COLLABORATIVE INTENT

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Why do parties—even sophisticated ones—draft contracts that are vague or incomplete? Many others have tackled this question, but this Article argues that there is an overlooked, common, and powerful reason for contractual gaps. Using original interviews with dealmakers, it introduces a theory of "collaborative intent" to show that the bureaucratic deal-building process within companies can help explain why contracts are incomplete, vague, and otherwise seemingly irrational. The institutional details of dealmaking are important but understudied, and have wide-ranging implications for contract theory, design, and interpretation.

This Article makes three contributions to the literature. First, using original interviews with in-house dealmakers, it provides the literature's first account of how deals are made within companies. Both economists and legal scholars have tackled the puzzle of incomplete contracting, but leading explanations overlook the critical influence of companies' internal deal-building process. Unlike individuals who enter into contracts, sophisticated business parties do not have

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monolithic intent. Instead, even before taking a seat at the negotiation table, business parties engage in a complex, internal bargaining process that requires many intra-corporate constituencies to weigh in and sign off on the deal. The result is that sophisticated business parties bring multiple agendas to the negotiation table, and those agendas are reflected in the contract. Second, collaboration complicates intent, especially for sophisticated parties. Rather than being the result of rational, considered contract design, contractual gaps may be mere byproducts of the contract-shepherding process within the firm. Finally, this Article offers practical guidance to courts and contract designers about the overlooked and rampant intra-corporate bargaining and pork-barreling process. It helps them account for collaborative intent in ex ante contract design and ex post contract enforcement.

INTRODUCTION

Four weeks before Halloween in 2018, a Delaware Chancery Court decision spooked the corporate world. In an unprecedented move, the court released German pharmaceutical giant Fresenius from its $4.75 billion contract to buy U.S. generic drug manufacturer Akorn based on a contract term called the material adverse change clause.[1] The decision in *Akorn, Inc. v. Fresenius Kabi AG* was the first time Delaware courts had found that a company triggered a material adverse change clause, and it sparked a storm of anxiety and commentary.[2]

In every merger and acquisition ("M&A") deal, there is a material adverse change provision: a long-winded, heavily negotiated provision choked with exceptions and caveats. Material adverse change provisions almost always say the same thing: that if something huge and unexpected happens between the contract's signing and the deal's closing, one or both parties can back out of the deal.[3] And, perhaps most surprisingly, despite the long negotiations and dense legalese, material adverse change provisions are vague.[4]

[1] Akorn, Inc. v. Fresenius Kabi AG, No. CV 2018-0300, 2018 WL 4719347 (Del. Ch. Oct. 1, 2018), aff'd, 198 A.3d 724 (Del. 2018).

[2] Many major firms issued client alerts, immediately digesting the landmark case for their clients. See, e.g., David Leinwand, James E. Langston & Mark E. McDonald, *Akorn v. Fresenius*: A MAC in Delaware, Cleary Gottlieb Steen & Hamilton LLP (Oct. 11, 2018), https://www.clearymawatch.com/2018/10/akorn-v-fresenius-mac-delaware [https://perma.cc/43KW-C54E]; Chris Gorman & Lisa Richards, *Akorn v. Fresenius*: Important Practical Lessons from First-Ever Material Adverse Effect, Fenwick & West LLP (Oct. 24, 2018), https://www.fenwick.com/publications/pages/akorn-v-fresenius-important-practical-lessons-from-first-ever-material-adverse-effect.aspx [https://perma.cc/9KPX-75MZ]; Peter A. Atkins & Edward B. Micheletti, 'Reasonable Efforts' Clauses in Delaware: One Size Fits All, Unless . . ., Skadden, Arps, Slate, Meagher & Flom LLP (Nov. 1, 2018), https://www.skadden.com/insights/publications/2018/10/reasonable-efforts-clauses-in-delaware [https://perma.cc/JR7Z-FYAP]; Grant J. Esposito, David J. Fioccola & Robert W. May, Delaware Court of Chancery Finds a Material Adverse Event and Excuses Buyer from Obligation to Close in *Akorn v. Fresenius Kabi AG*, Morrison & Foerster LLP (Oct. 9, 2018), https://www.mofo.com/resources/insights/181009-delaware-material-adverse-event.html [https://perma.cc/FE72-NR7Q].

[3] Albert Choi & George Triantis, Strategic Vagueness in Contract Design: The Case of Corporate Acquisitions, 119 Yale L.J. 848, 854 (2010) [hereinafter Choi & Triantis, Strategic Vagueness] (defining a material adverse change clause in a contract as one that "permit[s] the buyer to avoid the closing of a deal if a material change has occurred in the financial condition, assets, liabilities, business, or operations of the target firm").

[4] Id. at 853 (noting that material adverse change clauses are vague, but "among the most heavily negotiated nonprice terms").

Vague provisions like these are common but surprising. In M&A contracts, for example, parties routinely haggle over whether they will use "best efforts," "commercially reasonable best efforts," or "reasonable best efforts" to accomplish certain tasks—and each of these standards will be left unspecified and unquantified.[5] In debt contracts, borrowers promise to let lenders conduct "routine" inspections, without specifying what is routine.[6] In just about any corporate contract, parties promise "material" compliance or compliance that does not rise to a "material adverse effect," again without specifying what those thresholds might mean.[7] In each of these circumstances, sophisticated parties, who have both the technical sophistication and financial means to draft specific, complete provisions, choose instead to embrace vague, incomplete ones.

The persistence of vague provisions, incomplete contracts, and other such contractual oddities has long plagued both legal scholars and economists—and neither literature has a shortage of explanations. Economist and Nobel Prize laureate Oliver Hart famously notes that contracts are necessarily incomplete: there are no parties, no circumstances, where every contingency can be thought of and thought

[5] See Scot Baker & Albert Choi, Contract's Role in Relational Contract, 101 Va. L. Rev. 559, 565 (2015) (describing the common "best efforts" provisions as "a fault-based and open-ended standard"); Anthony J. Casey & Anthony Niblett, Self-Driving Contracts, 43 J. Corp. L. 1, 8 (2017) ("[Parties can choose to] use a vague standard that also requires a court to fill in the details after the fact. This could be a clause that requires something like 'reasonable efforts,' 'best efforts,' or 'commercially reasonable efforts.'"); Victor P. Goldberg, In Search of Best Efforts: Reinterpreting *Bloor v. Falstaff*, 44 St. Louis L. Rev. 1465, 1465 (2000) ("When contracting parties cannot quite define their obligations, they often resort to placeholder language, like 'best efforts.'"); Robert E. Scott, Contract Design and the Shading Problem, 99 Marq. L. Rev. 1, 20 (2015) ("[I]n the past fifty years, parties have increasingly inserted vague terms such as 'best efforts,' reasonable best efforts,' or 'commercially reasonable best efforts' as modifiers that are combined with specific of precise performance obligations under the contract."). The contracts law case *Bloor v. Falstaff*, 601 F.2d 609 (2d Cir. 1979), is another famous case about best efforts clauses.

[6] In *A. Gay Jenson Farms Co. v. Cargill*, 309 N.W.2d 285 (Minn. 1981), the well-known agency law case, for example, large international conglomerate Cargill lent money to a small Minnesota grain elevator operator, in part on the condition that Cargill could conduct routine inspections of the grain elevator. The intrusive nature of the inspections became one of the reasons that the grain elevator operator's other creditors later sued Cargill, arguing that the grain elevator operator was an agent of Cargill and that Cargill should be liable for the operator's debts. Id. at 290–91.

[7] Robert Malionek & Jon Weichselbaum, Five Keys to Analyzing a Material Adverse Effect, N.Y.L.J. (Mar. 6, 2019), https://www.lw.com/thoughtLeadership/five-keys-analyzing-material-adverse-effect-ny-law-journal [https://perma.cc/TM95-FQKH] (noting that "[m]ateriality is both qualitative and quantitative" and that in M&A contracts, representations can be made "that reasonably would be expected to result in [a material adverse change]").

out ex ante.[8] Many scholars have argued convincingly that vagueness in contracts—especially in contracts between sophisticated business parties—is intentional and rational: provisions that are rarely litigated but expensive to negotiate, such as material adverse effect provisions, are particularly well-suited to vagueness.[9] Still others have argued that contracts do not need to be complete or specific. Community and industry norms can and do fill the gap where contracts are vague—and sometimes even when contracts do not even exist.[10] And, in those cases, it is the

[8] See Oliver Hart, The Nobel Prize, https://www.nobelprize.org/prizes/economic-sciences/2016/hart/facts/ [https://perma.cc/E6MG-HZY4] (last visited Nov. 10, 2021) ("In the mid-1980s, [Hart] contributed to the theory of incomplete contracts. . . . These analyses have been significant for, among other things, governance of companies and the design of laws and institutions."); Oliver Hart & John Moore, Foundations of Incomplete Contracts, 66 Rev. Econ. Stud. 115 (1999) [hereinafter Hart & Moore, Foundations of Incomplete Contracts] (developing a model for the idea that contracts are incomplete); Oliver D. Hart, Incomplete Contracts and the Theory of the Firm, 4 J.L. Econ. & Org. 119 (1988); Oliver Hart, Dep't of Econ., Harvard Univ., Incomplete Contracts and Control, Nobel Prize Lecture 372–73 (Dec. 8. 2016), https://www.nobelprize.org/uploads/2018/06/hart-lecture.pdf [https://perma.cc/7TKE-49TD] [hereinafter Hart, Incomplete Contracts & Control] (noting that, although economists spent many decades working on questions involving complete contracts, "[a]ctual contracts are not like this, as lawyers have recognized for some time. They are poorly worded, ambiguous, and leave out important things. They are incomplete.").

[9] Choi & Triantis, Strategic Vagueness, supra note 3, at 852–53, 855 (arguing that parties can use vague contract provisions efficiently—for example, material adverse change clauses in acquisition agreements may remain vague because they are rarely litigated); Robert E. Scott & George G. Triantis, Anticipating Litigation in Contract Design, 115 Yale L.J. 814, 818–22 (2006) [hereinafter Scott & Triantis, Anticipating Litigation] (examining the efficiency of investment in the design and enforcement phases of the contracting process and arguing that parties can lower overall contracting costs by using vague contract terms ex ante and shifting investment to the ex post enforcement phase); Robert E. Scott & George G. Triantis, Incomplete Contracts and the Theory of Contract Design, 56 Case W. Res. L. Rev. 187, 195–96 (2005) (considering the role of litigation in motivating contract design).

[10] See Ronald J. Gilson, Charles Sabel & Robert E. Scott, Braiding: The Interaction of Formal and Informal Contracting in Theory, Practice, and Doctrine, 110 Colum. L. Rev. 1377, 1398–99 (2010) [hereinafter Gilson et al., Braiding] (discussing the "rivalry" between formal and informal enforcement for contracts and noting that the two can substitute for each other or complement each other); see also Lisa Bernstein, Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry, 21 J. Legal Stud. 115, 121–24 (1992) [hereinafter Bernstein, Opting Out] (describing trade association enforcement of contractual breaches); Lisa Bernstein, Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions, 99 Mich. L. Rev. 1724, 1725 (2001) (describing the cotton industry's alternative system of enforcement to the typical legal system).

threat of informal sanctions, such as loss of reputation, that curbs bad behavior, even without a legally binding contract.[11]

In many contexts, these explanations are convincing. Consider a simple apartment lease signed between one landlord and one tenant. Rather than spending a lot of time up-front discussing the specific condition in which the tenant needs to leave the apartment at move-out, the parties might simply decide to agree to the vague provision that the tenant needs to leave the apartment "clean." The law and economics view explains this decision well: in most cases, the tenant leaves the place clean enough, and the parties will never have to haggle over the details upon move-out. Relational contracting theory also explains the vagueness well: the landlord doesn't need to be too specific about cleanliness because the tenant relies on the landlord to give her a good reference for her next apartment rental.

But while existing explanations work well for simple, two-party contracts, and do some work in explaining sophisticated-party contracting, they fall short.[12] Certainly cost-benefit analysis and informal

[11] Informal sanctions are particularly effective in small, tight-knit communities where parties have many points of contact. A robust literature has documented the role of norms and informal sanctions in a variety of interesting settings. See Robert C. Ellickson, Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County, 38 Stan. L. Rev. 623, 628, 677 (1986) [hereinafter Ellickson, Of Coase and Cattle] (describing how rural cattle ranchers in Shasta County, California, abide by norms rather than rules and how animal trespass disputes are settled by self-help rather than formal legal enforcement mechanisms); Robert C. Ellickson, A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry, 5 J.L. Econ. & Org. 83, 84–85 (1989) (presenting evidence of informal enforcement—norms—overtaking formal enforcement in the whaling industry); Peter T. Leeson, An-*arrgh*-chy: The Law and Economics of Pirate Organization, 115 J. Pol. Econ. 1049, 1051 (2007) (describing the extralegal systems that pirates developed to provide checks on captain predation and to "create piratical law and order"); Bernstein, Opting Out, supra note 10, at 124 (describing how a diamond-merchant trade association in New York City helps to enforce contracts); Gillian K. Hadfield & Iva Bozovic, Scaffolding: Using Formal Contracts to Support Informal Relations in Support of Innovation, 2016 Wis. L. Rev. 981, 987, 1017 (describing the way in which commercial contracting parties across a variety of industries use a mix of formal and informal contracts to support their business relationships); Lisa Bernstein, Beyond Relational Contracts: Social Capital and Network Governance in Procurement Contracts, 7 J. Legal Analysis 561, 562 (2015) (describing how original equipment manufacturers in the Midwest have used a mix of formal contracts, relational contracts, and other tools to build and support their business relationships); Jonathan M. Barnett, Hollywood Deals: Soft Contracts for Hard Markets, 64 Duke L.J. 605, 607 (2015) (discussing the use of non-binding agreements—or "soft contracts"—in modern Hollywood filmmaking).

