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Ambiguity often results when concision trumps clarity

Watertight? Royalty Indemnity ruling is not

BY C. SCOTT PRYOR and JEREMY L. PRYOR

We are accustomed to hearing that less is more; that long, verbose explanations render opaque what would otherwise, if more neatly written, be translucently clear. In all forms of legal writing—from affidavits to zoning regulations—Hemingway is preferred to Faulkner. Concision is a virtue.

But concision is not the chief virtue: clarity is. And when concision is preferred to clarity, the result is nearly always ambiguity. Ambiguous legal writing of any type is latently problematic, but the potential for mischief is magnified when the form of writing is a judicial opinion. The recent decision of the Virginia Supreme Court in Royal Indemnity Co., v. Tyco Fire Products is an example of the hazard of valuing concision over clarity.

Tyco Fire Products ("Tyco") is the manufacturer of fire prevention equipment, including valves and sprinklers. Tyco's predecessor sold sprinkler heads to River Run Apartments ("River Run") in Woodbridge, Virginia, which Tyco then shipped and River Run had installed by June of 1997. Six years later a fire caused substantial damage to the apartments. As the insurer of the apartments, Royal Indemnity Company ("Royal") investigated the fire and concluded that the sprinkler heads had failed to open. Consequently, Royal sued Tyco for both negligence and breach of warranty.

The Circuit Court of Prince William County sustained pleas in bar on both claims and Royal appealed. The Virginia Supreme Court reversed and remanded the negligence claim but affirmed dismissal of the warranty action because under Virginia Code section 8.2-725 of the Uniform Commercial Code ("UCC") the statute of limitations had expired. While its affirmance of the dismissal was correct, ambiguities in the Court's opinion may mislead future litigants and courts about several provisions of the UCC.

The opinion in Royal Indemnity raises three questions under Article 2 of the UCC: (1) Was a detailed product description, a "technical data sheet," which came with the sprinkler heads, an express warranty? (2) Was any warranty created by the description displaced by an express "One-Year Warranty?" (3) Regardless of the answers to questions 1 and 2, did this product description amount to a warranty of future performance?

1. The description that came with the sprinkler heads was technical and precise. Article 2 deems such descriptions a form of express warranty; but unfortunately, the Court failed to make a straightforward application of its provisions when it held that "the product description cannot be said to constitute an express warranty of future performance for an indefinite period of time." Does the Court mean the description simply was not a warranty? The opinion is open to such a reading: "[T]he language amounts to a simple description of how the sprinkler head operates." Yet, UCC 2-313(b) explicitly provides that such a "simple description" is an express warranty: "(1) Express warranties by the seller are created as follows: . . . (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description." Applying Virginia law the Fourth Circuit appropriately concluded that "[a]ny description of the goods, other than the seller's mere opinion about the product, constitutes part of the basis of the bargain and is therefore an express warranty."
requirement of "reliance." But in Daughtrey v. Ashe, the Virginia Supreme Court held otherwise. The Court concluded that "the drafters of the Uniform Commercial Code intended to modify the traditional requirement of buyer reliance on express warranties." Virginia buyers need only show that the seller has made an express warranty for it to become "part of the basis of the bargain," he or she need not have known of it.

Under the Court's precedent, even a set of national safety standards incorporated into a contract by a reference of which the buyer has no knowledge can create an express warranty. In Yates v. Pitman Manufacturing, Inc., the Court reaffirmed its holding in Daughtrey, stating that "[a]n affirmation of fact is presumed to be a part of the bargain, and any fact that would remove such affirmation out of the agreement requires clear affirmative proof." In other words, "a plaintiff is not required to show that he relied upon the affirmation in order to recover under an express warranty claim." Reliance is not an element of a warranty plaintiff's claim.

Together, Daughtrey and Yates make clear that it is not the buyer who must prove that the description was part of the basis of the bargain; instead, the seller must prove that it was not. Yet in addressing the issue in Royal Indemnity, the Court seems to suggest that it may be open to reversing its prior holdings. One presumes that this was not its intent; but the failure of the Court to fully analyze the issue creates serious confusion and ensures future litigation on a question that until recently had been settled.

2.

