ *except*,⁴ and *also*.⁵

But that's only the beginning of the problem. Another frequent source of litigation arises over what the phrase modifies. Does it go back ten words? Twenty? A hundred? That depends on how long the sentence is. Believe it or not, there's a canon of construction about provisos, and the test is anything but clear: a proviso modifies only the immediately preceding language (whatever that is),⁶ but it may be held to reach back still further to effectuate the drafters' manifest intention.⁷ This type of guidance is of little practical value.

Finally, there's the problem of the blocklike appearance that provisos commonly create. You can double or even triple the length of a sentence with a couple of ill-placed provisos. Drafters frequently do this.

Let's look at a passage that illustrates all three problems. The first two words in the passage mean *if*, but after that the sense of the provisos gets more confusing:

Provided that the Issuing Bank or Escrow Agent has received an Inspection Report, the Purchase Price will be released upon the earliest occurrence of one of the following: (i) receipt by the Escrow Agent or the Issuing Bank of a letter from the Buyer, the Buyer's freight forwarder, if any, or the Buyer's shipper certifying that the Glenn Mill is loaded on one or more cargo vessels and in transit to Brazil; or (ii) the expiration of a period of one hundred twenty (120) calendar days following the Delivery Date; *provided, however, that* any events or circumstances beyond Buyer's reasonable control which prevent the disassembly, packing or shipment of the Used Steel Mill and/or Incomplete Mill, including both events of force majeure and causes imputable to Seller, shall extend the aforementioned period for the same number of days that such event or circumstance persists, and *provided, further, that* if such a period should be extended by such events or circumstances more

2. 2 Emory Washburn, *A Treatise on the American Law of Real Property* 26 (5th ed. 1887) ("The word 'proviso' or 'provided,' itself, may sometimes be taken as a condition, sometimes as a limitation, and sometimes as a covenant.").

3. See, e.g., *Barbara Oil Co. v. Patrick Petroleum Co.*, 566 P.2d 389, 392 (Kan. Ct. App. 1977) ("A proviso in a contract creates a condition . . .").

4. See, e.g., *Bounds v. State Workmen's Compensation Comm'r*, 172 S.E.2d 379, 383 (W. Va. 1970) ("[T]he statute, by the proviso, creates an exception . . .").

5. See, e.g., *Knight v. Chicago Corp.*, 188 S.W.2d 564, 567 (Tex. 1945) ("[A] proviso in statutes, contracts, or wills not infrequently introduces new or independent matter . . .").

6. See, e.g., *Grupo Protexa, S.A. v. All Am. Marine Slip*, 954 F.2d 130, 140 (3d Cir. 1992) ("[T]he language [in a proviso] qualifies the duty imposed by the language preceding the proviso . . ."); *Hospital Ass'n v. Axelrod*, 565 N.Y.S.2d 884, 886 (App. Div.) ("[G]enerally, a proviso limits the clause or terms immediately preceding it."); *appeal denied*, 577 N.E.2d 1059 (N.Y. 1991); *Schneider v. Forcier*, 406 P.2d 935, 938 (Wash. 1965) (en banc) ("Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent. Thus a proviso is construed to apply to the provision or clause immediately preceding it."); *Essex v. Washington*, 176 P.2d 476, 481 (Okla. 1946) ("[A proviso] qualifies and restricts that which immediately precedes it.").

7. See, e.g., *Hill v. Board of Educ.*, 944 P.2d 930, 332 (Okla. 1997) ("[A] proviso need not be confined to the immediately preceding subject where it clearly appears to have been intended to apply to some other matter."); *Sanzone v. Board of Police Comm'rs*, 592 A.2d 912, 919 (Conn. 1991) ("While sometimes a proviso is said to limit only the language immediately preceding it, the better rule is that the proviso limits the entire section or, as the case may be, subsection within which it is incorporated.").

than one hundred eighty (180) calendar days beyond the Delivery Date, either party may rescind this Agreement by written notice to the other, with a copy to the Escrow Agent or the Issuing Bank in accordance with section 11, hereof, whereupon the portion of the Purchase Price being held in the Escrow Account will be released to the Buyer or the letter of credit will be canceled, as the case may be, and title to and possession of the Glenn Mill will revert to Seller without the need for further action.