[12] In previous work, for example, I explored the puzzle of term sheets in M&A contracting. Term sheets—short, nonbinding precursors to a full-fledged M&A contract—are not contracts and are not legally binding or enforceable. Parties to term sheets do not operate in the tight-

sanctions account for *some* contractual oddities—but not all. This Article offers a friendly addendum to those pathbreaking explanations: collaborative intent.

At its core, collaborative intent relies on a simple idea: businesses are not monoliths. They contain many divisions, departments, operational groups, and other constituencies. This idea is well-understood in the literature—even Ronald Coase's seminal work on the boundary of the firm assumed that companies would contain multiple different groups within it.[13] Collaborative intent takes this idea a step further: it explicitly recognizes that each module within a company has its own purpose and, correspondingly, its own incentives, goals, limitations, and preferences. Internal constituencies often have a chance to veto—or at least weigh in on—both the substance and form of a proposed deal. By the time a company brings its intent to the negotiating table, that intent reflects the result of a consensus-building process within the company—in other words, the company brings what this Article calls its collaborative intent.

That collaborative intent in turn helps to account for many contractual oddities. Contracts that result from this kind of institutional collaboration are not necessarily rational, intentional, or carefully considered. Instead, they are amalgamations of many preferences within each deal party and result from the consensus-building process of getting the deal through a bureaucracy.

This Article provides a layered account of collaborative intent and its impact on deals and contracts, and proceeds as follows. Part I sets the stage. It shows how current contract theory does not account for the dealmaking process within firms. Part II presents the theory and evidence of collaborative intent. It uses two dozen original interviews with in-house dealmakers to show how the process of building consensus for a deal within the firm impacts contractual form and structure. Interview participants brought experience from a variety of industries, ranging from

knit communities where informal sanctions are known to work. Nonetheless, once parties sign them, they behave as though bonded. Why do nonbinding term sheets have binding power? See Cathy Hwang, Deal Momentum, 65 UCLA L. Rev. 376, 380 (2018) (describing how deal lawyers use preliminary agreements in M&A deals); Cathy Hwang, Faux Contracts, 105 Va. L. Rev. 1025, 1056 (2019) [hereinafter, Hwang, Faux Contracts] (describing how M&A deals create small relational ecosystems in which both the contracting parties and their agents are incentivized to engage in consummate, rather than perfunctory, performance).

13 Ronald H. Coase, The Nature of the Firm, 16 Economica 386, 390 (1937) (posing and discussing the "boundaries of the firm" question: When should individuals be expected to form firms, and when should they be expected to cooperate through contract?).

technology to hospitality to gaming, and uniformly reported that dealmaking within the firm is a collaborative exercise: it requires vote-whipping, pork-barreling, and balancing the needs of various constituencies into a coherent but multifaceted "intent." Part III turns to implications. Existing literature overlooks the institutional details that impact contract design. Collaborative intent injects important and overlooked nuance and helps to build out a nuanced account of dealmaking that can help shape contract theory, enforcement, and design.

I. CONTRACTUAL ODDITIES AND THE LIMITS OF RATIONALITY

Contracts, even those drafted by sophisticated parties, are riddled with holes: they are incomplete,[14] vague,[15] fragmented,[16] or otherwise off-kilter. But sophisticated parties have both the financial means and technical sophistication to draft better contracts. Why don't they?

In later Parts, this Article introduces a new theory of collaborative intent to explain common but odd contracting behavior. This Part sets the stage. In particular, it highlights how existing explanations for contractual oddities overlook the institutional details of dealmaking. Instead, these theories implicitly assume that sophisticated business parties are monolithic. But modern corporations are sprawling, tentacular, and hard to wrangle—and when existing theories ignore that reality, they fail to capture one of the major reasons for odd contracting.

The remainder of this Part proceeds as follows. Section I.A highlights some of the most common oddities in contracts between sophisticated parties. Chief among them are incompleteness and vagueness. Section I.B presents some of the leading law and economics rationales for these oddities. Some focus on cost: contract designers can sometimes reduce overall contracting costs by using vague terms, so they do, after engaging in a rational cost-benefit analysis. Others focus on renegotiation: contracts might be vague because they are mere reference points for future

[14] See Hart & Moore, Foundations of Incomplete Contracts, supra note 8, at 115; Hart, Incomplete Contracts & Control, supra note 8, at 372–73.

[15] See Choi & Triantis, Strategic Vagueness, supra note 3, at 852–53 (describing vagueness in sophisticated party contracting); Hart, Incomplete Contracts & Control, supra note 8, at 372–73 (noting that contracts are often ambiguous).

[16] See Cathy Hwang, Unbundled Bargains: Multi-Agreement Dealmaking in Complex Mergers and Acquisitions, 164 U. Pa. L. Rev. 1403, 1403 (2016) [hereinafter Hwang, Unbundled Bargains] (describing how parties use a set of agreements and contracts to document one unified business transaction).

negotiation. Section I.C introduces the relational contracting explanation. In short, relational contracting theory suggests that, in many circumstances, contract designers can leave contracts incomplete or vague because norms or informal sanctions fill the gap. Neither of these explanations, however, captures collaborative intent—the bureaucratic process of deal building within the firm that ushers many of these oddities into contracts.

A. Contractual Incompleteness

A complete contract is one in which every possible contingency has been thought of and written into the contract.[17] For some time, economists modeled contract theory with the assumption that contracts are complete.[18]

But as economist Oliver Hart noted in his prize lecture for the Nobel Prize in 2014, "Actual contracts are not like this, as lawyers have realized for a long time. They are poorly worded, ambiguous, and leave out important things. They are incomplete."[19]

Incompleteness exists in many forms. The most obvious is when a provision is omitted in its entirety. But incompleteness can also arise from ambiguity. Consider an apartment lease.[20] On its face, the lease might look complete: it has a move-in date and a termination date, it has information about how much rent will cost, and it lists the tenants and the landlord. No essential provision is omitted. But many ambiguities remain. What does it mean for the place to be left "clean" upon move-out—should the carpet be vacuumed or steam-cleaned, or merely left free of debris? Suppose that the lease provides that the landlord will make repairs in a timely fashion, and a furnace breaks in the middle of winter. Is a week

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[17] Hart, Incomplete Contracts & Control, supra note 8, at 372 ("[A complete contract is one where] everything that can ever happen is written into the contract. There may be some incentive constraints arising from moral hazard or asymmetric information but there are no unanticipated contingencies.").

[18] Id. ("The formal literature to that point was all about complete contracts.").

[19] Id. at 372–73.

[20] New York City apartment leases provide good examples. In New York City, many landlords and tenants use standard-form apartment leases—there are also variations on these forms that cover rent-stabilized and rent-controlled apartments. Despite these leases being detailed and standardized, however, many gaps and vague provisions, such as provisions about the warranty of habitability, remain. See Curbed Staff, Tenants' Rights and the Standard Rental Lease, Curbed N.Y. (Mar. 29, 2012, 5:50 PM), https://ny.curbed.com/2012/3/29/10385732/tenants-rights-and-the-standard-rental-lease [https://perma.cc/AJ4L-GJQS] (discussing standard-form leases in New York City and tenants' rights under them).

"timely"? A day? What happens if the furnace breaks on Super Bowl Sunday, and it is hard to find a repair service—is the landlord obligated to provide a hotel room for the tenant? Does the meaning of "timely" change if the furnace breaks in the summer?

In many cases, it is impossible for parties to draft contracts that anticipate every contingency. In fact, contract law casebooks are filled with examples of parties who fail to anticipate something that later results in litigation. For example, does "chicken" mean juicy, young fryers or do tough, old stewing chickens suffice?[21] Or, did the parties mean that bales of cotton would arrive on this ship *Peerless*, or another ship also, ironically, named *Peerless*?[22] Because it is impossible to think of every contingency ahead of time, it is also impossible to draft a contract that delineates each party's responsibilities in the face of these contingencies.

Incompleteness is often inevitable even when sophisticated parties, advised by sophisticated counsel, enter a contract.[23] In complex mergers and acquisitions, for example, parties often engage in multi-stage contracting, agreeing to the parts of the contract that they can while saving a lot of unresolved issues for later iterations.[24] Parties might also break

[21] See Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116 (S.D.N.Y. 1960) (finding that the word "chicken" in a contract means both young frying chickens and tough, old stewing chickens).

[22] See Raffles v. Wichelhaus (1864) 159 Eng. Rep. 375; 2 H. & C. 906 (finding that based on mutual mistake, the parties did not agree on the same thing and that they did not therefore enter into a binding contract).

[23] In the deal between Akorn and Fresenius discussed *infra*, for instance, both parties were sophisticated, and each was advised by sophisticated counsel. Akorn was advised by New York firm Cravath, Swaine & Moore LLP. See Akorn, Inc. & Fresenius Kabi AG, Agreement and Plan of Merger (Apr. 24, 2017), https://www.sec.gov/Archives/edgar/data/3116/000095015717000499/ex2-1.htm [https://perma.cc/8XSD-H4CB]. Cravath—always named a top firm by law firm ranking site Vault—occupies an office building in Midtown Manhattan that lawyers often call "the Death Star." See David Lat, Lawyerly Lairs: Cravath Re-Ups at the Death Star, Above the L. (June 27, 2007), https://abovethelaw.com/2007/06/lawyerly-lairs-cravath-re-ups-at-the-death-star/ [https://perma.cc/8YBM-VFPG] (calling Cravath's Midtown office building "their Death Star"). Fresenius was advised by British firm Allen & Overy LLP. See Akorn, Inc. & Fresenius Kabi AG, Agreement and Plan of Merger (Apr. 24, 2017), https://www.sec.gov/Archives/edgar/data/3116/000095015717000499/ex2-1.htm [https://perma.cc/8XSD-H4CB]. Allen & Overy is one of a handful of London-headquartered firms dubbed "the Magic Circle." Brian Dalton, The Magic Circle vs. New York's Elite, Above the L. (Sept. 16, 2014), https://abovethelaw.com/2014/09/the-magic-circle-vs-new-yorks-elite/ [https://perma.cc/VJ2R-GKVG] (noting that British Magic Circle firms include Allen & Overy, Clifford Chance, Freshfields, and Linklaters).

[24] Albert H. Choi & George Triantis, Designing and Enforcing Preliminary Agreements, 98 Tex. L. Rev. 439, 440 (2020) [hereinafter Choi & Triantis, Enforcing Preliminary Agreements] (noting that sophisticated business parties often enter into contracts in multiple

one understanding up into multiple contracts so that, for example, employment specialists can negotiate those parts while tax specialists negotiate other parts.[25] The primary reason for each of these different types of modular contracting is the same: at various stages in the deal, those at the negotiating table are unable to come to complete agreement, so they punt parts of the deal to ancillary contracts or later contracts.

Vagueness is also a type of incompleteness. In general, anything can be written specifically or vaguely. A speed limit, for instance, can be a specific rule (forty-five miles per hour) or a vague standard (drive reasonably).[26] Contract terms are the same: they can be specific or vague, with vague terms sometimes inserted because parties cannot think of anything else to write,[27] and sometimes, as some scholars argue, because contract designers have chosen to deploy those terms on purpose.[28] In either case, however, the vagueness results in incompleteness—the contract *could have been* more specific and more complete, but for some reason, details were left unwritten.

This Article sets aside the many instances in which unanticipated contingencies contribute to contractual incompleteness. Instead, it focuses on instances in which it seems that parties *can* see the major issues that will come their way—but, rather than choosing to negotiate those areas of incompleteness ex ante, they seem happy to allow the contract to continue to be incomplete. Sections I.B and I.C discuss leading explanations for the existence of contractual incompleteness in the face of knowable contingencies.

stages); Alan Schwartz & Robert E. Scott, Precontractual Liability and Preliminary Agreements, 120 Harv. L. Rev. 661, 665–67 (2007) (describing the sequential or simultaneous nature of early-stage investments).

[25] Hwang, Unbundled Bargains, supra note 16, at 1418–23 (describing the division of labor between corporate generalists and specialist attorneys, and noting that "[m]any complex, technical, or regulatory pieces of an M&A deal, however, are both modular and assigned to specialists").

[26] Anthony Casey and Anthony Niblett have suggested—using speed limits as a specific example—that big data-driven micro-directives can, in the future, replace vague standards with specific rules that are tailored to each driver and road condition. See Casey & Niblett, supra note 5, at 7–8.

[27] See Goldberg, supra note 5, at 1465.

[28] See infra Section I.B.

B. Law and Economics Explanations

While some contractual oddities are unintentional, many are created on purpose—or so argue contract theorists who take a law and economics approach to contract law.

It is easy to imagine everyday examples. Imagine academic co-authors, one from a psychology department and the other from a law school. They might disagree about where to publish their work: the psychologist wants to publish in a scientific journal, and the law professor wants to publish in a law review. Instead of hashing out an agreement ahead of time about where to publish, they might first begin to collaborate, under the theory that they might very well find no result and therefore have nothing to publish. They are—quite rationally—deciding that they might as well not argue ex ante because it may all be for naught. Similarly, a soon-to-be-married couple might disagree about religious upbringing for their future children but choose to put off the question until they have children. After all, they might have no children, or perhaps one partner will convert to the other's religion by the time the question becomes relevant.

Many scholars have argued, convincingly, that this kind of contractual punting is also common in contracts between sophisticated business parties. In other words, contract designers sometimes write vague or incomplete contracts on purpose, and rationally so.[29]

The best way to understand this argument is to begin with Richard Posner's influential article on the cost of contracting.[30] In it, he describes overall contracting cost as the sum of front-end costs, back-end costs, and judicial error.[31] Front-end costs are relatively straightforward: they are the time and money the parties spend negotiating a contract up-front. Complex provisions with many contingencies are harder to draft, so they increase front-end costs. So too do very specific provisions, or provisions on which the parties' initial positions are very far apart. Back-end costs are a little trickier: they are the expected value of future litigation.[32] Any

[29] Claire Hill sums this view up succinctly: "Why can't smart, well-motivated lawyers do a better job? . . . [T]hey rationally do not try." Claire A. Hill, Bargaining in the Shadow of the Lawsuit: A Social Norms Theory of Incomplete Contracts, 34 Del. J. Corp. L. 191, 191 (2009) [hereinafter Hill, Bargaining in the Shadow of the Lawsuit].