Royal Indemnity hints at a second reason why the Court could have concluded that the detailed description of the sprinkler heads was not a warranty: it may have been displaced by an express one-year warranty of "free[dom] from defects in material and workmanship." Two sections of Article 2 mandate that courts maintain the independent significance of multiple warranties if possible. UCC 2-316(1) provides that "[w]ords or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other . . . .

The substance of the two warranties—that the goods would be free from defects—was consistent. The remedies for breach of each warranty, however, were different: correction of defects vs. replacement of defective parts. In short, who had to pay for the labor in making any warranted repairs? The Illinois court applied the same rule in UCC 2-316 and held that "if one gives a warranty with an expanded obligation and in the same agreement attempts to give a similar warranty with a limited obligation, then the attempt to limit [the] warranty is rendered inoperative." In other words, "[t]he more extensive obligation must control." The principle of non-negation prevails.

Perhaps for the sake of brevity, the Virginia Supreme Court's Royal Indemnity opinion does not set out the substantive terms of the one-year warranty. Even without knowing its contents, however, we know that it was only one year in duration. There was no time limit on the product description. Following the principles of non-negation and cumulation, the Court should have concluded that the warranty by description survived the one-year warranty for the balance of the statutory term. By failing to do so, the Court has left this issue unresolved and the opinion of an Illinois court as the leading authority upon which Virginia's merchants can rely.

3.

After hinting at various reasons why Royal Indemnity's warranty claim should fail, the Court finally affirmed the trial court's dismissal on the ground that the statute of limitations had expired under UCC 2-725(1). Tyco delivered its sprinklers to Red River sometime in the spring of 1997. But Royal did not bring suit for breach of warranty until 2003—a span of six years. Under UCC 2-752(2), the statute of limitations on express warranties begins to toll at the time the goods are tendered, and expires after four years. Only if a warranty is for future performance can a plaintiff maintain a
Less is less

cause of action beyond the four-year window.26 And Tyco’s warranty by description was at least clearly not a warranty of future performance. Or so the Court seems to have reasoned.

Unfortunately the Court did not amplify its conclusion. It could have pointed to the present tense of the verbs in the description; nothing in it pointed to what should or would happen in the future. The Court could easily have elaborated by noting that UCC 2-725(2) requires that a warranty of future performance be explicitly so, which this description was not. It might have alluded to the leading treatise on the UCC, which observes that “it should be clear that this extension of the normal warranty period does not occur in the usual case, even though all warranties in a sense apply to the future performance of goods.”27 Or the Court might have cited some of the many cases construing what it means for a warranty to extend to “future performance” to support its conclusion.28 All of these considerations support the Court’s ultimate decision, but without providing any analysis, the Court’s opinion provides only slightly more guidance than a Magic 8 Ball.

Conclusion

A well written opinion demonstrates brevity. But a better written opinion privileges an analysis sufficient to exclude potential misreadings. Few opinions perfectly do both, but the Court’s opinion in Royal Indemnity—with its conspicuous lack of elaboration—unfortunately manages only the former.

