Merger Agreements Are Poorly Drafted

Commercial and Contracts

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Cheat Sheet:

- **Analysis of dysfunction.** This article draws lessons from the author's critique of a merger agreement for one of the biggest deals of 2025. The lessons apply to business contracts generally.
- **Stop copy-and-paste drafting.** Copying, on faith, from precedent contracts creates systemic flaws, as lawyers reuse language they don't fully understand.
- **Challenge the legalistic mindset.** Excessive wordiness and "magic language" add complexity without reducing risk, making contracts harder to read and use.
- **Recognize the hidden costs.** Poor drafting wastes time, increases legal spend, and can lead to confusion, mistakes, and disputes.
- **Making a fresh start.** To escape the systemic dysfunction, it's time for a fresh start. AI could replicate the dysfunction, while highly customizable automated templates may offer a path to clearer, faster, and more reliable M&A drafting.

In November 2025, the Harvard Law School Forum on Corporate Governance published a post entitled *Merger Agreements Are Too Long*. I took that as a sign that the time had come for tough love on merger agreements. I decided to join in by critiquing the drafting of a high-profile contract — something I do occasionally.

I haphazardly selected a public-company merger agreement from 2025 that provides for one major US railroad, Union Pacific Corporation, to acquire another, Norfolk Southern Corporation. I examined the merger agreement to see how clear it is and how it handles issues relating to structure and boilerplate.

I found it dysfunctional, in terms of both what it says and how it says it.

This article serves as an introduction to my analysis of the Norfolk Southern merger agreement. I start by telling you a bit about myself, then I describe the source of the shortcomings on display in the merger agreement and how to fix them, and then I summarize the nature of the shortcomings. The analysis itself comes in two versions, depending on whether you want to read it on-screen or print it out. You'll find links to those documents below.

This post and my analysis are intended not only for law firms that do mergers-and-acquisitions (M&A) work but also their clients and, more generally, anyone who works with business contracts.

About me

I don't do M&A deals, or deals of any sort. Instead, I research and write about how to say clearly in a contract whatever you want to say. In that capacity, I'm author of *A Manual of Style for Contract Drafting* (5th ed. 2023) (*MSCD*).

I'm also author of *The Structure of M&A Contracts* (2011), which addresses interplay of the parts of an M&A contract. And I've written about contract boilerplate — the dispute-resolution and administrative provisions found at the back of most contracts.

It's the system

In my analysis, I identify varied and pervasive shortcomings in the Norfolk Southern merger agreement. Based on my rooting around in M&A contracts over the years, I suggest that in that respect, the Norfolk Southern merger agreement is broadly representative of M&A drafting. In fact, it's broadly representative of mainstream contract drafting generally—the details vary, but the common theme is dysfunction. (I use the phrase "mainstream contract drafting" to acknowledge that there are presumably contracts to which my generalizations don't apply.)

That suggests the cause is systemic. There's only one possible culprit: copy-and-pasting.

Since forever, we've drafted contracts by copy-and-pasting, on faith, from precedent contracts and templates of questionable quality and relevance. That's what we've been instructed to do, and it's been our only option. So generally, we don't entirely understand why contracts say what they say, and we're unaware of flaws in how they say it. Thanks to the copy-and-paste machine, mainstream contract drafting consists of smart people churning out suboptimal contracts.

Lawyers try to turn that dysfunction into a virtue by applying the legalistic mindset. The legalistic mindset sees piling on extra words not as redundancy but as a way to mitigate risk. It also attributes magic powers to certain words and phrases, so they're presumed to be the only way to express a given meaning and will express that meaning regardless of the circumstances. And it's inclined to accept the conventional wisdom, no matter how flimsy.

So take endless copy-and-pasting, add the legalistic mindset, and that explains the systemic dysfunction.

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The costs of dysfunction

Shortcomings of the sort on display in the Norfolk Southern merger agreement make the reader work harder, so time and money are wasted at every stage in the contract process — drafting, reviewing, negotiating, and monitoring performance. Problematic drafting might also create confusion or cause mistakes, potentially leading to suboptimal outcomes, including disputes.

The first step to acknowledging a problem is to be aware of it. But it's easy to ignore the drip-drip-drip of time and money being chronically wasted. It's also easy to dismiss the risk of finding yourself unexpectedly at a disadvantage after the deal closes, with a messy dispute as a possible consequence. And the benefits of fixing contract language aren't easy to measure.

Those costs and benefits matter more if you plan for the long term. You can't count on that, particularly in a bet-the-company deal like Union Pacific's acquisition of Norfolk Southern: All players would likely be focused on getting the deal done and inclined to dismiss other considerations as a distraction.

Fixing the dysfunction

Inertia is a powerful force in contracts, but we can escape inertia if we can free ourselves from the copy-and-paste machine. That's a realistic proposition, if we upgrade our capabilities in two respects.

First, we must have a path to becoming better-informed consumers of contract language, so we know how to say clearly and concisely whatever we want to say in a contract. That's now possible, as in recent decades we have developed standards for contract language that are comparable to those we apply to other kinds of writing.