[30] Richard A. Posner, The Law and Economics of Contract Interpretation, 83 Tex. L. Rev. 1581, 1583–84 (2005) (defining the cost of a contract as the ex ante negotiating and drafting costs, plus the probability of litigation multiplied by the sum of the parties' litigation costs, the judiciary's litigation costs, and judicial error costs).

[31] Id.

[32] Id.

deal lawyer can describe a moment when a client wants to do *X*, but the lawyer really thinks *Y* should be done—and so, the lawyer advises the client, "If you go with *X*, there's a 50% chance that you'll end up in litigation, which will cost a bundle." It is that expected value—that 50% chance multiplied by a bundle—that Posner is capturing in his back-end costs. And back-end costs increase in two ways: when the chance of litigation increases, or when the "bundle" of cost becomes a larger bundle of cost.[33]

From there, other scholars have shown that there is a relationship between front- and back-end contracting costs: increasing one can reduce the other. As Claire Hill notes, "Parties bargain in the shadow of the lawsuit as much as the law"—the cost of potential ex post litigation affects how much parties might negotiate ex ante.[34]

An article by Robert Scott and George Triantis explores that connection between front- and back-end costs.[35] They argue that parties can choose to draft provisions precisely (as rules) or vaguely (as standards). Rules are harder to draft ex ante, so they cost more up-front, but they reduce back-end costs: they are less likely to be litigated and less likely to rack up high fees even when they are litigated.[36] Standards are the opposite: they are easier and cheaper to draft ex ante, but push costs toward the back-end because their vagueness increases misunderstanding, litigation probability, and costs if litigation comes to pass.[37]

An article by Albert Choi and George Triantis explores the "strategic" part of this vagueness.[38] They note that, if a provision is unlikely to be litigated, then it might be rational for parties to keep it vague—after all, why spend a lot of time and money negotiating that provision to specificity if the parties are unlikely to disagree and litigate it?[39] They argue that their logic holds true even if the potential negative litigation outcome is very, very negative, as long as the probability of litigation is very, very small. Their prime example is a material adverse effect clause in an acquisition agreement: if triggered, the clause has catastrophic

[33] Id.

[34] Hill, Bargaining in the Shadow of the Lawsuit, supra note 29, at 192.

[35] Scott & Triantis, Anticipating Litigation, supra note 9.

[36] Id. at 836 ("[I]t is prohibitively costly to draft a contract that entails no back-end costs and creates no enforcement uncertainty.").

[37] Id. at 838.

[38] Choi & Triantis, Strategic Vagueness, supra note 3.

[39] Id. at 883 (suggesting that where litigation is unlikely, spending less time drafting the contract provision ex ante is a way to minimize overall contracting costs).

ramifications, and might cause a deal of any size to collapse. But until the 2018 decision in *Akorn, Inc. v. Fresenius Kabi AG*, a material adverse effect clause had never been triggered, so the probability of litigation is very, very low. As a result, Choi and Triantis argue, it makes perfect sense for a material adverse effect clause to remain extremely vague.[40] In other words, the parties might have the ability (and financial means) to make the material adverse effect clause more specific, and therefore to make the contract *more* complete (if not entirely complete). But they choose not to for rational, economic reasons.

There are other rational, strategic reasons for contracts to remain incomplete. Uncertainty is a major, and intuitive, reason. Like the co-authors or romantic couple mentioned above, many sophisticated contracting parties are unable to resolve, ex ante, the inherent uncertainties in their deal. As a result, they leave gaps that are meant to be filled in later.

In long-term commercial relationships, for example, it is common for suppliers and customers to enter into (at least) two agreements.[41] The first is a master agreement that describes the major terms and conditions of the deal, but that excludes price and quantity terms.[42] The second is a purchase order that specifies the price and quantity—the customer submits a purchase order when he needs the materials.[43] Together with the master agreement, it forms a complete contract.[44] The two-fold nature of the transaction allows parties to agree to what they can at the first stage (major terms and conditions), while punting to a later date the issues that are not yet able to be resolved (the price and quantity of the purchase).

In M&A, the same multi-stage transaction structure is also common. Early in an M&A deal, for example, parties often enter into a short, simple term sheet that includes non-binding business provisions and binding negotiation provisions.[45] The binding provisions are ones that the parties can agree to at that early stage: for example, the parties mutually promise

[40] Id.

[41] See Lisa Bernstein, Beyond Relational Contracts: Social Capital and Network Governance in Procurement Contracts, 7 J. Legal Analysis 561, 562, 566 (2015) (describing how original equipment manufacturers in the Midwest use a master supply agreement followed by a later purchase order that specifies quantity to create a binding contract).

[42] Id. at 566.

[43] Id.

[44] Id. (noting that the master agreements are "legally unenforceable until a purchase order specifying a quantity is sent and accepted").

[45] See supra note 12 and accompanying text (describing term sheets in M&A).

not to use the information they exchange during early due diligence to compete with each other, or agree not to poach each other's employees.[46] Many business provisions are left non-binding—essentially incomplete—because parties cannot agree to them early on. Parties write *something* down—a sticky place from which they can later engage in renegotiation—but allow themselves the flexibility to change their minds in the face of future events.

Beyond strategy and uncertainty, parties also sometimes choose to leave contracts incomplete because they expect to revisit them later. Oliver Hart and John Moore argue convincingly, for example, that contracts are not only a way for parties to write down their legally enforceable rights and obligations but also a way to "provide[] a reference point for the parties' trading relationship: more precisely for their feelings of entitlement."[47] Their argument relies on their differentiation between perfunctory and consummate performance—where the former is judicially observable and enforceable, and the latter is not. Parties provide consummate performance if they feel that they are getting what they are entitled to in a bargain and withhold consummate performance if they feel shortchanged. Hart and Moore argue that parties' feelings of entitlement are informed in part by what is written in the contract—that is, a contract is a "reference point" for how parties will behave. One way to think about their results is that even fairly complete contracts are incomplete because parties have a range of performance options: they can perform in a perfunctory manner, they can perform in a consummate manner, or they can perform somewhere in between.[48] And how they choose to perform is always subject to renegotiation—depending on the circumstances, the performance of the other party, and how the contract itself is written, parties might adjust their level of performance along that scale.

There is another, related reason that parties might choose to write vague contracts instead of negotiating to specificity: they wish to preserve

[46] See Hwang, Faux Contracts, supra note 12, at 1043 (noting that term sheets contain binding terms that "relate to the *process* of the deal—for example, parties often agree to binding exclusivity and confidentiality terms and to terms in which they agree not to solicit each other's employees for employment").

[47] Oliver Hart & John Moore, Contracts as Reference Points, 123 Q.J. Econ. 1, 2 (2008) [hereinafter Hart & Moore, Contracts as Reference Points] (noting that contracts define what parties feel they are entitled to in a trading relationship and the point from which they will begin later renegotiations).

[48] See id. at 3 (noting that a party might "withhold some part of consummate performance if he is shortchanged—we refer to this as 'shading' ").

flexibility in their own performance.[49] Any seasoned M&A lawyer has sat through a negotiation in which the parties negotiate, spiritedly, for levels of performance that sound identical to a casual observer. The buyer might promise to use "reasonable efforts" to secure financing for the deal, while the seller counters that the buyer must use "best efforts."[50] Parties might then throw around the oft-used but entirely ambiguous "commercially reasonable efforts,"[51] or, worse, the seemingly meaningless and rarely used "reasonable best efforts."[52] Promises qualified by these levels of performance have the danger described by Hart and Moore—the perhaps unwelcome opportunity for each party to shirk on its performance—but might rationally be inserted by a party, too, to allow itself *flexibility* in performance.

A simple example helps to clarify. Suppose that Taylor says to her roommate, Meredith, "I will walk the dog if you deal with the dishwasher." Meredith agrees. This vague provision provides an opportunity for Meredith to provide perfunctory performance (just opening the dishwasher when it is done cleaning the dishes, so it will stop beeping) or consummate performance (doing the same, but also emptying the dishwasher and restacking the clean dishes in the cabinet). Hart and Moore's argument is that the contract—Taylor asking, Meredith agreeing—provides a reference point for Meredith's performance. Meredith will provide consummate performance if she feels like she is getting her end of the bargain; that is, if Taylor walks the dog.

Suppose that, instead, Taylor had offered: "The dishwasher beeps incessantly when it's done. I'll walk the dog if you empty the dishwasher when it's done." Meredith might then decide to insert some vagueness into the contract in order to provide herself some flexibility. She might

[49] See Claire A. Hill, A Comment on Language and Norms in Complex Business Contracting, 77 Chi.-Kent L. Rev. 29, 55 (2001) (noting that contracts often set the stage, and enforcement ex post is flexible).

[50] See Joseph P. Rockers, Bethany P. Withers & Tucker DeVoe, Satisfying "Commercially Reasonable Efforts" / "Best Efforts" Clauses in Today's Environment, Goodwin (Mar. 31, 2020), https://www.goodwinlaw.com/publications/2020/03/03_31-satisfying-commercially-reasonable-efforts [https://perma.cc/Y5X4-LJTS].

[51] See, e.g., Williams Cos. v. Energy Transfer Equity, L.P., 159 A.3d 264, 271–73 (Del. 2017) (analyzing the oft-used "commercially reasonable efforts" standard for the first time in Delaware and providing some guidance as to the meaning of that standard).

[52] See, e.g., Hexion Specialty Chems., Inc. v. Huntsman Corp., 965 A.2d 715, 749 (Del. Ch. 2008) (holding that the not-often-used "reasonable best efforts" standard in the context of deal financing means taking acts "both commercially reasonable and advisable to enhance the likelihood of consummation of the financing").

reply, "Don't worry, I'll deal with the dishwasher." This allows Meredith to provide a range of acceptable performance: she can empty it, as Taylor requests, if she has time. But if something better comes up, Meredith can simply turn off the dishwasher to stop its beeping and still have fulfilled her end of the bargain.

In short, parties often have a hard time drafting complete contracts simply because it is hard to know how the future will unfold and what contingencies will come to pass. Nonetheless, many scholars argue that sophisticated parties often have the means to make contracts *more* complete—that is, more specific—but choose not to. A variety of completely rational reasons might account for this: cost-related strategy, uncertainty, or even intentionally trying to gain more flexibility in performance.

These explanations are often convincing—and no doubt accurate in many cases—but they do not tell the whole story. In particular, these explanations tend to assume an omniscient contract designer who makes decisions about contractual incompleteness rationally, strategically, and carefully—deciding, for instance, that it is best to leave this contract term vague because it may be renegotiated, or to leave that one vague because it is unlikely to be litigated. Evidence from original interviews presented in Part II, however, shows where these explanations fall short: namely, they overlook the fact that sophisticated business parties engaged in dealmaking tend *not* to delegate dealmaking authority to a single strong, rational executive.

C. Relational Contracting Explanations

Relational contracting theory also tries to explain why contracts are incomplete, vague, or otherwise wonky. But it too assumes a monolithic contract designer.

In this literature, no scholar is more influential than Stewart Macaulay, who famously began his seminal relational contracting paper by asking, "What good is contract law?"[53] Macaulay's argument, developed over a storied career, is simple: for the most part, contracts are not protected by formal sanctions.[54] Rather, "[r]elational sanctions and private

[53] Stewart Macaulay, Non-Contractual Relations in Business: A Preliminary Study, 28 Am. Socio. Rev. 55, 55 (1963).

[54] See Stewart Macaulay, Freedom from Contract: Solutions in Search of a Problem?, 2004 Wis. L. Rev. 777, 778 ("Many, and probably most, parties to contracts disputes do not litigate

governments do most of the work of protecting expectations and reliance."[55] In other words, when one party breaches a contract, often—or maybe even usually—its counterparty does not take it to court and seek formal enforcement. Rather, parties most often turn to *informal* enforcement—such as reputational sanctions—to punish the breaching party.

Since Macaulay opened the floodgates, numerous other scholars have documented the ways that parties—often in tight-knit, so-called "small-world" settings—rely on informal enforcement in their relationships. One notable example is Lisa Bernstein's classic study on diamond merchants. In it, Bernstein documents the fascinating, tight-knit world of Midtown Manhattan diamond merchants who rely on social and reputational bonds to enforce the decisions of their internal trade organization.[56] Bernstein and others have documented informal enforcement in a variety of other settings, including whaling, pirating (of the Jolly Roger variety, not of the intellectual property variety), cotton trading, Hollywood filmmaking, and more.[57]

In these settings, broadly speaking, informal enforcement can either provide an alternative to formal enforcement or complement formal enforcement.[58] Either way, the existence of informal sanctions provides yet another explanation for intentional incompleteness: parties can rely on norms and informal sanctions to fill in the gaps.[59]

The literature on informal sanctions is closely tied to that of norms: communities that are tight-knit enough to have strong norms are also those that can sanction, informally, those who fail to abide by them. A classic study by Robert Ellickson illustrates this. In his study, Ellickson traveled to the rural Northern California ranching community of Shasta County, where he noticed that individuals had multiple points of contact

or even threaten to do so. Some know that if they went to court, they would lose. However, many who might or almost certainly would win do not litigate.").

[55] Id. at 820.

[56] Lisa Bernstein, Opting Out, supra note 10, at 119–30.

[57] For a sample of some of the most intriguing articles in this vein, see sources cited *supra* notes 10–11.

