A lesson in drafting contracts

What's up with 'representations and warranties'?

By Kenneth A. Adams

Legalese is sometimes necessary. But sometimes, it's not.

In corporate agreements, assertions of fact are referred to as *representations and warranties*. Unless, that is, they're referred to simply as *representations*. Or referred to simply as *warranties*. Likewise, a party will *represent and warrant* as to one or more facts, unless it just *represents* or just *warrants*.

Using pairs of synonyms, or near synonyms, in legal writing suggests bloat, and using different words to convey the same meaning is a reliable sign of confusion. One is entitled to wonder whether drafters wouldn't be better served by opting for one noun (and verb) and sticking with it.

It may come as a surprise, but the answer is that they certainly would. For clearer, more concise, and more disciplined drafting, you should, except when waiving implied warranties, steer clear of *warranty* and its verb equivalent and instead refer to assertions of fact as *representations* and have the parties *represent*.

Reaching this conclusion requires a three-step analysis. First, one must ask how, for general contract-law purposes, one distinguishes between *representation* and *warranty*. (This article doesn't consider the specialized definitions of *representation* and *warranty* for purposes of insurance contracts.) Second, one must consider how courts construe these words as they're used in contracts. And third, one must consider what the costs are of continuing to follow custom by using in one's drafting the couplets *representations and warranties* and *represents and warrants*.

The literature on drafting is largely silent on the distinction between representations and warranties, with only a handful of commentators taking a half-hearted stab at it. The most assertive take is that offered in the *Model Stock Purchase Agreement* (1995) and *Model Asset Purchase Agreement* (2001) — both published by the ABA's Section of Business Law — which state that "representations are statements of past or existing facts and warranties are promises that existing or future facts are or will be true." But *Krys v. Henderson*, 69 S.E.2d 635, 637 (Ga. Ct. App. 1952), is the only case I have found that stands squarely for this distinction. If you examine the question anew, you discover that the actual distinction is rather more subtle.

Of the two words, *representation* is the more straightforward. *Black's Law Dictionary* defines *representation* as "A presentation of fact — either by words or by conduct — made to induce someone to act, esp. to enter into a contract."

Related to the concept of a representation is the tort of misrepresentation. Section 159 of the *Restatement (Second) of Contracts* says that "A misrepresentation is an assertion that is not in accord with the facts." One can have fraudulent, negligent and innocent misrepresentation; these are discussed in sections 526, 552 and 552C, respectively, of the *Restatement (Second) of Torts*.

To constitute misrepresentation, an assertion must relate to something that is a fact at the time the assertion is made, in other words past events or current circumstances but not future events. (See comment c of Section 159 of the *Restatement (Second) of Contracts*.) That is presumably what underlies the notion stated in the *Model Stock Purchase Agreement* and *Model Asset Purchase Agreement* that statements of future facts do not constitute representations.

But it doesn't follow that the meaning of *representation* must be linked to the elements of an action for misrepresentation. Indeed, references to representations as to a future event are commonplace in general legal usage. To pick two examples at random, 37 *American Jurisprudence, 2d* Fraud and Deceit §§ 80 refers to "the test to determine whether a representation is of an existing fact or of a futurity," and in *Smith v. Waste Management*, 407 F.3d 381, 382 (5th Cir. 2005), the court refers to "representations about Waste Management's future earnings."

Regarding the meaning of *warranty*, under common law an express warranty is a seller's affirmation of fact to the buyer, as an inducement to sale, regarding the quality or quantity of goods, title or restrictive covenants to

Adams is the author of A Manual of Style for Contract Drafting *(American Bar Association 2004). He conducts in-house seminars on contract drafting, is a lecturer at the University of Pennsylvania Law School, and practices corporate law with Lehman & Eilen LLP. His e-mail is kadams@adamsdrafting.com.*

real property. See Howard O. Hunter, *Modern Law of Contracts* §§ 9.5 (2004). While the *Model Stock Purchase Agreement* and *Model Asset Purchase Agreement* say otherwise, there is no reason why a warranty shouldn't be of a past fact, such as the date a car was manufactured.

Because the majority of warranty cases today arise under the Uniform Commercial Code, the modern common law of warranties is of somewhat limited application. But important warranty law applications do fall outside the UCC. For example, cases involving the sale of a business can turn on warranties made by the seller. See, for example, *Quality Wash Group V, Ltd. v. Hallak*, 58 Cal. Rptr. 2d 592 (Cal. Ct. App. 1996); *CBS v. Ziff-Davis Publishing*, 553 N.E.2d 997 (N.Y. 1990).

Regarding the UCC definition of *express warranty*, UCC §§ 2-303 states in pertinent part that "Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise."

Under this definition, a statement of fact can be a warranty (as is the case with the common law definition of *warranty*), but so can an obligation. For example, it is commonplace to refer to as a warranty a contract undertaking to replace defective parts. See, for example, *Schimmer v. Jaguar Cars*, 384 F.3d 402, 403 (7th Cir. 2004) (referring to how a car manufacturer had provided a limited written warranty to repair or replace any nonconformities or defects).