NOTES:
2. WYDICK, supra note 1 at 36 (“Most sentences should contain only one thought. ... The average length of your sentences should be below twenty-five words.”).
3. BRYAN A. GARNER, THE ELEMENTS OF LEGAL STYLE 53 (2d ed. 2002) (“Ideally, legal writing is taut.”); STRUNK & WHITE, supra note 1 at 23 (“Vigorous writing is concise. A sentence should contain no unnecessary words, a paragraph no unnecessary sentences, for the same reason that a drawing should have no unnecessary lines and a machine no unnecessary parts. A sentence should contain no unnecessary words. This requires not that the writer make all his sentences short, or that he avoid all detail and treat his subjects only in outline, but that every word tell.”).
4. RONALD DWORKIN, LAW’S EMPIRE 1 (1986) (“It matters how judges decide cases. It matters most to people unlucky or litigious or wicked or saintly enough to find themselves in court.”).
5. 70 S.E.2d 91 (Va. 2011).
6. Royal Indemnity at 98.
7. When the F960/Q-46 is in service, water is prevented from entering the assembly by the Plug and O-Ring Seal in the Inlet of the Sprinkler. Upon exposure to a temperature sufficient to open the Bulb, the Bulb shatters and the Bulb Seal is released. The compressed Spring is then able to expand and push the Water Tube as well as the Guide Tube outward. This action simultaneously pulls outward on the yoke, withdrawing the Plug and O-Ring Seal from the Inlet and initiating water flow.
8. Id.
9. Id.
14. Id. at 79, 413 S.E.2d at 339.
15. The buyer in Daughtrey did not see the seller’s description of the diamonds as “H color and vvs1 clarity” for any reason. As an example, the bracelet on which the diamonds were mounted in a box that contained the description. 243 Va. at 75, 413 S.E.2d at 337. Seven years later the Fourth Circuit applied Daughtrey to hold that a buyer could sue on an express warranty that first came to his attention during litigation. Martin v. American Medical Systems, 116 F.3d 102 (4th Cir. 1997) (“Clear Virginia authority is [that] [a]ny description of goods, other than the seller’s mere opinion about the product, constitutes part of the basis of the bargain and is therefore an express warranty. It is unnecessary that the buyer actually rely upon it.”). Id. at 105. And in 2006, the Federal District Court for the Eastern District of Virginia held for the plaintiff on a breach of a warranty claim based on a description contained in a “cut sheet.” Kraft Foods, Inc. v. Banner Engineering & Sales, Inc., 446 F. Supp. 2d 551 (E.D. Va. 2006). Like the plaintiff in Royal Indemnity, Kraft Foods was a sophisticated commercial buyer. Also like in Royal Indemnity, the warranty in Kraft Foods was not denominated as such; rather, it was contained in non-engineered design drawing (also known as a “cut drawing”) that was intended only “to give a general indication of how the sold goods were to be installed. Id. at 558. Unlike Royal Indemnity, however, the buyer in Kraft Foods clearly relied on the description when installing the goods. Id. at 560 (“FloOrics used torque wrenches to tighten the stainless steel bolts to 60 foot-pounds, as it understood Banner’s cut sheet to require.”).
17. Id. at 606, 514 S.E.2d at 607 (internal quotations marks and citations omitted).
18. Id.
19. Daughtrey, 243 Va. 73, 78, 413 S.E.2d at 338-39 (“[N]o particular reliance on such statements need be shown in order to weave them into the fabric of the agreement. Rather, any fact which is to be determined oust of the agreement requires clear affirmative proof.”). For examples of seller’s who successfully proved that a representation was not part of the basis of the bargain see Flynn v. Biomet, Inc., 1993 WL 540570 (E.D. Va. 1993).
20. Id. at 98. The court does not expressly hold that the express warranty displaces the warranty by description but strongly suggests such a conclusion:
21. Considering the explicit one-year warranty contained in the “technical data sheet,” the product description cannot be said to constitute an express warranty of future performance for an indefinite period of time.
22. UCC 2-317
25. See JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE §13-7 at 596 (6th ed. 2010) (“In practice 2-317 is most often applied when the seller has made an express warranty and failed to exclude or limit the implied warranties.”).
26. Id. at 338, 421 N.E.2d at 830 (emphasis added).
27. Id. (emphasis added). The engineering drawings contained an additional four-year warranty that was not relevant to the court’s holding.
28. Id. at 344, 421 N.E.2d at 836.
29. Id.
30. UCC 2-725(2).
31. WHITE & SUMMERS, supra note 19 §12-9, at 461. The authors elaborate on their conclusion when they write that:
32. The quoted portion of 2-725(2) applies only in a case in which the warranty “explicitly extends to future performance.” Presumably such a case would be one in which the seller gave a “time guarantee” or one in which the seller, for example, expressly warranted that an automobile would last for 24,000 miles or four years whichever occurred first. Id.
33. See, e.g., Selzer v. Brunsell Bros., Ltd., 257 Wis. 2d 809, 285, 652 N.W.2d 806, 813 (App. 2002) (discussing whether remedial promises of repair or replacement of a defective part or entire good should be deemed warranty of future performance).
34. See supra Annot. 81 ALR 5th 483 “What Constitutes Warranty Explicitly Extending to ‘Future Performance’ for Purposes of UCC § 2-725(2)” (2000).