[58] See Gilson et al., Braiding, supra note 10, at 1379–83.

[59] Kathryn Hendley's article on trust between trading companies in Russia in the 1990s presents a number of fascinating case studies that illustrate the importance of relationships in contracting. See Kathryn Hendley, Coping with Uncertainty: The Role of Contracts in Russian Industry During the Transition to the Market, 30 Nw. J. Int'l L. & Bus. 417, 419–20, 460 (2010).

with each other within the community.[60] This feature of the community facilitated the proliferation of norms so strong that they trumped law. For instance, state law allowed neighbors to seek formal enforcement for cattle trespass—but the ranchers of Shasta County overwhelmingly shunned formal enforcement and settled disputes informally, through self-help.[61]

Ranchers who violated the norm of informal dispute resolution could be punished—if not in some formal sense, then along some other dimension in which the neighbors had contact. As Ronald Gilson, Charles Sabel, and Robert Scott aptly put it: "In compact and homogeneous communities, . . . the community as a whole can sanction the breach of one member's obligation to another by ostracizing the malefactor, cutting off not just business ties but all the social benefits of belonging to the group."[62]

Norms and informal sanctions, then, can also help fill in the gap, allowing parties to leave their formal contracts incomplete. Consider, for example, the familiar world of new-attorney hiring. Every year, second-year law students at American law schools vie for "summer associate" jobs at "Big Law" firms in major cities, which will hopefully be converted into full-time employment after graduation.

When a law student accepts a summer associate position, she rarely signs a contract, discusses summer pay, or negotiates a permanent salary. At best, she might have a set of emails in which a partner of the firm "offers," and she "accepts," a summer job—but often that conversation will even be over the phone instead of in writing. Instead, key employment terms like summer pay and permanent pay are simply *understood*: young attorneys starting out at Big Law firms are paid slightly more than $200,000 in their first year.[63] The summer associate position pays at the same scale but pro-rated, and the student herself will pay for housing and transportation to the location. These ironclad norms

[60] Ellickson, Of Coase and Cattle, supra note 11, at 629, 675–76.

[61] Id. at 659–67, 671–85.

[62] Gilson et al., Braiding, supra note 10, at 1393–94 (citing Alan Schwartz & Robert E. Scott, Contract Theory and the Limits of Contract Law, 113 Yale L.J. 541, 557 (2003) [hereinafter Schwartz & Scott, Limits of Contract Law] (noting that in small, homogenous communities, "everything that happens soon becomes common knowledge, and boycotts of bad actors are easy to enforce")).

[63] See Caroline Spiezio, Willkie Goes to $205k as Big Law Salary Hikes Continue, Reuters (June 17, 2021, 4:01 PM), https://web.archive.org/web/20220329162013/https://www.reuters.com/legal/legalindustry/willkie-goes-205k-big-law-salary-hikes-continue-2021-06-17/.

take the place of a formal contract, and if a firm violates these norms—say, by paying less than what is expected—they will no doubt be shamed on Above the Law, an industry gossip website.[64] In other words, instead of having a complete formal contract, major law firms and future lawyers simply agree vaguely to future employment, leave the formal contract incomplete, and let norms fill in the gaps.

As in the situations described in Section I.B, intentional incompleteness that relies on norms and informal sanctions to fill the gaps can also be rational and even efficient. For one thing, where norms are ironclad and informal sanctions are sure and swift—as in the context of Big Law employment—it seems to be simply a waste of time to write down all the employment terms because all the major players know all the major terms. Everyone knows what the salary is, and students are sure to spread the news if their future employer turns out not to pay the industry norm.

For another, using this kind of informal contracting also gives flexibility to both parties, for good or for ill. For example, another ironclad norm in Big Law hiring is that summer associates almost always receive offers to join the firm permanently in the fall after graduation.[65] But in the summer of 2009—one year after the 2008 Financial Crisis, and just when law firms were being hit hardest—several firms violated that norm. The vast majority of the summer class of 2009 should have received offers, and they should have started working in the fall of 2010. However, Kirkland & Ellis did not give offers to a significant proportion of its summer associates,[66] Skadden announced that it would defer the

[64] See generally About, Above the L., https://abovethelaw.com/about/ [https://perma.cc/9MM6-WN77] (last visited Oct. 28, 2021) (describing the website as "a behind-the-scenes look at the world of law" that "provides news and insights about the profession's most colorful personalities and powerful institutions, as well as original commentary on breaking legal developments").

[65] See Staci Zaretsky, Summer Associate Offer Rates (2019): Make Way for More Record Hiring!, Above the L. (Aug. 19, 2019, 11:18 AM), https://abovethelaw.com/2019/08/summer-associate-offer-rates-2019-make-way-for-more-record-hiring/ [https://perma.cc/G5ZS-7XR6].

[66] See Elie Mystal, Nationwide No Offer Watch: Numbers from Kirkland and Orrick, Above the L. (Sept. 1, 2009, 12:36 PM), https://abovethelaw.com/2009/09/nationwide-no-offer-watch-numbers-from-kirkland-and-orrick/ [https://perma.cc/4YQ2-RVER] ("At Kirkland & Ellis, sources report that the firm's offer rate was a solid 85% firm wide. In Chicago and New York, that offer rate climbed to around 90%. But out west, things were not as rosy. Multiple tipsters reported that the offer rate out of Kirkland's Los Angeles office was between 60% and 65%. In Palo Alto, things were even worse. Sources report a 50% offer rate.").

permanent start date of its summer class indefinitely,[67] and Cravath offered to allow its associates to defer their start dates for a year.[68] From the firms' perspective, the decision to use norms in summer and permanent associate hiring, rather than real contracts, was a good thing. During an economic crunch, norms gave firms the flexibility not to hire, or to defer, huge numbers of high-cost attorneys. From the students' perspective, however, norms were bad: even though they could bad-mouth their firms to other law students, they were still left jobless—and the joblessness was made worse by the fact that they were graduating during an economic downturn.

In short, contracting parties enter into incomplete contracts because they know that they can rely on norms and informal sanctions to fill the gap with provisions that they expect. Moreover, relying on norms and informal sanctions for gap-filling can also give parties the flexibility to make adjustments later in the process.

Beyond the ideas of norms and informal sanctions, however, relational contracting theory also contributes something else to the contract theory literature—the inkling that contracts might not be only private law that is created by and adjudicated by a handful of parties.

Formal contracts can be understood, at their most basic level, as agreements between *A* and *B*, in which disputes between the two are adjudicated, ex post, by courts. Relational contracting changes that equation slightly. The contract might still only be between *A* and *B*, but the contract might be adjudicated, ex post, by communities (or, sometimes, a combination of courts and communities).[69]

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[67] See Elie Mystal, Skadden Summers: Welcome to the New Market, Above the L. (May 19, 2009, 11:19 AM), https://abovethelaw.com/2009/05/skadden-summers-welcome-to-the-new-marketclass-of-2010-start-dates-pushed-to-2011/ [https://perma.cc/VNP3-5AFC] ("Skadden summers will not be able to start with the firm until 2011 at the earliest. Sources at the firm report that the idea was to let summers know as early as possible that they would have to come up with something else to do between graduating from law school in 2010 and starting with the firm.").

[68] See Cravath, a Top Law Firm, to Pay New Hires to Delay Start, N.Y. Times (June 12, 2009), https://www.nytimes.com/2009/06/13/business/13legal.html [https://perma.cc/LPT2-D3Y4] (stating that Latham "offered their incoming lawyers $75,000 in March to delay their start for a year").

[69] In recent work, Matthew Jennejohn and I argue that there are more than two adjudicators: there are also regulators, for instance, who read, use, and judge contracts. For that reason, contracts might be speaking to many parties at the same time. Cathy Hwang & Matthew Jennejohn, Contractual Depth, 106 Minn. L. Rev. (forthcoming 2022) (manuscript at 19–20), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3934673 [https://perma.cc/MXK7-THDL].

But is the ex post part of the equation the only part that involves more than the traditionally understood parties? The literature has largely overlooked this question, with two exceptions.

The first is Vic Fleischer's paper on the role of regulators in shaping deal structure.[70] Fleischer argues that many M&A deals functionally have *three* parties at the table: the expected buyer and seller, and also the government.[71] Buyers and sellers structure their deals, in express or tacit negotiation with the government, so that their deals can receive the best regulatory treatment.[72]

For example, consider a deal in which Party *A*, a large conglomerate, plans to buy Party *B*, a company that operates hotels. Party *A* could purchase or merge with Party *B*—simple enough. Or, Party *B* could first split itself into an operating company and a real estate holding company, and Party *A* could buy the two different entities, ultimately holding the real estate in a separate company. Existing tax rules allow real estate holding companies to largely avoid corporate tax. The two deal structures—buying Party *B* in one fell swoop, or in two parts—have the same result: Party *A* owns Party *B*. But the second deal structure allows a good chunk of Party *B*'s assets to receive advantageous tax treatment.[73] Existing laws and regulations—standing in for the government—shape how parties design their deal.

The second exception to the literature's silence is my own article exploring why complex transactions are completed in multiple related contracts, rather than in just one large omnibus contract.[74] That article describes the world of M&A contracting, in which a single M&A deal involves not just the central acquisition agreement, but also numerous contemporaneous ancillary agreements. It argues that M&A deals are "unbundled" into many modules for two reasons. First, modularity allows the simple parts of the deal to be peeled off to junior associates,[75] who can

[70] Victor Fleischer, Regulatory Arbitrage, 89 Tex. L. Rev. 227 (2010). The title of Fleischer's article refers to a phenomenon where parties change the structure of their deals, without changing the underlying economics, for the purpose of reducing regulatory costs. Id. at 230.

[71] Id. at 238.

[72] Id. at 238, 287.

[73] See Hwang, Unbundled Bargains, supra note 16, at 1415–16, 1439–40 (discussing how real estate investment trust ("REIT") deals allow a single corporation to gain tax advantageous treatment for the part of its business that holds real estate); see also infra Section II.A (same).

[74] Hwang, Unbundled Bargains, supra note 16, at 1405.

[75] Id. at 1423–26 (noting that junior associates often work on simple modules). For a more robust discussion of the work of junior associates in transactional settings, see Cathy Hwang,

complete those projects at lower cost.[76] More relevant to this Article, modules also allow the parts of the deal that require specialist attorneys to be assigned accordingly.[77] An employment issue, for instance, might be broken off into its own self-contained contract so that employment lawyers can work on it, and so that the right parties—perhaps just the buyer and the buyer's future employee—can be party to it.[78] In this description, then, the article hints at a world in which there are more than *two monolithic parties* at the table: the buyer and the seller. Rather, there are hints that there are others—employees, perhaps, or tax planners—who have some kind of seat at the negotiating table, and who might have some influence on how the contract ultimately shakes out.

* * *

While both law and economics and relational contracting scholars have presented interesting and convincing explanations for contract incompleteness, they both fall short. In particular, both strands of literature assume *rationality*: that contracting parties make considered, thoughtful decisions about leaving contracts incomplete or vague. A look under the hood of each party to the contract, however, suggests that each party's intent is much more complicated, and much less rational—and Part II begins to take just such a peek under the hood.

II. DEALMAKING WITHIN THE INSTITUTION

Why do parties leave contracts incomplete? Existing theories suggest that parties choose to do so: they either conclude that the cost of drafting a complete contract outweighs its benefit, or they leave contracts incomplete in the belief that norms and informal sanctions will fill in the gaps.

This Part presents a new idea: that some contractual oddities, including incompleteness and vagueness, result from quirks of dealmaking within each contracting party's internal bureaucracy. At its core, this idea is

Value Creation by Transactional Associates, 88 Fordham L. Rev. 1649, 1659–61 (2020) (noting that transactional associates add value to deals by re-integrating contracts that have been modularized).

[76] Hwang, Unbundled Bargains, supra note 16, at 1424 (noting that the work of junior associates "is billed to a client at a lower hourly rate").

[77] Id. at 1418–23 ("Many complex, technical, or regulatory pieces of an M&A deal, however, are both modular and assigned to specialists.").

[78] Id. at 1419, 1427–32 (describing how modularizing an employment agreement can help deal parties be more precise about which individuals should be party to the employment agreement).

simple and intuitive. Business decisions are made by many people rather than just one, and each decision maker's preferences have the potential to make their way into a contract. Just as a negotiated acquisition agreement represents a compromise between a buyer and a seller, the position that each business party brings to the table initially might also reflect internal compromise. And, when internal constituencies work together to make a deal happen, the deal that is brought to the table represents that party's "collaborative intent."

In later Parts, this Article discusses some of the implications of collaborative intent. For example, collaborative intent may account for ways business parties behave inconsistently: demanding specificity in one part of the contract while pushing for vagueness in another part. It also discusses implications for contract theory and practical takeaways for those who design contracts.

This Part, however, focuses on describing parties' internal dealmaking processes, which existing literature has largely ignored. It relies on two dozen original interviews with dealmakers who work within companies. Interview participants, who included lawyers and businesspeople, have experience in a wide range of business settings. They work at public companies and large, private companies; at regional companies and at multi-national, household-name companies; and at late-stage start-ups, venture-backed companies, and blue-chip stalwarts. They also represent a broad swath of industries, including energy, high technology, social media, and entertainment.

What interview participants have in common is that they all have "lead negotiator" roles within their companies, and they spoke about experiences at companies that are all, loosely speaking, large: the smallest of them employs hundreds of employees, and the largest employs tens of thousands. And, to a person, they described their company's internal dealmaking process as collaborative, consensus-driven, and influential on the final contract.[79]

The remainder of this Part proceeds as follows. Section II.A focuses on a theory of collaborative intent. In particular, it describes and defines the roles of various players within the dealmaking process. Section II.B presents evidence from the original interviews. As business parties prepare to enter a deal or contract negotiation, they must take the temperature of their own internal constituencies, a process that resembles

[79] For more information about the interview participants, see *infra* Appendix A.

the vote-whipping process in a legislature. When approaching a business deal, the lead dealmakers bring to the table the many preferences and requirements that their internal constituencies have imposed on them—and that package of information thereby constitutes the business party's "position" in a deal. Section II.C provides some notes on the qualitative interview methodology that this Article uses.