In fact, the middle proviso creates an exception, and the third (as you might have recognized) creates what lawyers call a “condition subsequent” to the exception. But then there’s the question of what the second proviso modifies: does it go back to the beginning of the sentence, or only to (i) and (ii), or only to (ii)? If you took the time to puzzle it out, you’d finally conclude that it modifies only (ii), which is the only preceding language that mentions a period of time. Finally, did you notice how unappealing the long paragraph is?

If you eliminate the provisos and use subparagraphs (see § 34), the ambiguities are removed. Equally important, the passage becomes much more readable:

If the Issuing Bank or Escrow Agent receives an Inspection Report, the Purchase Price must be released upon the earlier of:

- (A) the date when the Escrow Agent or the Issuing Bank receives a letter, from either Buyer or Buyer’s freight forwarder or shipper, certifying that the Glenn Mill is loaded on one or more cargo vessels and is in transit to Brazil; or
- (B) 120 days past the Delivery Date, with the following qualifications:
 - (1) this 120-day period will be extended for as long as any event or circumstance beyond Buyer’s reasonable control—including force majeure and causes imputable to Seller—prevents disassembling, packing, or shipping the Used Steel Mill or Incomplete Mill;
 - (2) if, under (1), the period is extended for more than 180 days beyond the Delivery Date, either party may rescind this Agreement by giving written notice to the other and by forwarding a copy to the Escrow Agent or the Issuing Bank, in accordance with section 11; and
 - (3) if either party rescinds under (2), the portion of the Purchase Price held in the Escrow Account will be released to Buyer or the letter of credit canceled; title to and possession of the Glenn Mill will then automatically revert to Seller.

And according to the system for computing average sentence length (again, see the beginning of § 34), the average in that particular passage is now down to 33 words—as opposed to the 250-word sentence in the original.

You’ll see the same phenomenon again and again: you can always improve on a proviso. Here are three more examples:

- Neither party may assign this Agreement without the prior written consent of the other party; *provided, however, that* Publisher may assign its rights and obligations under this Agreement without the

prior written consent of Author to any person or entity that acquires all or substantially all of the business or assets of Publisher.

- If Pantheon’s annual requirements for aluminum closure sheet fall below the 9-million pound minimum, Pantheon will purchase and Alu-Steel will supply all of Pantheon’s volume requirements; *provided, however, that* Pantheon may have reasonable trial quantities supplied by an alternate source.
- If in the absence of a protective order Bryson is nonetheless compelled by court order to disclose protected information, Bryson may disclose it without liability hereunder; *provided, however, that* Bryson gives Pantheon written notice of the information to be disclosed as far in advance of its disclosure as practicable and that Bryson use its best efforts to obtain assurances that the protected information will be accorded confidential treatment; and *provided further, that* Bryson will furnish only that portion of the protected information that is legally required.

The first two examples are easily remedied by relying on *But* as a sentence starter—a perfectly acceptable and even desirable method of beginning a sentence (see § 6):

- Neither party may assign this Agreement without the prior written consent of the other party. But without the prior written consent of Author, Publisher may assign its rights and obligations under this Agreement to any person or entity that acquires all or substantially all of Publisher’s business or assets.
- If Pantheon’s annual requirements for aluminum closure sheet fall below the 9-million-pound minimum, Pantheon will purchase and Alu-Steel will supply all of Pantheon’s volume requirements. But Pantheon may have reasonable trial quantities supplied by an alternate source.

A grammatically acceptable but less appealing method would be to start those revised sentences with *However*.⁸

The third example requires only slightly more ingenuity to improve the wording:

- If in the absence of a protective order Bryson is nonetheless compelled by court order to disclose protected information, Bryson may disclose it without liability if:
 - (A) Bryson gives Pantheon written notice of the information to be disclosed as far in advance of its disclosure as practicable;
 - (B) Bryson uses best efforts to obtain assurances that the protected information will be accorded confidential treatment; and

8. See William Strunk, Jr. & E.B. White, *The Elements of Style* (4th ed. 1999); Bryan A. Garner, *A Dictionary of Modern American Usage* 342–43 (1998); Sheridan Baker, *The Complete Stylist* 55–56 (2d ed. 1972).

- (C) Bryson furnishes only the portion of the protected information that is legally required.

Notice how the revision makes it clear that there are three requirements with which Bryson must comply. That wasn't as clear in the original.