Just as a representation can underlie an action for misrepresentation, an action for breach of warranty must be based on a warranty. But whereas the definition of *representation* is broad enough to include assertions of fact that wouldn't support an action for misrepresentation, *warranty* is narrowly construed so as to mean, in effect, an assertion of fact that would support an action for breach of warranty. That's why courts don't use warranty terminology in cases that don't involve sales.

So much for the legal meaning of the words *representation* and *warranty*; what is the significance of how these terms are used in contracts? Conceivably, a court could hold that a party may only bring an action for breach of warranty if the assertion of fact underlying the claim is referred to as a warranty in the underlying contract. Or it could hold that for a valid action for misrepresentation, the assertion of fact underlying the claim must be described as a representation in the underlying contract.

If courts were in the habit of so holding, how one uses *represent* and *warrant* in a contract would be important, given the significant difference between these causes of action in terms of the remedies available, the applicable statutes of limitations, and other matters. And drafters would be justified in preparing for either alternative by consistently using *represents and warrants*.

At one time, courts adopted just such an approach. In one famous English case, a seller who had "affirmed" that his product was a bezoar stone — a kind of concretion found in certain animals and believed to have occult qualities — was held not liable for failure to provide such a stone because he had not stated that he was "warranting." *Chandelor v. Lopus*, 79 Eng. Rep. 3 (Ex. Ch. 1625).

Courts now take the opposite approach. This is evident, for example, in *Quality Wash Group V, Ltd. v. Hallak*, 58 Cal. Rptr. 2d at 596, in the way the court states that "The seller's *warranty* provides, in pertinent part, 'Seller makes the following *representations* regarding the assets.'" (Emphasis added.) And UCC §§ 2-313(2) states that "It is not necessary to the creation of an express warranty that the seller use formal words such as 'warrant' or 'guarantee' or that he have a specific intention to make a warranty."

By the same token, it would be bizarre for a court to conclude that if a party *warrants* as to a given fact, rather than *represents* or *represents and warrants*, the one or more parties to whom that assertion was made would not be entitled to bring a claim for misrepresentation as to that assertion.

The current approach makes sense. For one thing, *representation* and *warranty* serve to flag an assertion of fact, but they don't affect the meaning of that assertion. Indeed, the only function of the verbs *represent* and *warrant* is to make it clear who is making the assertion of fact; otherwise, you could have the assertion of fact stand on its own — *the engine is in good operating condition* rather than *Jones represents that the engine is in good operating condition*.

If you were to require *represent* or *warrant* to convey any additional meaning, you would in effect be speaking in code. If you want to specify what a party's remedies would be if another party's factual assertions were to prove inaccurate, your only plausible option would be to address that issue directly.

If the question of what cause of action a party is entitled to bring does not depend on the terminology used by the party that made the assertion at issue, then in the appropriate context that assertion could give rise to both a claim for misrepresentation and a claim for breach of warranty without requiring that the contract describe the assertion as both a representation and a warranty. That is what the case law indicates. See, for example, *Edwin Bender and Sons v. Ericson Livestock Commission Co.*, 421 N.W.2d 766, 770 (Neb. 1988); *Newman v. Kendall*, 154 A. 662, 664 (Vt. 1931).

Even though the terminology you use to flag assertions of fact won't have any effect on the claims a party can bring, you're still left with the task of determining which term to use. *Representation* (and *represent*) is the better choice. It can be used with all assertions of fact, whereas using *warranty* in that manner — in other words, not restricting its use to assertions made in

the context of a sale — would be to do violence to the standard meaning given the term. And *representation* is also more narrowly tailored to that task, given that a warranty can also express an obligation.

You would need the word *warranty* only for purposes of waiving implied warranties, such as the implied warranty of merchantability, and in that context the word would simply serve to refer to legal doctrine.

Of course, you could always follow custom and stick with *representations and warranties*. The odds are slim that anyone would ever call you on it, because legal terms that have ceased to serve — or never did serve — any useful function tend nevertheless to remain in use, either out of simple aversion to change or because a given term has acquired an incantatory quality. (That there's an element of incantation to *representations and warranties* is suggested by the fact that it's much less frequently worded as *warranties and representations*.)

In fact, the converse is more likely to be the case, in that a junior lawyer who opts for *representations* rather than *representations and warranties* may well come in for harrumphing from higher up the food chain as to how that's not the way it's done. And anyhow, if which term you use would have no substantive effect, why not follow tradition?

Here's why not: Whereas the couplet *representations and warranties* is mildly annoying when you encounter it a dozen times or more in a contract, you couldn't say that this usage on its own constitutes a significant problem. But you shouldn't consider it on its own, because it is invariably joined by many other deficient usages — other redundant synonyms, the traditional recital of consideration, a range of archaisms, use of *shall* to mean anything other than "has a duty to," incoherent formatting, use of words and numerals to express numbers, and so forth.

Together, these usages often render the modern contract an utter chore to draft, read and interpret. They also encourage a general heedlessness as to meaning, thereby increasing the odds that a given piece of contract prose will contain a drafting flaw that results in a dispute or deprives a client of an anticipated benefit.

The only way to improve contract prose would be to attempt to address each of these deficiencies. Using *representations* instead of *representations and warranties*, and *represents* instead of *represents and warrants*, would be as good a place as any to start.