A. A Theory of Collaborative Intent

In his aptly-named article, Congress is a "They," Not an "It": Legislative Intent as Oxymoron, political scientist Kenneth Shepsle observes that Congress, being made up of many legislators, does not have monolithic intent.[80] Rather, when a bill passes, outside observers can only know two things for sure. First, a majority prevailed. And, second, that majority contains many legislators, each of whom may have voted for the bill for different reasons—for instance, because of the way it was written, because it affected another bill that they supported, or because they see it as a reasonable compromise.[81] As Shepsle notes, "To ask, in this circumstance, what Congress 'intended' is to invite a non sequitur."[82]

Companies, too, are like legislatures. They are not monolithic—instead, they are made up of groups of people who have different goals. This, of course, means that when a company is contemplating a deal, its interest, too, is not monolithic. Rather, many people have a say. What, then, is the company's interest that actually comes to the negotiating table? Who decides those interests, and who decides how they will show up in the contract?

These are the questions that the theory of collaborative intent tries to answer. At its core, collaborative intent is a simple idea: when a company is about to do a deal, many people within the company have a say in what they want the deal to look like. Those opinions can be based on a variety of things, for example, economic constraints, legal or regulatory constraints, or an individual agent's self-interest. If the company ever had

[80] See Kenneth A. Shepsle, Congress is a "They," Not an "It": Legislative Intent as Oxymoron, 12 Int'l Rev. L. & Econ. 239, 244 (1992) ("[T]he winning majority consists of many legislators; their respective reasons for voting against the status quo may well be as varied as their number."). But see Ryan D. Doerfler, Who Cares How Congress Really Works?, 66 Duke L.J. 979, 981 n.5, 998–1008, 1018 (2017) (arguing that corporations, unlike legislatures, can manifest genuine intent, and citing work by philosophers on shared agency).

[81] Shepsle, supra note 80, at 244–45.

[82] Id. at 245.

a singular intent, by the time its negotiator sits down to negotiate with the counterparty, that intent has been filtered through a kaleidoscopic bureaucracy. The intent that a business party brings to the table, then, is a collaborative one.

For example, consider an iconic company like Patagonia, a private company based in the United States that makes outdoor clothing.[83] Currently, Patagonia contracts with factories in several countries to produce its products.[84] Suppose, however, that Patagonia would like to buy some of those facilities so that those facilities are owned and operated by Patagonia itself.

Many departments within Patagonia might have a say in this deal. For example, the chief financial officer ("CFO") and her staff might need to weigh in on whether Patagonia has the resources to buy these factories and whether buying these factories is a cost-efficient way to do business. Tax and Legal Departments might weigh in on the tax implications of owning real estate in various jurisdictions, how a potential deal might be structured (as an asset deal or a stock deal), or whether the purchased factories should be held in a separate foreign subsidiary or a real estate company. Human Resources might tackle whether and how to retain key factory employees after the acquisition. Product designers might weigh in on whether Patagonia has the skills or capabilities to produce specialized fabrics in-house; salespeople might weigh in on product quality; the Shipping Department might weigh in on the logistics of developing a way to ship materials from the company's own factories to the company's own warehouses; and Information Technology might weigh in about how to build systems for tracking products made and shipped. And these departments merely scratch the surface: they say nothing of the opinions of fashion designers, accountants, customers, other suppliers, government regulators, industry organizations, and more.

To execute a deal, there must be many cooks in the kitchen—and what those cooks think affects how contracts shake out. Take the core question of how to structure a deal. Most acquisitions are structured in one of three

[83] Clothing & Gear, Patagonia, https://www.patagonia.com/shop/clothing-gear/ [https://perma.cc/X9E7-6F38] (last visited Oct. 27, 2021).

[84] See Patagonia Clothing: Made Where? How? Why?, Patagonia, https://www.patagonia.com/blog/2012/04/patagonia-clothing-made-where-how-why/ [https://perma.cc/HAB4-68JX] (last updated June 11, 2015) (disclosing where Patagonia makes its clothing).

ways: as an asset purchase, a stock purchase, or a merger.[85] A key benefit of an asset purchase is that the buyer can buy the company's assets without buying the company's liabilities.[86] So, if the target company—the company that owns the factory in question—has a number of outstanding lawsuits pending from unsafe work conditions, or some suits regarding order fulfillment, it is theoretically possible for Patagonia not to assume those liabilities by structuring the deal as an asset purchase. In theory, then, Patagonia's Legal Department might push for an asset purchase, and that preference might be brought to the negotiating table, affecting how the contract is structured between Patagonia and the company that owns the factory.

But there might be another wrinkle. In the United States, companies that largely hold only real estate can be organized as real estate investment trusts ("REITs")—and REITs do not have to pay entity-level tax.[87] Over the past decade or two, many companies that own substantial real estate have chosen to take advantage of the REIT structure by, essentially, sawing their companies in two: one side of the company owns real estate and is organized as a REIT, and the other side of the company owns the operations. Companies that have taken advantage of this structure include ones that own hotels,[88] storage facilities,[89] cell phone towers,[90] wind

[85] See Selling Your Company: Merger vs. Stock Sale vs. Asset Sale, Cooley Go, https://www.cooleygo.com/selling-your-company-merger-vs-stock-sale-vs-asset-sale/ [https://perma.cc/3LNK-NKGH] (last visited Oct. 27, 2021) (describing the differences between mergers, stock sales, and asset sales).

[86] Id. ("Buyers like asset sales since asset sales allow a buyer to only acquire desired assets and leave unwanted assets (and liabilities, both known and unknown) behind with the seller.").

[87] Bradley T. Borden, Rethinking the Tax-Revenue Effect of REIT Taxation, 17 Fla. Tax Rev. 527, 539 (2015) (arguing that, despite not paying entity-level tax, REITs "could counterintuitively increase the government's tax revenue").

[88] Lodging/Resorts REITs, Nareit, https://www.reit.com/what-reit/reit-sectors/lodgingresorts-reits [https://perma.cc/S8KD-N2JU] (last visited Oct. 27, 2021) (listing a number of "[l]odging REITs," which are REITs that "own and manage hotels and resorts and rent space in those properties to guests").

[89] Self-storage REITs, Nareit, https://www.reit.com/what-reit/reit-sectors/self-storage-reits [https://perma.cc/7SX3-AG58] (last visited Oct. 27, 2021) (describing self-storage REITs as ones that "own and manage storage facilities and collect rent from customers").

[90] Lisa Springer, 10 "Unusual" REITs to Buy for Yields of Up To 7.7%, Kiplinger (May 2, 2018), https://web.archive.org/web/20200813065430/https://www.kiplinger.com/slideshow/investing/t044-s001-10-unusual-reits-to-buy-for-high-yields/index.html (noting that Crown Castle International, which owns communications infrastructure, including cell towers, is a REIT).

turbines,[91] and prisons.[92] In this hypothetical deal, the Legal Department might push for an asset purchase, but the Tax Department might push for bifurcating both Patagonia and the target company before the acquisition so that Patagonia ultimately owns the factory partially through a REIT and partially though an operating company.

In short, when a business enters into a contract, its lead negotiator brings the intents and interests of many different internal constituencies to the negotiation table. Companies are large and messy,[93] and, as a result, a company's intent is also messy and multifaceted.

If corporations are like Congress—representing many different interests and viewpoints, messy, and hard to wrangle—then the lead negotiator in a transaction is like a majority whip in the Senate. A majority whip is an elected member of the majority political party that works behind the scenes to garner support for a bill.[94] In a corporation, there are usually two lead negotiators: a senior member of the legal team and a senior businessperson. Together, they speak to various departments in the corporation to understand their needs and preferences, take the lead on negotiating internally and with the other contract party, liaise between departments, report to higher-ups, and amalgamate all the different internal ideas into one "company position."

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[91] Id. (describing Hannon Armstrong as "a sustainable infrastructure REIT that invests in solar, wind and energy efficient assets").

[92] See Brad Thomas, 2 Prison REITs Poised to Profit, Forbes (Nov. 30, 2019, 7:00 AM), https://www.forbes.com/sites/bradthomas/2019/11/30/2-prison-reits-poised-to-profit/ [https://perma.cc/9TBL-E6EM] (describing two REITs that own private prisons).

[93] The idea that a corporation is complex and messy is better understood in the corporate governance literature—but the idea has not made the jump into the business contracting literature. Much of the corporate governance literature—if not most of it—has been about the fact that corporations are large, unwieldy, and comprise individuals with many divergent interests. In fact, one of the major problems in corporate governance is born out of this unwieldiness: agents of the corporation, including directors and executives, sometimes act in their own self-interest rather than in the best interest of the corporation. An entire body of statutes, regulations, case law, norms, and research has arisen in reaction to this problem. Corporate agents, even when they want to do something that is good for them but bad for the corporation, must abide by their fiduciary duties lest they be fired, fined, held liable, or socially ostracized. An uncountable number of academic articles have been written about this subject. For the most famous of them, see Eugene F. Fama & Michael C. Jensen, Separation of Ownership and Control, 26 J.L. & Econ. 301 (1983) (discussing the problems that arise in corporations when owners—stockholders—relinquish control to hired managers).

[94] See Daniel Palazzolo, Evaluating Majority Party Leaders in Congress, 6 Forum, no. 3, art. 1, 2008, at 2 (defining the majority whip as someone who "polls party members to determine support for major bills and persuades wayward members to support the leadership's position").

In larger transactions, outside counsel are often engaged to actually negotiate the deal and draft the contract—but when outside counsel refer to "the client," they are actually referring to those lead negotiators, who tell the outside counsel what the company's position is on various issues.

All told, then, the process of dealmaking by consensus looks a bit like a pyramid. At the bottom are many constituencies within the company that have a say in how the deal is put together. At the top are one or two lead negotiators, who consolidate those ideas into the "company's position." What outside counsel, the other contract party, and outside observers see is the tip of the pyramid—the company's position, as represented by the lead negotiators. But below that is a vast network of departments, individuals, and internal interest groups who weigh in on transactions.

B. Evidence of Collaborative Intent

Interviews with lead negotiators[95] who work within a variety of corporate settings help to flesh out the contours of how deals are put together within the company and how that process contributes to collaborative intent within the contract.

1. Lead Negotiators and Consensus Building

Uniformly, interview participants stated that, rather than being a top-down, executive-driven process, dealmaking within their company was collaborative. In fact, several interview participants reported that high-level executives are not involved in the early stages of dealmaking at all.

Several companies have a standing committee that evaluates potential deals before the chief executive officer ("CEO") is involved. One interview participant reported that at his company, a group of individuals meets monthly to discuss potential major deals and then brings potentially viable deals to higher-ups: "Our company is super consensus-driven. So there are leaders in about a dozen different functions who all have to be nodding together to take that [potential deal] to the CEO. It takes a long time to get that consensus . . . ."[96] Another interview participant reported

[95] Most interview participants were in-house counsel, who have an increasingly expanded role to play with companies and corporate legal departments. For more on the role of in-house counsel, see Jonathan C. Lipson, Beth Engel & Jami Crespo, Foreword, Who's in the House? The Changing Nature and Role of In-House and General Counsel, 2012 Wis. L. Rev. 237.

[96] Telephone Interview with Interview Participant 6 (Dec. 3, 2019).

a similar process: "The corporate development committee is the team that decides what's good or not good to pursue. We meet monthly. Our CEO isn't involved in that committee."[97] Yet another noted that "[t]he businesses are run by senior managers, but they don't know the details. The details are held in the files and heads of more junior management."[98]

One exception to the usual collaboration process is when a company engages in a major business transaction, such as a merger or an acquisition: one participant noted, for instance, that "M&A is a lot more top-heavy . . . . Generally, [it] has a lot more input from the CFO and CEO. They generally shepherd the deal across."[99] Another reported that "[l]arger stuff—really large stuff—a [general manager][100] or CEO will come in and have that conversation."[101] Another interview participant noted that for an international acquisition, "[t]hat was discussed at the international level. The CEO, CFO, me [a general counsel], someone at the international level, and our [Chief Information Officer] and Chief Technology Officer [("CTO")]. We [met] pretty frequently."[102] And when higher-ups choose to engage, their preferences matter: "If the CEO of [my company] and the managing group of [my company's parent company] want[] to do the deal, no one else really has to sign off per se."[103]

Corporate culture also plays an important role, and certain corporate cultures can encourage a top-down decision-making process. One interview participant, for example, described her company as having a strong CEO- and CFO-centric corporate culture. That culture influenced how deals originated within the company and helped to explain the CEO and CFO's high level of involvement, even in smaller deals. She noted, for instance, "We've got a management committee and senior operations, and we've also got a CEO who is very involved in our M&A. It could be any of them who is the initial contact for the deal." [104] Moreover, she continued:

[97] Telephone Interview with Interview Participant 4 (Dec. 2, 2019).
[98] Telephone Interview with Interview Participant 3 (Nov. 27, 2019).
[99] Telephone Interview with Interview Participant 1 (Nov. 11, 2019).
[100] In this particular company, a general manager is the business head of a particular group. See Telephone Interview with Interview Participant 15 (Jan. 7, 2020).
[101] Id.
[102] Telephone Interview with Interview Participant 13 (Dec. 16, 2019).
[103] Telephone Interview with Interview Participant 8 (Dec. 10, 2019).
[104] Telephone Interview with Interview Participant 18 (Jan. 28, 2020).

