Litigating the Meaning of Contract Language? Consider Retaining an Expert

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One source of fights between parties to a contract is ambiguity. Does a particular provision allow for alternative meanings? If so, which should prevail, if any?

A problem with resolving disputes over ambiguous, or allegedly ambiguous, contract language is that ambiguity is a complex topic—it arises in different ways, many of them far from obvious. So when a judge or litigator without a grounding in the subject analyzes ostensibly ambiguous contract language, confusion often results.

This article explains that to reduce the chances of such confusion, litigators should consider retaining an expert in contract language.

Judicial Confusion

Despite the strength of the U.S. judicial system, it's not hard to find instances of courts resolving disputes over the meaning of contract language in ways that don't make sense. For example, consider how the Second Circuit Court of Appeals invoked a principle of interpretation that's markedly at odds with English usage (see my article here), how the Third Circuit Court of Appeals opted for an unreasonable interpretation of an *or* (see my article here), and how the Federal Circuit misanalyzed the phrase *at least one of X and Y* (see my blog post here).

Obviously, this sort of confusion isn't limited to appellate courts—it's commonplace for courts at all levels to misanalyse contract language. Here's an example that a reader pointed out to me.

In Dynamic Aviation Group Inc. v. Dynamic International Airways, LLC, No. 5:15-CV-00058, 2016 WL 1247220 (W.D. Va. Mar. 24, 2016) (PDF here), the parties to a contract disagreed over the meaning of the following provision:

> On or before October 9, 2014, the Company shall discontinue the use of (i) the name "Dynamic Airways" and (ii) any logo or trademark substantially similar to that mark used by Dynamic Aviation, Inc., or previously used by the Company while owned by the Seller or the Seller's Members.

The court held that clause (ii) had two possible meanings and so was ambiguous. It is indeed ambiguous, but not in the way the court describes.

The first meaning the court offered was the one the plaintiffs sought—that the phrase "substantially similar" in clause (ii) modified the phrases "that mark," "used by Dynamic Aviation, Inc.," and "previously used by the Company." That would result in clause (ii) encompassing marks substantially similar to "Dynamic Airways," marks substantially similar to all the logos and trademarks used by Dynamic Aviation, Inc., and substantially similar to all the logos and trademarks used by the Company when it was owned by the Seller or the Seller's Members.

But the first meaning cannot be derived from the language at issue unless you supplement the text of clause (ii) as marked in square brackets below (the enumeration is mine):

> *Plaintiffs' Interpretation*
>
> any logo or trademark substantially similar to (A) that mark[,] (B) [any logo or trademark] used by Dynamic Aviation, Inc., or (C) [any logo or trademark] previously used by the Company while owned by the Seller or the Seller's Members

There's no basis for so rewriting clause (ii).

The second meaning the court offered was the one the defendant sought (the enumeration is mine):

> *Defendant's Interpretation*
>
> any logo or trademark substantially similar to that mark (A) used by Dynamic Aviation, Inc., or (B) previously used by the Company while owned by the Seller or the Seller's Members

That's a natural reading of clause (ii). But the court suggested that other possible interpretations might exist, and indeed, here's another interpretation, the only other interpretation to which clause (ii) is susceptible (again, the enumeration is mine):

> *Third Interpretation*
>
> any logo or trademark (A) substantially similar to that mark used by Dynamic Aviation, Inc., or (B) previously used by the Company while owned by the Seller or the Seller's Members

The ambiguity on display in clause (ii) is syntactic ambiguity, which involves uncertainty over what part of a sentence a phrase modifies, or what part of a phrase a word modifies. In this case, the question is exactly what the phrase "substantially similar to that mark" modifies.

So the court was inadvertently correct in stating that clause (ii) was ambiguous. The question of whether the court's misreading of clause (ii) affected its analysis is beyond the scope of this article. What matters for our purposes is that the sort of misreading on display in *Dynamic Aviation Group* occurs sufficiently often in caselaw as to be unexceptional.

Litigator Confusion

If a court misreads disputed contract language, that might well mirror confusion on the part of the litigators representing one or both sides.

One would like to think that if a coherent interpretation were available, the litigators who would stand to benefit from it would present that interpretation in an authoritative and compelling way.

But you can't count on that. For one thing, just as lawyers tend to think that they write better than they actually do, I suspect that litigators are prone to overestimating their semantic acuity. And many litigators don't understand how contract language works—they make the mistake of assuming that it's like the persuasive writing used in litigation, whereas it's more limited and stylized.

Dynamic Aviation Group features what appears to be an additional instance of litigators misreading contract language. Here's what the court says about the meaning of the phrase *substantially similar*:

> [The plaintiffs] claims this phrase is unambiguous because it can be given a plain and ordinary meaning. [The defendant] disagrees, and argues that "substantially similar" is ambiguous because reasonable people can disagree as to its meaning in this contract.

In fact, the phrase *substantially similar* isn't ambiguous, it's vague. Vagueness arises when determining whether a given standard has been satisfied is a function of the circumstances, with the possibility of dispute over borderline cases. Perhaps the defendant's counsel intentionally invoked ambiguity instead of vagueness, but it might be that they, like most lawyers, were unaware of the distinction. If you're unable to distinguish the different sources of confusion in contracts, you're perhaps ill-equipped to analyze the meaning of disputed contract provisions.

Expert Testimony

One way to address confusion over the meaning of disputed contract provisions is to engage an expert. But U.S. courts generally decline to admit expert testimony on whether contract language is ambiguous. Instead, expert testimony is admissible only as to the technical meaning of contract language. (See my blog post here.) In my experience, some courts are willing to entertain expert testimony, but perhaps only because they're unaware of the prevailing practice.

It makes no sense to refuse to admit expert testimony on ambiguity. It's clear from the caselaw that you can't assume that judges are equipped to analyze ambiguity, any more than you can assume that a careful driver knows how to service a car engine.

Allowing expert testimony on ambiguity would help litigants present judges with a basis for sensible analysis of disputed contract provisions. Such testimony would also remind judges of their limited expertise in this area. But judges might resist, as admitting expert testimony on ambiguity would presumably result in more briefs and longer trials.

Even if expert testimony on ambiguity isn't admissible, litigants could nevertheless derive most of the benefit of expert testimony by retaining experts to help them behind the scenes. What matters most is that *someone* put an expert analysis before a judge. For example, if the defendant in *Dynamic Aviation Group* had retained an expert, the defendant might have persuaded the court that the plaintiffs' reading of clause (ii) wasn't viable. Suitable citations in briefs would make it clear that the litigators have tapped into relevant expertise.

But be careful whom you retain as an expert. It's not enough that the expert be a linguist or an expert in litigation writing. (For a cautionary tale of what can happen when you retain as an expert someone with a background in litigation writing, see this blog post.) Look for someone with credentials as a commentator on contract language.

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