

Representations, Warranties and Covenants: Back to the Basics in Contracts

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“Representations,” “warranties” and “covenants” are so common in contracts that the words are likely to be overlooked. They appear not only as nouns, but as verb forms as well. Sometimes there is a separate section for each word, implying that they have distinct meanings. Often they are grouped together as “represents and warrants” or “represents, warrants and covenants.” Unfortunately, these repetitious phrases blur their meanings. Their imprecise use does not frequently result in litigation, but there’s much to be said for reducing redundancy and ambiguity.

These words are basic building blocks of contracts and have a long history. Each has traditionally had a distinct meaning and purpose. The key difference among these words is temporal – past and present for representations; past, present, but mainly future for warranties; and mainly future for covenants. The remedies for a false representation, breach of a warranty or violation of a covenant also have differed. Giving attention when drafting or editing a contract to their backgrounds and the traditional distinctions among them will promote clarity.

Representations

In traditional usage, a representation precedes and induces a contract. It is information by which a contracting party decides whether to proceed with the contract. A representation is an express or implied statement that one party to the contract makes to the other before or at the time the contract is entered into regarding a past or existing fact. An example might be that a seller of equipment represents that no notice of patent infringement had been received.

A representation traditionally was not part of a contract, and a claim for damages due to a misrepresentation generally would not be allowed. Instead, a claim that a misrepresentation induced a contract might be pursued in fraud, either to rescind the contract or for damages. In some instances, a claim might be based on the tort of negligent misrepresentation.

If a representation was included as part of a contract, it typically would function as a “condition” or “warranty.” A condition is a vital term going to the root of the contract (for example, that a lawyer hired under an employment agreement must be licensed to practice law), which, if the condition were false, would entitle the employer to repudiate the contract. In contrast, a representation in a contract might be a “warranty,” which would be an independent, subsidiary promise that did not go to the root

of the contract (such as that the lawyer claims to always wear a suit to the office), and, if false, might give rise only to a claim for damages.

Warranties

Warranties generally are promises that appear on the face of the contract. They are important parts of the contract, requiring strict compliance. Warranties may include representations, agreements or promises that a proposition of fact is true at the time of the contract and will be true in the future. A warranty provides that something in furtherance of the contract is guaranteed by a contracting party, often to give assurances that a product is as promised. It often is equivalent in effect to a promise that the warranting party will indemnify the other if the assurances are not satisfied.

Warranties may be categorized as affirmative warranties, i.e., those that focus on assurances that certain facts are true or acts have been performed at the time of the contract, and promissory warranties, i.e., those that are agreements for the future. Either type of warranty entitles the protected party to damages for breach or to the particular remedies set forth in the contract. Damages are based on the difference between the value of contract as agreed upon compared to the value of the contract given the facts at the breach.

Warranties now commonly provide protection for consumer products, and are subject to the Uniform Commercial Code and federal law. An “extended warranty” protects beyond the initial agreement between a buyer and seller. It is a form of insurance and may be regulated as such depending on state law and the particulars involved.

Comparing Representations and Warranties

Justifiable reliance generally is an element for a misrepresentation claim, but the state of mind of the party to whom the warranty is given is not pertinent to a warranty claim, and a party may enforce an express warranty even if the beneficiary believes the warranty will be breached and the problem it covers will arise.

Traditionally, a warranty also differed from a representation in these ways: (1) a warranty was always part of a contract, while a representation usually was a collateral (or a separate) inducement prior to the contract; (2) a warranty was on the face of a contract, while a representation might be written or even oral; (3) a warranty was conclusively presumed to be material, while a party claiming a misrepresentation had to establish materiality; (4) a warranty had to be strictly complied with, while substantial truth was enough for a representation; (5) a contract remained binding if a warranty was breached (unless the warranty was also a condition that was vital to the contract, e.g., that the lawyer hired under an employment agreement was licensed); and (6) only damages were recoverable from a breach of warranty, while a party defrauded by a misrepresentation might in some circumstances rescind the contract or recover damages for fraud.

Covenants

A covenant in a contract traditionally has been a solemn promise in writing, signed, sealed and delivered, by which a party pledges that something has been or will be done or that certain facts are true. Historically, a covenant was in a sealed document that was self-authenticating, and witnesses were not required to establish the terms in the document. Of course, with the abolition of private seals over the last hundred years or more, contracts have been enforceable without being sealed documents.

Covenants usually are formal agreements or promises in a written contract, and are usually in agreements relating to real property. Covenants in or related to a contract usually are secondary to the main reason for the contract. They are an undertaking to do or not do something in the future; for example, that conditions will be maintained between the signing of a contract and the closing of the transaction, or while a loan is unpaid, or that a party will not compete or sue. A covenant – similar to a warranty – has always been part of the contract. A claim for breach of a covenant may be for damages or specific performance, or, potentially, if the covenant is important enough, for rescission or termination.

The Future

Dispensing with “representations,” “warranties” or “covenants” might be the norm for contracts in the future. Some commentators and model forms avoid the words, substituting “agree” or “obligate” or use “represent” to also cover “warrant.” Distinctions based on these terms have been important – perhaps to an excessive degree – in the past. Courts today are more willing than before to excuse formalism related to particular words, but it’s safe to warrant that archaic distinctions still matter in the digital age.

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