> Our CFO is a little unique to us—he's just pretty involved in how our M&A works. He will sometimes be the person who ends up being the point person for our CEO. I can think of one smaller deal where our CFO wasn't involved. That was more based on other things going on at the same time, plus the size of the deal.[105]

Of course, specific quirks of particular executives or executive teams might result in a situation where some relatively small matter must, unusually, be reviewed by higher-level managers. For example, prior to conducting diligence or otherwise seriously considering a deal, companies often sign a non-disclosure agreement (also called a confidentiality agreement or "NDA").[106] Active companies sign many NDAs, and junior attorneys often negotiate and sign them.[107] One interview participant who works at one of the largest companies in the world, however, reported that "there are certain terms in our NDA that require literal executive approval, like a non-compete or a standstill. We typically don't [include those terms in the NDA] because we don't want to bother the CFO or something."[108] Since NDAs are often considered small-potatoes agreements, it is surprising that executives at large companies would want to review provisions in them—but, on the other hand, recent high-profile litigation about standstill provisions in NDAs has also put them at the forefront of many minds.[109]

[105] Id.

[106] See Hwang, Unbundled Bargains, supra note 16, at 1405 ("Confidentiality agreements are among the most common ancillary agreements in M&A transactions: parties enter into these short, simple agreements to protect nonpublic information exchanged during initial evaluation and negotiation."); see also Mergers & Acquisition Comm., Am. Bar Ass'n, Model Merger Agreement for the Acquisition of a Public Company 341 (2011) ("A confidentiality agreement . . . is usually the first agreement entered into between the parties to a potential transaction. . . . [T]he discussions are frequently at an early stage, with neither party being committed to pursuing a transaction.").

[107] Hwang, Unbundled Bargains, supra note 16, at 1405 ("Because deal lawyers often consider confidentiality agreements straightforward and boilerplate, junior attorneys or in-house counsel usually draft them.").

[108] Telephone Interview with Interview Participant 16 (Jan. 7, 2020).

[109] In 2012, a stray provision in a non-disclosure agreement caused Delaware courts to enjoin a $5.5 billion transaction. See Martin Marietta Materials, Inc. v. Vulcan Materials Co., 56 A.3d 1072, 1076 (Del. Ch. 2012) (enjoining for four months Martin Marietta's hostile bid for Vulcan), aff'd, 68 A.3d 1208 (Del. 2012); Hwang, Unbundled Bargains, supra note 16, at 1404–07. For a case note that describes the issue, see Sasha S. Hahn, Note, "Between" a Rock and a Hard Place: *Martin Marietta v. Vulcan* and the Rise of the Backdoor Standstill, 65 Hastings L.J. 1393, 1396 (2014).

These examples of top-down engagement seem to be the exception rather than the rule. Except for these examples, participants uniformly reported that dealmaking was collaborative—a process of one or two people quarterbacking the deal and seeking buy-in, feedback, consensus, or vetoes from various departments who would be affected by the deal. One interview participant, who is a lead negotiator within his company, said, "I think of my role as a train conductor. I have to direct the deal to different stations to keep the train going on time."[110] Another interview participant likened the lead negotiator role to that of "a broker or middle-person who tries to get the different corporate constituencies to some resolution."[111] Repeatedly, interview participants described their job, when spearheading the deal negotiations, as one of consensus-building among various internal departments.[112]

One interview participant noted that "the consensus has to always be there. At least for us, we need to have a formal approval process, and people need to get formal sign-off [on] those deals. The business development person is beholden to those groups [that sign off on the deal]."[113] Another in-house lawyer said, "I very much see my role as building consensus internally."[114] Still another noted, "It is a consensus process. Very few companies I've worked with [have] one individual in control."[115] This lawyer went on to note that consensus-building was important even in an M&A deal where other interview participants had reported that senior executives might be more likely to be involved: "In the M&A process, if we're the company making the purchase, we need to do involved analysis about how the [target] that's being acquired can be integrated into our contracts [and] buying programs."[116] Another interview participant described the process of consensus as "walking down the halls,"[117] and yet another described the process of going from

[110] Interview with Participant 1, supra note 99.

[111] Interview with Participant 3, supra note 98.

[112] See, e.g., Telephone Interview with Interview Participant 2 (Nov. 13, 2019) (describing the dealmaking process as "a consensus process," and noting that "[in v]ery few companies I've worked with is one individual in total control"); Telephone Interview with Interview Participant 21 (Feb. 12, 2020) ("[W]e are a consensus-driven organization."); Telephone Interview with Interview Participant 9 (Dec. 11, 2019) ("[T]he consensus always has to be there.").

[113] Interview with Participant 9, supra note 112.

[114] Telephone Interview with Interview Participant 14 (Dec. 16, 2019).

[115] Interview with Participant 2, supra note 112.

[116] Id.

[117] Telephone Interview with Interview Participant 7 (Dec. 10, 2019).

the Accounting Department to the Intellectual Property Department to the Maintenance Department to get feedback and sign-off on a deal.[118]

2. Internal Constituencies and Contract Substance

Importantly, internal departments' preferences and needs shape the substance of the deal. Many of the departments that shape the deal are the ones that one might expect—departments that deal directly with money-related issues, such as costs, financing, taxes, and accounting. Other prominent ones include human resources and departments that need to perform the deal.

a. Accounting and Finance

Numerous interview participants described the accounting and finance departments as crucially important to deal substance.[119] For example, the accounting department can decide how revenue is recognized,[120] what counts as goodwill for accounting purposes,[121] and what kind of financing the company needs for an acquisition.[122] One interview participant noted that their Accounting Department "can even affect timing . . . . So, say we're gonna be filing our 10-Q [(a required quarterly disclosure statement for public companies)] on this day. [The Accounting Department might say,] 'We can't close [the deal] in this window.'"[123] The interview participant went on to note that it was technically possible to close the deal at the preferred time, but it would require the Accounting Department to work with the company's auditors on obtaining additional

[118] Telephone Interview with Interview Participant 10 (Dec. 11, 2019).

[119] Id. ("[The accounting and finance teams are] the people who are cutting the checks at the end of the day. They are not prescriptive, like we need XYZ. They will be like this is how we operate. Can you make it work?"); Interview with Interview Participant 12 (Dec. 11, 2019) (noting that the accounting team "is always part of the conversation upfront"); Interview with Participant 13, supra note 102 ("There is always legal, tax, finance. . . . [T]hen there are [sic] in-house accounting.").

[120] Interview with Participant 9, supra note 112 ("[W]hen our offerings are both products and services, and the way you count each is slightly different in terms of how they are recognized, those are conversations we have with accounting all the time.").

[121] Interview with Participant 8, supra note 103 ("[Many of my company's acquisitions are] heavy goodwill companies, not a lot of assets. So finance and accounting would be involved.").

[122] Interview with Participant 7, supra note 117 ("What kind of financial assurance [is] the Accounting Department able to support? Credit or bonds? There's a brainstorming meeting that outlines the gelatin of a proposal.").

[123] Telephone Interview with Interview Participant 19 (Jan. 31, 2020).

documentation: "We could do it. But then you have the [Chief Accounting Officer] say, 'We are precluded from closing in this window and that's the directive.' "[124]

The same interview participant also noted that the Accounting Department's priorities can also become main priorities in the deal. For example:

> The most important thing [in a particular deal] is that we don't have consolidated accounting. But why? Is it because it's a lot of work for the [accounting] team? Or is there actually some kind of financial risk to the company? So this becomes one of the five commandments of the deal—that we can't have consolidated accounting.[125]

Other departments that deal with financial issues also play important roles—and which department deals with financial issues may be industry- and deal-specific. One interview participant, who is an attorney in the General Counsel's Office of a company that works with performers, noted that insurance is an important part of deals in her industry, so her company's Risk Management Team—the team that deals with insurance—is very involved in shaping the insurance parts of the contract. She typically starts a deal with a standard contract, "but let's say a performing artist is going to use pyro[technics], well, that changes the risk profile. So I know I have to talk to the Risk Management Team and say, 'Hey, this is going to use pyro. Given that, do we need to change the insurance exhibit?' "[126] When she goes back to negotiate the contract on behalf of the company, the risk management team will have added their input to the contract, and will shape how she represents the company's position:

> Risk Management will often say, "We can't live with any of these edits." On the way back, the decision point is that they have given me feedback—do I take their position as being our position, or do I take it under advisement and overrule [them] [because] I still need to get this deal done?[127]

[124] Id.
[125] Id.
[126] Id.
[127] Id.

Another interview participant who works with real estate holdings noted that their Real Estate Department has a heavy hand in contract substance—so much so that they have their own contract:

> Real Estate has its own contract and they have a lot of influence. They have a lot of influence that relates to the timing perspective. A lot of times we'll say we want to buy this and the seller wants to close in ten days. Real Estate will say, "We can do this in ten days," or they say, "We can do this in phase one and phase two and we need ninety days."[128]

b. Human Resources and Employment

Many interview participants described human resources departments as being key players in mergers and acquisitions.[129] For example, one interview participant noted that, when acquiring another company, the Human Resources Department of his company often helps to decide which employees to retain post-acquisition. In one particular acquisition, in which the acquirer was purchasing a target company that owned a particular technology, the Human Resources and Information Technology Departments worked together to determine who those key employees would be: "It would make no sense to buy the tech and the next day have nobody who understood it. [When deciding who to bring in, we ask,] 'How senior should they be? [What is t]heir background, their ability?' "[130]

Another interview participant noted that in acquisitions, the Human Resources Department at her company would shape what was included in key employment agreements. In particular, she noted that for deals involving foreign acquisition targets, the Human Resources Department wanted her to include a non-competition provision in the employment agreements of all 100 of the target company's employees. However, contract laws in the target company's country required contracts to have consideration—so in order for the non-competition provision to have legal force, the acquirer had to pay a signing bonus to each of the 100

[128] Interview with Interview Participant 11 (Dec. 11, 2019).

[129] See, e.g., Interview with Participant 16, supra note 108 ("[T]here's always HR."); Interview with Participant 6, supra note 96 ("[T]he HR team would prefer to have a say over every hire and fire between sign[ing] and clos[ing of a deal], and every stock option."); Interview with Participant 8, supra note 103 ("HR would often be involved.").

[130] Interview with Participant 13, supra note 102.

employees. This interview participant described a back-and-forth with her Human Resources Department over what to put into the employment agreements:

> Our HR person was like, "These [non-competition provisions] are very standard terms in [our company]; we need to have them sign it." . . . I just said, "That's not possible because we aren't going to give bonuses to every one of these employees." So my suggestion was that we give bonuses to the employees with benefits, who are the key employees.[131]

Yet another interview participant described how his Human Resources Department had changed the structure of the transaction. In one particular transaction, his company, the seller, was spinning off a division. The acquirer wanted the seller to continue providing some services during the initial post-closing period—a common arrangement, and one that is often accomplished through a transition services agreement.[132] Under a transition services agreement, the selling company agrees to provide the transitional services. Yet, even though "it's way better and so much easier to have a transition services agreement," the seller's Human Resources Department "ha[s] a meeting with [our accounting/consulting firm] and for some reason get in their head that they want to have an employee lease agreement."[133] In an employee lease agreement, "you have a bunch of people's names in the agreement," and the acquirer has to separately contract with each employee rather than the selling company as a whole.[134] The interview participant noted, "I don't care if it's a transition services agreement or a lease, but it does matter because it's 100% substantively different in how we draft these different provisions [in the contract]."[135]

[131] Interview with Participant 16, supra note 108.

[132] See Barbara Murphy Melby, Considerations in Transition Services Agreements in M&A Transactions, Del. Bus. Ct. Insider (Mar. 1, 2016), https://www.morganlewis.com/pubs/considerations-in-transition-services-agreements-in-ma-transactions [https://perma.cc/59AE-CBT2] ("When a company is sold in an M&A transaction and the seller is expected to continue to provide services to support the post-closing company, the parties to the transaction enter into a transition services agreement (TSA), which governs the provision of such services to the post-closing company.").

[133] Interview with Participant 19, supra note 123.

[134] Id.

[135] Id.

c. Departments that Perform the Contract

Internal departments that actually have to do the physical work contemplated by the deal—whether those are product design teams, technical teams that must work together in a joint venture, or other departments that have to provide some kind of service—also often have a say in what goes into the contract.