By the way, relatively few transactional lawyers have ever heard the chorus of warnings about provisos. Long-standing members of the bar, having practiced for 25 years or more, often use provisos throughout their work. You might well ask how this is possible if the principle about avoiding them is so well established. The answer is that, even despite recent improvements, legal drafting has long been neglected in American law schools. And the literature on legal drafting is little known. You'll find that most transactional lawyers can't name even one book on the subject. So it's hardly surprising that even the most basic principles of good drafting are routinely flouted. Only in the past few years have law schools begun to correct this problem by offering more drafting courses.

Exercises

Basic

Revise the following passages to eliminate the provisos:

- The quantity of product whose delivery or acceptance is excused by force majeure will be deducted without liability from the quantity otherwise subject to delivery or acceptance; *provided, however, that* in no event will Buyer be relieved of the obligation to pay in full for product previously delivered.
- Contractor will be reimbursed for travel and subsistence expenses actually and necessarily incurred by Contractor in performing this Contract in an amount not to exceed \$2,000; *provided that* Contractor will be reimbursed for these expenses in the same manner and in no greater amount than is provided in the current Commissioner's Plan.
- The Borrower may, at any time and from time to time, prepay the Loans in whole or in part, without premium or penalty, upon at least one business day's notice to the Lender, specifying the date and the amount of the prepayment; *provided, however, that* each such prepayment must be accompanied by the payment of all accrued but unpaid interest on the amount prepaid to the date of the prepayment.

Intermediate

Revise the following passages to eliminate the provisos:

- If Seller's production of the product is stopped or disrupted by an event of force majeure, Seller must allocate its available supplies of the product to Buyer based upon the same percentage of Seller's preceding year's shipments of products to Buyer in relation to Seller's total shipments for the product, *provided, however, that* to the extent that Seller does not need any tonnage that is available in excess of the allocation of products to Buyer, it must make that tonnage available to Buyer.
- This Agreement will terminate upon the termination of the Merger Agreement under § 6.1 or two years from the effective date of this Agreement, whichever occurs earlier; *provided that* if the Merger Agreement is terminated under § 6.1(d), 6.1(g), or 6.1(h) of that agreement and at the time of termination there has been an acquisition proposal as described in § 14 of that agreement, then this Agreement will not termi-

nate until four months after the termination of the Merger Agreement or payment to the parent company of a termination fee under § 6.2, whichever occurs earlier.

- When the Lease term expires, if Renton has fully complied with all its obligations under the Lease, Renton will be entitled to a 20% interest in the profits of Jamie Ridge in the form of a nonmanaging membership interest, and the right to lease or buy for nominal consideration approximately 1.6 acres, in an area designated by Jamie Ridge, for the purpose of operating a garden nursery, *provided that* any such lease or sale would be contingent upon the nursery's purpose being permitted under all applicable laws, and *provided further that* the area designated for the nursery would be burdened by a restrictive covenant prohibiting any other use thereof.

Advanced

In a federal statute or regulation, find a passage containing at least two provisos. Rewrite the passage to eliminate the provisos and otherwise improve the style. If you're part of a writing group or class, bring a copy of the before-and-after versions for each colleague.

§ 37. Replace *and/or* wherever it appears.

With experience you'll find that you don't need *and/or*. But more than that, you'll find that *and/or* can be positively dangerous.

About half the time, *and/or* really means *or*; about half the time, it means *and*. All you have to do is examine the sentence closely and decide what you really mean. If a sign says, "No food or drink allowed," it certainly doesn't suggest that you are allowed to have both. And if a sign says, "Lawyers and law students are not allowed beyond this point," even though the message is bizarre it doesn't suggest that a lawyer may proceed alone.

But let's look at real sentences from transactional documents. In the following examples, *and/or* means *or*:

- Licensee provides no warranty as to the nature, accuracy, *and/or* [read *or*] continued access to the Internet images provided under this Agreement.
- The Foundation will promptly furnish Sponsor with a disclosure of all intellectual property conceived *and/or* [read *or*] reduced to practice during the project period.
- Each party will inform the other if it becomes aware of the infringement by a third party under any claim of a patent that issues on joint inventions *and/or* [read *or*] sole inventions. If litigation occurs under any joint invention *and/or* [read *or*] sole invention, and both parties are necessary parties to the litigation, then each party will pay its own costs.

Here, though, it means *and*:

- All applicable state and federal taxes will apply to cash awards received *and/or* [read *and*] options exercised by ZBZ.
- Licensee agreesto indemnify Owner forany claims forbrokerage commissions *and/or* [read *and*] finder'sfees made by any real-estate broker for a commission, finder's fee, or other compensation as a result of the License.