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The Virtue of "Represents and Warrants": Another View

By Stephen L. Sepinuck

In our October 2015 issue, Kenneth Adams presented an article on the use of "represents" and "warrants" to introduce statements of fact. This month, Professor Stephen L. Sepinuck presents his views on the topic.

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Representations and warranties are different. A representation is a *statement* of fact; a warranty is a *promise* of fact. Admittedly, they can look very similar. Language such as "I am a licensed contractor" could be a representation, a warranty, or both. But despite similarity in appearance, and the occasional difficulty in distinguishing between them, their differences are substantial.

Representations straddle the line between contract and tort. Under contract law, a misrepresentation might prevent a contract from being formed, make a contract voidable, or provide grounds for reformation. However, an action for damages based on a misrepresentation is essentially a tort claim. In contrast, while breach of warranty had its origin in tort (Judge Posner once referred to warranty as "a freak hybrid born of the illicit intercourse of tort and contract"), it is now generally viewed as a contract action. As a result, the elements of a claim for misrepresentation and a claim for breach of warranty are quite different.

Both typically require proof that the statement or promise was untrue and caused damages. However, a claim based on a misrepresentation also requires proof that the statement was material, sometimes requires proof that the person making the misrepresentation knew or should have known that the statement was false, and usually requires proof that the other party reasonably or justifiably relied on the statement. Liability for breach of warranty, on the other hand, is a form of strict liability and does not require that the warrantor knew or had reason to know that the promise was untrue. It also does not require proof of reliance, reasonable or otherwise. Perhaps more important, claims for misrepresentation and breach of warranty are subject to different statutes of limitations.

Not only are the elements of the claims different, but successful claims for misrepresentation and breach of warranty yield different remedies. Specifically, the remedy for breach of warranty is typically some measure of expectancy damages, whereas the remedies for the tort of misrepresentation are typically rescision plus some measure of reliance or restitution damages, along with punitive damages if the misrepresentation was intentional. In addition, tort damages, including damages for misrepresentation, are sometimes subject to the economic loss doctrine.

There is another distinction between representations and warranties. The permissible substance of a representation is different from the potential scope of a warranty. Most authorities hold that a representation must be a statement of past or present fact; it cannot be about a future fact. A warranty, in contrast, can be a promise about the past, present, or future. Thus, for example, "this app works on both iPhones and Android phones" could be a representation or warranty, whereas "this app will, for the next six months, work on both iPhones and Android phones" cannot be a representation. In addition, a representation generally cannot be about the law. That is because each party is presumed to know the law and thus cannot reasonably rely on a statement about the law by the other party. In contrast, a party might be able to warrant statements about the law.

Admittedly, the distinctions between representations and warranties have been blurred somewhat by U.C.C. § 2-313(1), which provides that "[a]ny 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." This provision performs a bit of alchemy by converting every *statement* of fact about the goods (if the statement was part of the basis of the bargain) into a warranty, and hence into a *promise* of fact. However, Section 2-313 says nothing about whether such a statement also remains a representation. Put another way, even though Section 2-313 treats representations as warranties, it does not purport to treat all warranties as representations or prevent a statement from being a representation and giving rise to the remedies for misrepresentation. More important, Section 2-313 has no relevance to transactions not involving a sale of goods. Thus, for all other types of transactions—loan agreements, services contracts, transactions in intellectual property—all the distinctions between representations and warranties endure.

In spite of the numerous and important distinctions between representations and warranties, some mavens of contract drafting recommend against using "represents and warrants" in an agreement because no known case has relied on the presence of both verbs. My advice is different. Instead of glossing over the differences between representations and warranties, embrace them. Consider which statements should be (and can be) representations, which should be warranties, and which should be both. Then introduce each group with the appropriate verb.

There is little or no harm in using two verbs (i.e., "represents and warrants") instead of one (e.g., "states"); the few extra letters do not make the agreement more difficult to read or excessively long. More important, there are two potential benefits to this phrasing.

First, if the drafter intended a contracting party to make both a statement of fact (a representation) and a promise of the same fact (a warranty), it is not clear that a single verb would or could necessarily convey that intention. Using two previse verbs thus increases the likelihood that a reader aware of the law will interpret the provision as the drafter intended.

Second, using both verbs when both types of term are desired—and only one verb when only one type of term is desired or appropriate—comports with broader generalization that transactional attorneys should: (1) fully understand each different type of contract term, e.g., declarations, representations, warranties, covenants, conditions; (2) be aware of the limitations and consequences of each; and (3) make informed and thoughtful decisions about what type or types of term each provision in an agreement should be. In other words, using "represents" for representations, "warrants" for warranties, and both verbs where appropriate might prompt a transaction attorney to carefully consider which type of term each reference to fact should be.

After all, not every reference to fact in an agreement should be both a representation and warranty. For a *known* fact, it is usually appropriate for the party who knows it to both represent and warrant the fact, and thereby be subject to both tort and contract claims if the fact proves not to be true. However, in some settings only one set of remedies is desired. For example, an issuer of life insurance policies might want its insureds only to represent, not warrant, statements about their health because what the insurer wants is a right to rescind, not a right to sue for damages. Moreover, for an *uncertain* fact—that is, a fact about which some doubt exists—the parties might not wish to allocate the risk of falsity in the manner that a warranty would. If a contracting party warrants an uncertain fact, the contracting party is accepting the risk—strict liability in contract—that the fact might not be true. If a contracting party instead merely represents that the party has no knowledge or reason to know that the fact is false, the party has accepted much less risk.

Carefully distinguishing among representations, warranties, and statements that should properly be both can only be a good thing. There is more danger in confusing different types of terms than any harm or affront to brevity posed by the phrase "represents and warrants."

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