One businessperson interviewed, for instance, described the Product Team in a technology company as more important than other teams: "There's more important ducks [to get in a row] than others. Not every vote is equal. So [P]roduct [Team]—super important . . . . We usually speak with products first. In the technology industry, they are the visionary."[136] Another interview participant, a former general counsel of a web-based company, said that dealmakers would "really need to get a lot of buy-in from the CTO, because if the CTO says it's not gonna happen because we have this big project in the second or third quarter . . . . [The company] wouldn't agree to the deal unless the CTO said they could implement [it]."[137]

Another interview participant, also from a technology company, noted that technical teams helped draft the defined terms in the contract:

> To define what "chemical synthesis" and "packaging" mean[] is very important because we might say that your company gets the chemical synthesis. So that defined term is very important. [It might] have different specs, like vapor level [or] pressure. [The drafting process] is kind of a partnership [with the technical team] in that I will provide some guidance on how it's been done before, but they will go in and add a lot more specificity.[138]

Another interview participant is the general counsel of a diversified investment company that owns car dealerships, and she described a number of different deals in the auto industry where input from a dealership's service department changed the substance of the deal. She noted that when she is reviewing contracts related to car service, for example, "I'll ask . . . the Service Department if they have sufficient number of lifts to do this. Or [Information Technology], can you support

[136] Interview with Participant 15, supra note 100.
[137] Interview with Participant 8, supra note 103.
[138] Interview with Participant 9, supra note 112.

this infrastructure?"[139] A senior executive of the same company also noted that when the company is looking to buy a new dealership, the input of "the used car guy" in the car sales department actually changes the valuation of the business.[140] In particular, used car inventories are hard to price too far before the closing date because used cars are each so different from each other, "so [the general counsel] builds in great latitude to negotiate on the spot . . . . We have guys who are very good at evaluating used cars, so they are used to negotiating on the spot because they are experts."[141]

For the interview participant at the company that deals with performing artists, the Maintenance Department was often an important shaper of contract substance. This interview participant works at a company that, as part of their business, provides arenas and other large venues for concerts and other events. She noted that when negotiating a deal, she frequently consults with the Venue Maintenance Team, who has to perform the maintenance obligations described in the contract:

> The partner [who is going to use or rent the facilities] says, "Can you do the cleaning [of the facilities] in a particular way?" As the lawyer, that sounds okay, but I go to the maintenance team and ask, "Is that actually okay, because of the systems in place and the equipment?"[142]

In some instances, she has encountered provisions from counterparties that she modifies after consulting with Maintenance:

> They have a provision that says, "If we have an urgent request that might 'impact performance,' the maintenance team has to clean it 'immediately.'" The maintenance team says, "Things that might impact performance are a lot of things. Change it to 'as soon as practicable.'"[143]

* * *

In short, internal departments within a company can, and often do, affect the substance of the deal. Important departments vary, but across the board, interview participants reported that departments dealing with money, such as finance and accounting, influence the substance of the contract. Depending on the industry, other departments—such as those

[139] Interview with Participant 11, supra note 128.
[140] Interview with Participant 12, supra note 119.
[141] Id.
[142] Interview with Participant 10, supra note 118.
[143] Id.

dealing with insurance—also influence the financial aspects of the deal, so they also have a seat at the table and influence the substance of the contract. Interview participants also often noted that the human resources department is very important in shaping the deal. Departments that execute and perform what is promised in the contract—and those departments vary by industry and deal—also influence the contract's substance.

3. Internal Constituencies' Effects on Contractual Form

In addition to affecting the substance of the deal, internal departments within a company can also affect the form of the contract.

In the contract design literature, one leading theory for contractual vagueness is that contract designers have decided, after a cost-benefit analysis, that the cost of negotiating to specificity ex ante outweighs the potential cost of litigation ex post.[144] Interview participants, however, described several other reasons for vagueness.

One reason is that vagueness is the only way to get internal constituencies comfortable with the contract at hand. One general counsel, for instance, noted that "[i]n this process of 'we're trying to build our consensus,' it is true that we leave something vague or punt. The punt is the move. Sometimes, that's how you get all these parties in the party to get comfortable."[145] He added that sometimes, the backdrop is that "[w]e can't figure out what the exact line is [to put in the contract], so let's decide on a standard."[146]

Another reason for contractual vagueness relates to performance: internal constituencies sometimes ask contract drafters to use vague provisions so that the company can have more flexibility on how to perform the contract.[147] Software-as-services companies, for instance,

[144] See Scott & Triantis, Anticipating Litigation, supra note 9, at 816; Choi & Triantis, Enforcing Preliminary Agreements, supra note 24, at 461–62.

[145] Interview with Participant 6, supra note 96.

[146] Id.

[147] There is an interesting tie-in here to Oliver Hart and John Moore's work on contracts as reference points. In particular, Hart and Moore describe the difference between perfunctory performance (which complies with the letter of the contract) and consummate performance (in which those performing the contract actually do a good job—more than just complying with the letter of the contract). This interview participant's rationale for inserting vagueness—in order to give contract performers more wiggle room—suggests that the contract performers want to be able to more easily provide perfunctory performance. See Hart & Moore, Contracts as Reference Points, supra note 47, at 3.

often negotiate about "up-time" with potential customers: how often the service provider can promise that the service will be up and running.[148] In negotiating these contracts, one interview participant at such a company noted that "[w]e try to make [the contract] more vague to give us more wiggle room . . . to create as many exceptions as possible to the up-time rules."[149]

Another interview participant, a general counsel who works with a company that owns car dealerships, noted that some of her company's dealerships have agreements to service "fleet vehicles"—vehicles owned or used by local government.[150] The general counsel explained:

> So we have a government contract that we're servicing the fleet vehicle, and [the government] wants [the vehicle] turned around in three days. So I turned it around to "three days subject to parts availability and factors beyond our control . . . ." So we create ambiguity and wiggle room.[151]

The idea, then, is to write a vaguer contract so that those who perform the contract can have more leeway in how they perform the deal.

Internal constituencies can also change the form of a contract in another way: specifically, they can push some provisions out of the main contract and into an ancillary agreement.[152] One former general counsel of a web-based company, for instance, noted that for joint ventures with other websites, "the technical team did run the show."[153] Although the business

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[148] See Michael Koch, Secrets of 100% SaaS Uptime, Medium (Apr. 7, 2017), https://medium.com/@MichaelKoch/secrets-of-100-saas-uptime-3e1b76564301 [https://perma.cc/R6WX-8GXX] (explaining up-time as the amount of time that software providers promise to have their service available to users).

[149] Telephone Interview with Interview Participant 5 (Dec. 3, 2019). Relatedly, the same interview participant also noted that if the company promised higher up-times, they would try to make those promises conditioned on specific instances: "We're trying . . . also to be very specific and say, 'This only applies to very specific cases and circumstances.' " Id.

[150] See Rick Popely, What is a Fleet Vehicle, and Should I Buy One?, Cars.com (June 6, 2020), https://www.cars.com/articles/what-is-a-fleet-vehicle-and-should-i-buy-one-422490/ [https://perma.cc/8VV9-J68M] (noting that a fleet vehicle can include "a car or truck bought by a rental car company, other type of business or a government agency that buys vehicles in bulk").

[151] Interview with Participant 11, supra note 128.

[152] In previous work, I have also written about how the process of creating an M&A deal within a law firm can lead to the creation of ancillary documents. In short, separating technical details into a separate self-contained document allows multiple teams to work on the deal simultaneously. See Hwang, Unbundled Bargains, supra note 16, at 1418–22.

[153] Interview with Participant 8, supra note 103.

people needed to negotiate a lot of the deal, "the risk would be the technical people making it work."[154] As a result, the main agreement would "have a provision about [the website] going live that's three sentences, but it would incorporate by reference a sixty-page technical agreement about what happen[s] when people [aren't] complying [with the joint venture]."[155]

4. Competition Within the Corporation and Lack of Uniform Intent

Another fascinating aspect of companies' internal dealmaking is that internal constituencies are often competing with each other during the dealmaking process. As a result, their intents in the deal are vastly different from each other, and often different from that of "the company" as a whole.

One interview participant noted:

> When you're a really diversified company, you have multiple business units; you have multiple strategy units within those business units. They all have different agendas. In fact, they are all competing with each other for funding . . . . [A]ll of the machinations and internal negotiations about who wins and who loses . . . is a robust process.[156]

He added that in a big deal at a big company, some of the provisions that make it into the contract "[are] just [the] pork barrel spending of congressional spending deals."[157]

Another interview participant noted that, especially with the sale of a division:

> [T]he head of this segment at some point is negotiating against you. She's looking out for her employees, and you're trying to sell the company and get the best price at close . . . . [Y]ou have all these different interests. Some of them are against the company. Some of them are just what everyone knows.[158]

In particular, he remembered one incident in which "[t]he head of this division was dialed in [to a call] and we got off the phone and I said, 'We

[154] Id.
[155] Id.
[156] Interview with Participant 6, supra note 96.
[157] Id.
[158] Interview with Participant 19, supra note 123.

might not be able to invite her to more calls. She's negotiating against the company.' "[159]

And these divergent-intent issues are even prevalent at the executive level. One interview participant noted:

> [T]he CEO would never do the deal without knowing how the accounting would hit because his or her bonus was tied to metrics, like EBITDA [(earnings before interest, taxes, depreciation, and amortization)] or free cash flow. They probably want to cut their own deal with the board to include or exclude certain things. There would be a very tacit agreement with Accounting, saying, "I don't want to do this deal unless it would get this accounting treatment," and then Accounting would say, "Yes, it will get this treatment."[160]

C. A Note on Methodology

The findings in this Article are informed by interviews with two dozen individuals. Interview participants are those who have experience playing the lead negotiator role inside of a company, either as an in-house attorney or on an in-house corporate development team.

The interviews were semi-structured. When interviewing participants, I asked the same set of open-ended questions about how a deal is put together and supplemented those with follow-up questions and requests for clarification.

To identify interview participants, I used a snowball sampling technique, asking each interview participant at the end of the interview if they could introduce me to additional potential participants. This method has its pros and cons but is one of the best ways to gain access to busy dealmakers.

Appendix A provides more detailed information about the interview participants and methodology.

III. IMPLICATIONS FOR CONTRACT ENFORCEMENT AND DEAL DESIGN

This Part discusses the implications of collaborative intent for contract enforcement and deal design. This Article has argued that institutional details—and, in particular, the process of whipping votes for a deal within

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[159] Id.

[160] Interview with Participant 8, supra note 103.

each company—help to explain aspects of the contract incompleteness, vagueness, and irrationality that existing theories cannot.

This Part explains why this new information matters. In Section III.A, it discusses the implications of collaborative intent for contract theory and enforcement. Theoretically, collaborative intent's most immediate implication is to complicate the line between *text* and *context*. On one hand, details of how deals are put together within companies provide even more context for a judge to consider—and unlike industry norms, it is context that comes directly from the deal parties themselves. On the other hand, more context increases litigation costs—a concern that has long plagued textualists.

Section III.B discusses how contract designers can mitigate the enforcement problems brought to the fore by collaborative intent. In particular, it suggests that modular contracting—breaking out parts of the deal into separate, relatively self-contained modules—can help contract designers mitigate the costs of collaborative intent. To some extent, the dealmaking *process* is already modular, with the engineering departments of the two parties talking directly to each other, for instance. The challenge, then, is to move that modularity onto the pages of the contract.

Together, Sections III.A and III.B attempt to consider some of the many implications of collaborative intent and to create an account of contracting and transactional law that is more richly layered.

A. Contract Theory and Enforcement

Perhaps the longest-standing debate in contract theory is the parol evidence question: whether judges should consider extrinsic evidence in making their decisions.[161] Contextualists argue that getting to the right

[161] See, e.g., Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, Text *and* Context: Contract Interpretation as Contract Design, 100 Cornell L. Rev. 23, 25–26 (2014) [hereinafter Gilson et al., Text and Context] (describing some of the differences between textualist and contextualist approaches to contract interpretation, and noting that "[i]n a textualist regime, generalist courts cannot choose to consider context; in a contextualist regime, these courts must consider it. Thus, text or context"); Alan Schwartz & Robert E. Scott, Contract Interpretation Redux, 119 Yale L.J. 926, 931–32 (2010) [hereinafter Schwartz & Scott, Contract Interpretation Redux] (laying out some basic differences between textualist and contextualist interpretation approaches to contract interpretation); Schwartz & Scott, Limits of Contract Law, supra note 62, at 544, 550 (setting out a modern formalist/textualist theory of contract law and contractual interpretation); Eric A. Posner, A Theory of Contract Law Under Conditions of Radical Judicial Error, 94 Nw. U. L. Rev. 749, 751 (2000); Eric A. Posner, The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation, 146 U. Pa. L. Rev. 533, 534 (1998) (noting that the parol evidence rule is a

answer requires consideration of extrinsic evidence, such as industry norms, trade usage, and course of dealing.[162] The Uniform Commercial Code, which governs most everyday commercial transactions, takes a contextualist approach.[163] Textualists, on the other hand, favor interpretation that stays within the four corners of the contract.[164] Scholars have argued that textualism is particularly appealing when considering contracts between sophisticated parties because those parties have already made a rational decision ex ante about how much context they want to put into a contract.[165]

Collaborative intent muddies this inquiry. In particular, it introduces new context that may help courts better pin down the parties' bargain—but, at the same time, whether courts *should* consider that new context remains an open question.

Textualism is, at its core, a pragmatic doctrine: textualists recognize that an accurate judicial interpretation is ideal, but seeking that accuracy may be too costly.[166] In other words, their problem with contextualism is not that it might be more accurate—rather, their problem is that contextualism might be too costly. Another key tenet of textualism is that sophisticated parties already embed as much or as little context as they want into the contract.[167] If they had wanted courts to look at any course of dealings or industry norms, textualists argue, sophisticated parties would have written that information into the four corners of the contract.

substantive rule of law that states that courts "will refuse to use evidence of the parties' prior negotiations in order to interpret a written contract unless the writing is (1) incomplete, (2) ambiguous, or (3) the product of fraud, mistake, or a similar bargaining defect").

[162] See Gilson et al., Text and Context, supra note 161, at 27.

[163] See U.C.C. § 1-303 (Am. L. Inst. & Unif. L. Comm'n 2017). The Restatement (Second) of Contracts also takes a contextualist approach. See Restatement (Second) of Contracts §§ 221–23 (Am. L. Inst. 1981).

[164] See Gilson et al., Text and Context, supra note 161, at 25–26 (setting out the basic differences between textualism and contextualism, and describing the two modes of interpretation as binary, with one excluding the other); Schwartz & Scott, Contract Interpretation Redux, supra note 161, at 938–39 (discussing differences between textualist and contextualist interpretation regimes); Schwartz & Scott, Limits of Contract Law, supra note 62, at 550 (arguing that textualism is the appropriate way to interpret commercial contracts between sophisticated parties).

[165] See Gilson et al., Text and Context, supra note 161, at 23, 26.

[166] See Schwartz & Scott, Contract Interpretation Redux, supra note 161, at 930 ("[A]lthough accurate judicial interpretations are desirable, . . . no interpretive theory can justify devoting infinite resources to achieving interpretive accuracy.").

[167] See Gilson et al., Text and Context, supra note 161, at 26.