And second, we need a more reliable resource on *what* to say in contracts. Based on what I hear from BigLaw transactional partners, many are preoccupied with the prospect of using artificial intelligence for drafting contracts. But if we train AI on mainstream contract drafting, the AI will replicate dysfunction — we'll be a long way from contracts that are clear, concise, and relevant.

It's not enough to replicate more efficiently the contract language we have. Instead, we need a fresh start.

The best way to accomplish that would be through a technology that never really had its moment: contract automation. That would involve developing for the broader market, with the help of specialists under editorial control, a library of templates that are automated and highly customizable. Such templates would speed the drafting process and offer a decision tree that is much more expansive than what is offered by copy-and-pasting. The user completes an interview, consulting the guidance provided and answering questions. The system then delivers a draft that is clear, concise, and relevant — it reflects the choices made by the user.

Creating such templates requires painstaking attention to detail, but the effort pays off in control and precision.

AI could be used to streamline how such templates are created and used. For example, AI could be used to determine, from a legacy template or from a set of precedent contracts, how the user would likely complete the interview. And AI would benefit from such templates, as the contract language they create would provide reliable raw material for training AI.

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Implementing change

Highly customizable templates would help with drafting any kind of contract, but M&A contracts might be particularly conducive to this approach. Because mergers are governed by statute, and because acquisitions provide for transfers, M&A contracts generally resemble one another more than do contracts that provide for ongoing relationships. Template variants could address the needs of different market segments.

A general preference in M&A for consistency from deal to deal, with limited changes, could be used to justify never undertaking the overhaul I propose. Instead, make the change, get through the period of adjustment, and reap the benefits of contracts that are clearer, more concise, more relevant, and drafted more quickly.

It would be unrealistic to expect individual law firms to develop their own highly customizable templates. They would likely find the work burdensome, and they couldn't count on having access to the necessary expertise. And most would be unlikely to achieve economies of scale allowing them to recoup the investment required. It would make more sense for a consortium of law firms and companies active in M&A, or a trade group, to get involved.

A more effective process for M&A contracts is up for grabs, if the M&A world can handle the change.

My analysis

My analysis of the Norfolk Southern merger agreement is available in two versions. Use this version if you plan on printing out a copy — I recommend that while reading text annotated with comments, you have in front of you both a page with the underlying text and the page with my comments on that text. Use this version if you want to read it on-screen. You can use Acrobat Reader DC to do so — it's free. In the on-screen version, the links aren't clickable, but you can copy-and-paste them.

My analysis comes in five parts:

- **Part 1** consists of the first seven pages of the merger agreement, annotated with comments relating to clarity and comments relating to layout and typography.
- **Part 2** consists of extracts showing the different ways the word *shall* is used and misused in the merger agreement, with proposed fixes. (This part leaves untouched everything else in those extracts.)
- **Part 3** consists of an annotated version of one subsection from page 14 of the merger agreement, followed by a suggested redraft of that subsection.
- **Part 4** consists of page 81 of the merger agreement, annotated with comments relating to structure issues in M&A contracts.
- **Part 5** consists of pages 87–90 of the merger agreement, annotated with comments relating to boilerplate provisions.

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Clarity

Because of archaisms, redundancy, wordiness, irregular verb structures, awkward syntax, and other problems, the prose of the Norfolk Southern merger agreement is nowhere near as clear as it might be. And layout glitches don't help. In that respect, the Norfolk Southern merger agreement is broadly consistent with other merger agreements and with business contracts generally.

My annotations in part 1 don't show the full effect of those problems, as mostly I flag a given issue just once instead of flagging every instance. It takes only a few legalistic usages, repeated often, to make contracts prose tiresome. And my analysis covers only the first seven pages; in the remaining 92 pages, more problems are to be found.

In part 1, I note everything that could be improved, rather than limiting myself to shortcomings that might be thought the more significant ones. In other words, I'm not a proponent of drafting that's "good enough." I have four reasons for that:

- First, if contracts prose features enough minor problems, the cumulative effect forces the reader to work harder.
- Second, problems that might seem minor have a way of unexpectedly leading to disputes.
- Third, minor problems suggest carelessness—a reader might wonder whether that carelessness resulted in other and bigger problems.

- And fourth, if a contract is to be used as a template for multiple transactions, that would allow you to devote more resources to optimal drafting than would be the case for a one-off contract. You'd have no excuse for making do with "good enough."

To get a sense of the effect of overuse of *shall*, see part 2. And the redraft in part 3 offers an example of the cumulative effect of fixing the shortcomings.

Structure

My analysis regarding structure, in part 4, is limited to the bringdown condition, which allows one side to use inaccuracy in the other side's statements of fact to relieve the first side of its obligation to close.

My comments in part 4 relate to misconceptions and omissions in the conventional wisdom regarding interplay of the parts of an M&A contract.

Boilerplate

In part 5, most of my comments question the utility of a given boilerplate provision, or part of one. In a merger agreement for a substantial acquisition, there's little incentive to trim boilerplate, but in other kinds of transactions there might be more interest in being economical.

My other comments point out a few problematic words and phrases.

The links, again

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