The defining characteristic of contract drafting is that each new transaction will closely resemble other transactions. As a result, the urge is to copy contracts used in other transactions, making only whatever adjustments are necessary to reflect the new transaction.

That could be a source of strength, but because traditional contract language is a dysfunctional stew of archaisms, redundancy, chaotic use of verbs, overlong sentences, confusing terminology, and other problems,[80] wholesale copying has given rise to a pathology this author calls "passive drafting":[81]

- You don't have the time or, in all likelihood, the expertise to reassess the language of precedent contracts and templates, so you copy it, on faith, assuming that because it was thought suitable for other comparable transactions it will work for yours.
- Because it has been "tested"—in other words, has been scrutinized by the courts—you stick with contract language that has given rise to disputes.
- Because you're copying, you don't need guidelines.
- Because you're copying, no one needs to be trained.
- And as part of convincing yourself that copying is a matter of best practices rather than simple expediency, you accept as meaningful distinctions between contract usages what are in fact obscurantist rationalizations.

The result is that traditional contract language remains dysfunctional, and so does the process.

Attempts to distinguish between *represents* and *warrants* as contract usages fall within the final element in the passive-drafting pathology outlined above. So do attempts to distinguish between *indemnify* and *hold harmless*,[82] and *best efforts* and *reasonable efforts* (in England, *best endeavours* and *reasonable endeavours*).[83] The most important point about all such reasoning is not just that it fails to convince but that the usages advocated come a distant second-best to saying clearly whatever it is you want to say.

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[80] *See* Kenneth A. Adams, *Dysfunction in Contract Drafting: The Causes and a Cure*, 15 TENN. J. BUS. L. 317 (2014).

[81] *See* Kenneth A. Adams, *Active Drafting: A Short Manifesto*, ADAMS ON CONTRACT DRAFTING (Oct. 14, 2014), http://www.adamsdrafting.com/active-drafting-a-short-manifesto/.

[82] *See* ADAMS, *supra* note 3, ¶¶ 13.323–33.

[83] *See id.* ¶¶ 8.4–40.

The alternative to passive drafting is "active drafting":

- You follow a comprehensive set of guidelines for contract language.
- You get trained in how to draft and review contracts consistent with those guidelines.
- You aim to use templates and precedent contracts that are consistent with those guidelines.
- Unless the law gives you no choice, you don't continue using confusing language, applying whatever gloss courts have given it. Instead, you employ only those usages that avoid undue risk of confusion.
- You don't attempt to address deal points by invoking inscrutable distinctions in legalistic terminology. Instead, you address issues explicitly and clearly.

Because analysis of *represents* and *warrants* ties into broader discussion of what we want contract language to look like, it serves as something of a litmus test. That leads to the following observations:

First, two prominent commentators, Tina Stark and Bryan Garner, have in effect endorsed the remedies rationale for significance of the verbs *represents* and *warrants*. It would be surprising if that wasn't at least somewhat representative of their general approach, and in the case of both Stark[84] and Garner,[85] it seems to be.

Second, it's disconcerting that English practitioners and judges have fallen so heavily for the restrictive remedies rationale for use of the verbs *represents* and *warrants*. Add to that their unhelpful treatment of *endeavours* provisions[86] and one has reason to wonder whether the problem is systemic.

Third, in this author's experience, the Section of Business Law of the American Bar Association tends to favor traditional contract language. Use of *represents and warrants* in the *ABA Model Stock Purchase Agreement* and its

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84 *See* Kenneth A. Adams, *It's Time to Get Rid of the "Successors and Assigns" Provision*, ADVOCATE, June/July 2013, at 30 (critiquing Stark's analysis of the "successors and assigns" provision).

85 *See* Kenneth A. Adams, *Some "Efforts" Advice That I Wouldn't Give*, ADAMS ON CONTRACT DRAFTING (Jan. 21, 2015), http://www.adamsdrafting.com/some-efforts-advice-that-i-wouldnt-give/ (critiquing Garner's recommendation regarding use of *best efforts* and *reasonable efforts*).

86 *See* Kenneth A. Adams, *Beyond Words*, SOLICITORS J., Sept. 30, 2014, at 18 (*best endeavours* and its variants under English law).

endorsement of an unconvincing explanation for use of *represents and warrants*[87] is consistent with that. It can be challenging to change the approach of volunteer group efforts such as those behind the Section of Business Law's model contracts, but if the Section of Business Law wishes to advance the cause of active drafting, it's well positioned to do so.

And finally, lawyers and others who work with contracts should bear in mind that they don't have to follow the herd when it comes to contract usages.[88] The only people you have to convince are those on your side of the transaction and on the other side of the transaction. Given the ubiquity of the phrase *represents and warrants*, the incoherence of traditional approaches to use of those verbs, and the merits of instead simply using *states* and addressing remedies explicitly (if that's thought to be worthwhile), initiating conversations about *represents and warrants* might be a good way to promote active drafting and help bring contract prose into the modern age.

[87] *See supra* note 34 and accompanying text.

[88] *See supra* text accompanying notes 61–62.