These arguments have strong intuitive appeal. For example, there is strong circumstantial evidence that sophisticated parties can and do put what they want into the contract. Sophisticated business parties are, as their name suggests, sophisticated—and they tend to be well-advised by both in-house and outside counsel. Time and time again, they have shown that they can craft contracts that meet their needs and that solve novel problems that arise in the bargaining process.[168] If there is something a sophisticated party wants in a contract, there is plenty of evidence to suggest that they can put it into the contract.

Moreover, there may be good reasons that sophisticated parties want to exclude extrinsic evidence in interpretations of their contracts.

Sophisticated parties often enter into novel or bespoke deals—deals where there are no close cousins from which to draw analogies. For example, every decade or so, a new wave of U.S.-based companies engage in what is known as a corporate inversion—a type of transaction that allows the company to move its principal place of business to an international location that will grant the company favorable tax treatment.[169] Each new wave of inversion activity comes with some new innovation that did not exist in previous waves. Those innovations are, by definition, hard to compare to other corporate transactions or even with previous corporate inversions. Attempting to interpret a contract governing a corporate inversion by comparing it to industry norms might be impossible, or might yield a result that makes little sense.[170]

[168] Ron Gilson's seminal article on deal lawyering, for instance, describes the many contractual innovations that deal lawyers have devised to deal with problems such as information asymmetry and difficulty in specifying performance obligations. See Ronald J. Gilson, Value Creation by Business Lawyers: Legal Skills and Asset Pricing, 94 Yale L.J. 239, 293 (1984).

[169] See Cathy Hwang, The New Corporate Migration: Tax Diversion Through Inversion, 80 Brook. L. Rev. 807, 808–09 (2015) (describing several recent waves of corporate inversion activity).

[170] Contrast this to the contextualist approach that the Uniform Commercial Code adopts. Article 2 of the Uniform Commercial Code deals with the sale of goods. U.C.C. § 2 (Am. L. Inst. & Unif. L. Comm'n 2017). There are two efficiency-based reasons to adopt a contextualist approach for the sale of goods. First, many commercial contracts involving the sale of goods involve the sale of commodities. When a buyer enters into a contract to buy a widget, she presumably wishes to buy what the market believes is a widget—the industry norm of a widget. If that is the case, evidence from industry norms is not only acceptable, but perhaps dispositive. Second, many commercial transactions are of relatively lower value. It may not be worth the buyer's or the seller's time to negotiate carefully about what a widget is for a relatively low-amount widget transaction. It is efficient for them to rely on industry norms to define the widget.

The bespoke nature of the deals might also mean that, even if there is an analogy to draw, that analogy might not be appropriate. For example, each year, there are many more small private mergers and acquisitions than there are large public ones. And, while both transactions are M&A transactions, they have many differences. For example, large public transactions must file for and receive pre-clearance from antitrust regulators—a process that is time-consuming and costly.[171] In contrast, small transactions do not require antitrust pre-clearance. In fact, the filing fee for pre-clearance review—which ranges from $45,000 to $280,000[172]—easily eclipses the total deal value of many small private transactions. It may be tempting to compare large public deals to the innumerable smaller ones, but the reality is that these deals are similar only in name—in substance, they are so different as to be incomparable.

While these justifications for textualism have intuitive appeal, collaborative intent throws a wrench in the works. In particular, a key argument for textualism is that sophisticated parties want to exclude evidence that they did not create themselves. This makes sense if one assumes that sophisticated-party dealmaking is often too bespoke to be comparable to other deals, and thus excluding evidence from other deals is a way to cut noise out of the interpretation process.

Evidence from collaborative intent, however, is not evidence from *other* deals: it is evidence from the parties *themselves*. In fact, not only is it evidence from the parties themselves, it is also evidence from the same exact deal—just at a different stage of the deal's life cycle. If that is the case—that there is evidence from the same parties, and from the same deal—do parties still want to exclude that evidence from consideration?

Here, it is important to distinguish between externally-generated and self-generated extrinsic evidence. Textualist arguments are concerned with the former: evidence from other parties, other deals, or unrelated industry norms that sophisticated parties feel is unrelated to the deal at hand. Evidence of collaborative intent, however, is self-generated extrinsic evidence.

And there are many reasons why parties might wish to treat these two kinds of extrinsic evidence differently. For one thing, in bespoke deals

[171] See Filing Fee Information, Fed. Trade Comm'n (Mar. 4, 2021), https://www.ftc.gov/enforcement/premerger-notification-program/filing-fee-information [https://perma.cc/3864-73P8] (providing information about the fees associated with filing for pre-clearance from antitrust regulators).

[172] Id.

between sophisticated parties, externally-generated extrinsic evidence might inject confusion, because analogies are inapt. Self-generated extrinsic evidence seems not to have those problems, since the evidence generated is closely related to the deal at hand. In fact, sophisticated parties often already integrate into their deals pieces of information that might be categorized as self-generated extrinsic evidence. For example, parties often explicitly integrate preliminary or ancillary agreements from the same deal with the main contract.

Another reason involves the cost-accuracy tradeoff. Textualism recognizes that accuracy is ideal, but investigating context may be too costly. This idea is most powerful when considering the vast amounts of context that courts *could* consider: For example, when interpreting a vague provision of a public company acquisition agreement, should the court analogize to contracts from the same year? What about contracts over the last five years that involve the same industry? What about contracts over the last five years that use the same deal structure? The world of potential context is expansive, and, correspondingly, expensive.

Considering only context generated from collaborative intent is perhaps different: it introduces some limited investigatory cost into the adjudication process, but that cost is relatively modest because the available context is relatively modest. At the same time, collaborative intent, which has thus far been overlooked, has the potential to substantially increase accuracy. Thus, parties might find that the cost of including context from collaborative intent is worthwhile, given the gains in accuracy. The cost-accuracy tradeoff of including evidence from collaborative intent is, at the least, worth investigating.

Finally, it is worth noting that there are downsides to including this evidence, too. A clear analogy can be drawn between collaborative-intent evidence and legislative history, and many an article has been written about the pros and cons of considering legislative history in statutory interpretation. This Article does not attempt to advocate for the inclusion of collaborative-intent evidence into adjudication. Rather, it suggests that collaborative-intent evidence complicates matters, and makes it harder to decide what should and should not be included. Evidence from collaborative intent has the potential to increase interpretive accuracy, but, like all extrinsic evidence, also has the potential to increase contracting costs.

B. Contract Design

Collaborative intent complicates questions of interpretation: Should judges consider evidence of collaborative intent when interpreting contracts? If so, to what extent? This Article merely starts the conversation about those important questions.

Through contract design, however, contracting parties may be able to mitigate some of the interpretive challenges that collaborative intent introduces. In previous work, I have discussed the benefits of modular contract design, which allows parties to mitigate risk by dividing contracts into discrete modules.[173] Here, the principle is the same: modularity can reduce some risks.

In general, a contract's structure can be more modular or more integrated.[174] Modular contracts are ones where provisions are relatively self-contained and do not need interconnections with other provisions to work, whereas integrated ones rely on those interconnections.[175] Contract modules can be within the contract itself—for example, a tax representation in an acquisition agreement might be quite self-contained. Contract designers can also modularize a contract by using multiple agreements—for example, by breaking a single contract into several contracts, so that each bit of the deal can be sectioned off into its own separate, specific contract.[176]

A major benefit of modularity is that modular parts of the contract can be swapped out without affecting the rest of the contract, much like tires on a car can be swapped out without affecting the rest of the car.[177] In the context of collaborative intent, however, the major benefit of modularity is not that modules are easy to swap out: rather, it is that the modules are *self-contained*.

Collaborative intent can create ambiguity in the contract. For example, the contract can include both what the executives want, and also what the production team, human resources department, information technology

[173] See Hwang, Unbundled Bargains, supra note 16, at 1427–34.
[174] See Cathy Hwang & Matthew Jennejohn, Deal Structure, 113 Nw. U. L. Rev. 279, 301 (2018) (discussing modular and integrated contracting).
[175] Id.
[176] See Hwang, Unbundled Bargains, supra note 16, at 1409 (describing the process of breaking one acquisition agreement into an acquisition agreement and several ancillary agreements).
[177] See Hwang & Jennejohn, supra note 174, at 301 (discussing how contract modules can be swapped out without affecting other parts of the contract).

department, and others want in the deal. In an ideal world, a lead negotiator would be able to consider the motivations of various constituencies within a company and synthesize them into one coherent "intent of the company." Interview participants have reported, however, that this often does not happen: instead, contracts reflect a mishmash of ideas from various corners within the company. Modularity, then, allows a lead negotiator to clarify *the company's* intent and differentiate it from the parts of the contract that exist merely as a result of intra-corporate bargaining. The lead negotiator can separate the agreement into different modules, where parts of the contract clearly reflect the contracting party's intent, and other parts reflect intra-corporate bargaining.

Not only does this separation help clarify the contract's meaning, but it also reflects, to a large extent, the existing state of the contract negotiation process. Interview participants noted that departments within the company often spoke directly to each other, coming up with the substantive terms of the agreement before reporting back to their respective lead negotiators for memorialization in the contract. Modularizing the contract would involve the relatively low-cost change of putting some of those side discussions into an ancillary agreement, thereby making clear that they are not to be considered part of the main contract.

Moreover, some sophisticated parties already design their contracts in this way. It is common, for instance, for a seller to continue providing back-office services to its acquiring company for some time after a sale through a separate transition services agreement, and some interview participants reported that they broke out separate contracts, exhibits, or appendices for certain functions.

Moving the modular negotiation process onto the pages of the contract, then, is a relatively low-cost fix that clarifies interpretation challenges.

CONCLUSION

This Article offers a new explanation for why sophisticated parties use incomplete, vague, or otherwise unexpected contracts: collaborative intent. Using original interviews with in-house dealmakers, it shows how the bureaucratic, intra-corporate bargaining process within large companies contributes to contracting oddities. These institutional details of dealmaking have largely been overlooked by scholars, judges, and lawyers alike, and have the potential to change how we think about contract theory, interpretation, and design.

APPENDIX A: INTERVIEWS AND METHODOLOGY

The findings in this Article are informed by interviews with two dozen individual interview participants. Interview participants are all individuals who have experience as lead negotiators for bespoke, non-routine deals within their companies. They are either in-house lawyers or have in-house business roles.

The interviews were semi-structured. When interviewing participants, I asked the same set of open-ended questions about how a deal is put together and supplemented those with follow-up questions and requests for clarification. I took notes and transcribed the answers in real time. I did not record interviews but did occasionally read back my transcription to ensure accuracy. I usually reviewed interview notes shortly after the interview ended to correct typos and other minor transcription errors.

When interviewing, I asked interview participants to focus on larger, more bespoke deals, rather than routine commercial deals, so that I could hear about the process of creating a new type of deal from scratch. Interview participants described a variety of bespoke deals, including mergers, acquisitions, joint ventures, divestitures, investments, co-branding deals, deals with entertainers, and others. Where relevant, those details are noted in the Article.

For brevity and anonymity, each interview participant is identified within the text of the Article by a reference term, which is noted in the chart below. The chart also provides other information about the interview participants, such as general descriptions of the companies where they work, including whether the company is public or private, and the company's primary industry. To protect participants' anonymity, I promised not to identify any participant or their company by name, and, within the text, I often edited out details from answers that I believed would too easily identify the participants and their employers.

To identify interview participants, I used a snowball sampling technique, asking each interview participant at the end of the interview if they could introduce me to additional potential participants. The main shortcoming of this method is sampling bias. However, personal introductions helped me gain access to a population that would otherwise not speak to me—the interviews required high-level corporate negotiators to spend a substantial amount of time talking to me about often-confidential internal decision-making processes. Without a personal introduction, it would have been hard to gain access to these individuals.

Another shortcoming of the interview methodology is that a participant's memory about past deals might be faulty. To mitigate this issue, I asked interview participants to focus their answers around a particular recent deal. In some cases, those deals were public, so the interview participant could tell me more specific information, and I could ask more specific follow-up questions. Details about those deals have been edited out. In most cases, deals were either in progress or completed but not public, so I do not know which specific deals were being discussed.

The chart below provides more information about individual interview participants. Each interview participant's job type and company type are reported below as of the time of the interview. Interviews with Interview Participants 11, 12, and 22 were conducted in person; the rest were telephone interviews. Interview Participants 11 and 12 work at the same company and were interviewed at the same time. Interview Participants 6 and 15 work at the same company but were interviewed separately. Other than those overlaps, no interview participants work at the same company.

Interview Participants

Reference Term	Job Type	Company Type
Interview Participant 1	In-house attorney	Private; technology
Interview Participant 2	In-house attorney	Public; technology
Interview Participant 3	In-house corporate development	Public; software-as-service
Interview Participant 4	In-house attorney	Public; software-as-service
Interview Participant 5	In-house attorney	Private; software as service
Interview Participant 6	In-house attorney	Public; technology
Interview Participant 7	In-house attorney	Private; energy
Interview Participant 8	Former in-house attorney	Private; internet
Interview Participant 9	In-house attorney	Public; technology
Interview Participant 10	In-house attorney	Public; technology
Interview Participant 11	In-house attorney	Private; diversified investment

Reference Term	Job Type	Company Type
Interview Participant 12	Chief Operating Officer	Private; diversified investment
Interview Participant 13	In-house attorney	Private; software-as-service
Interview Participant 14	In-house attorney	Private; services
Interview Participant 15	In-house corporate development	Public; technology
Interview Participant 16	In-house attorney	Public; technology
Interview Participant 17	In-house attorney	Private; fashion
Interview Participant 18	In-house attorney	Private; gaming
Interview Participant 19	In-house attorney	Public; software-as-service
Interview Participant 20	In-house attorney	Private; online retailer
Interview Participant 21	In-house attorney	Private; retailer
Interview Participant 22	In-house attorney	Private; industrial services
Interview Participant 23	In-house attorney	Private; financial services
Interview Participant 24	In-house attorney	Public; entertainment