

# ELIMINATING THE PHRASE *REPRESENTS AND WARRANTS* FROM CONTRACTS

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The phrase *represents and warrants* is a fixture in English-language contracts. It's used to introduce statements of fact, as are the verbs *represents* and *warrants* used separately. And the words *representation* and *warranty* are used to refer to statements of fact in a contract.

In the United States, courts and most practitioners attribute no particular significance to use of *represents and warrants* to introduce statements of fact, although some U.S. commenters suggest that the phrase has implications for remedies. By contrast, in England, courts, practitioners, and commentators accept that those verbs do have implications for remedies, with *represents* leaving open the possibility of tort remedies for misrepresentation and *warrants* leaving open the possibility of contract remedies for breach of warranty.

Given that the U.S. and English legal systems share so much, and given that contracts drafted in the United States and England share essentially the same language, the different treatment accorded the verbs *represents* and *warrants* under the two systems suggests that something is amiss.

Something is indeed amiss, in that it's pointless and confusing to use *represents* or *warrants* in a contract to introduce statements of fact. Those who attribute significance to those verbs, whether used separately or together, ignore the powers and responsibilities of those who draft or review contract language.

This article will show that to avoid this confusion, you should do two things. First, use *states* to introduce statements of fact in a contract. And second, if you want to exclude particular remedies or make sure that they're available, do so explicitly instead of relying on inscrutable code.

This article first considers how drafters use *represents* and *warrants* in the United States, explanations offered for their significance, and how those explanations fall short. It then does the same for use of *represents* and *warrants* in England. It then offers an alternative explanation for prevalence of the phrase *represents and warrants* and recommends alternative ways to address issues

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ostensibly underlying use of *represents* and *warrants*. It then considers use of *warrants* in the context of sale of goods. It closes by considering some broader implications.

## I. UNITED STATES LAW AND PRACTICE

### A. Usage

In English-language contracts generally, *represents* or *warrants* or both are used to introduce statements of fact by parties—statements relating to matters that they broadly control or that fall within the scope of their operations.

In the United States, sometimes only one verb is used, but usually both are joined in a doublet—*represents and warrants*. For example, this author determined that of the 106 contracts in the sample used in the 2009 Private Target Deal Points Study,<sup>1</sup> all used either *represents and warrants* or *representations and warranties* (with a different verb) to introduce statements of fact, except for one, which used just *represents*.<sup>2</sup> (One also sees, but much less frequently, *warrants and represents*, with the order reversed.)

Sometimes one or more verbs are added to *represents* and *warrants* (whether used separately or together), as in *Acme represents and acknowledges* and *Acme represents, warrants, covenants, and agrees*. This sort of erratic use of verbs is in keeping with the chaotic use of verb structures in traditional contract language generally.<sup>3</sup>

In the first of the two preceding examples, adding *acknowledges* to *represents* inappropriately conflates the two kinds of “language of declaration,” this author’s term for the ways one can state facts in a contract.<sup>4</sup> Use of *acknowledges* suggests that a party isn’t stating a fact regarding matters that it broadly controls or that fall within the scope of its operations but instead is accepting as accurate a statement of fact that the other side of the transaction claims is accurate or one the accuracy of which both sides are equally capable of ascertaining.<sup>5</sup>

As for the second of the two preceding examples, adding *covenants* and *agrees* supplements language of declaration with two other categories of contract

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<sup>1</sup> American Bar Association Mergers & Acquisitions Market Trends Subcommittee, 2009 Private Target Mergers & Acquisitions Deal Points Study (Dec. 23, 2009) (available only to members of the Committee on Mergers and Acquisitions at <http://link.reuters.com/muc78q>).

<sup>2</sup> See KENNETH A. ADAMS, THE STRUCTURE OF M&A CONTRACTS § 2.32 (2011).

<sup>3</sup> See KENNETH A. ADAMS, A MANUAL OF STYLE FOR CONTRACT DRAFTING ch. 3 (3d ed. 2013).

<sup>4</sup> See *id.* ¶ 3.270.

<sup>5</sup> See *id.* ¶ 3.313.

language, namely language of obligation and language of agreement.<sup>6</sup> That suggests that the drafter intends to convey three kinds of meaning in one statement. In terms of semantics, that doesn't make sense.

So this article addresses use of only one or both of *represents* and *warrants* to introduce statements of fact.

Furthermore, a different analysis applies to the verb *warrants* and the noun *warranty* on their own, without *represents* and *representation*, regarding goods in a contract for the sale of those goods. That's addressed later in this article.<sup>7</sup>

### B. Remedies for Inaccurate Statements of Fact

Determining what *represents* and *warrants* each mean requires considering the remedies available under U.S. law for inaccurate statements of fact in a contract.

Due to how the common law has developed in U.S. states, if a party's statement of fact turns out to have been inaccurate, the counterparty might be able to bring a tort-based claim for misrepresentation, a contract-based claim for breach of warranty, or both.

Detailed analysis of the distinction between a claim for misrepresentation and a claim for breach of warranty is beyond the scope of this article. Instead, here's a summary of the distinction offered in one work regarding statements of fact:

A misrepresentation claim is grounded in tort and seeks to redress breaches of a party's common law duty to establish honestly the "factual predicates" to his or her commercial relationships. But misrepresentation liability is generally not imposed strictly on the basis that a given representation was incorrect. Instead, liability only attaches if the defendant made a material misrepresentation fraudulently or, in some cases, negligently, upon which the recipient justifiably relied to his or her detriment.

A claim based upon a breach of an express warranty, by contrast, is premised upon one party's specific contractual promise that a stipulated fact or set of facts is correct. If the warranty set forth in the written agreement is incorrect, it would be irrelevant that the

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<sup>6</sup> See Kenneth A. Adams, "Represents, Warrants, Covenants, and Agrees," ADAMS ON CONTRACT DRAFTING (June 18, 2009), <http://www.adamsdrafting.com/represents-warrants-covenants-and-agrees/>.

<sup>7</sup> See *infra* pp. 224-26.

warranting party honestly believed that the disputed statement was true, that the recipient of the warranty did not rely upon the incorrect statement, or that the warranty was not a material basis upon which the complaining party entered into the contract. Indeed, a warranty is strictly enforced like any other contractual covenant or agreement, generally without regard for intention, materiality, or reliance.<sup>8</sup>

In that context, the simplest meaning of *representation* is that it's a statement of fact that might support a claim for misrepresentation. And the simplest meaning of *warranty* is that it's a statement of fact that might support a claim for breach of warranty.

### C. *The Remedies Rationale*

Some U.S. commentators have attempted to attribute significance to each verb in *represents and warrants*. They fall into two camps, one offering what this article calls the “remedies rationale,” the other offering what this article calls the “timeframe rationale.”

The most explicit statement of the remedies rationale is offered in Tina L. Stark's book *Drafting Contracts: How Lawyers Do What They Do*: “By virtue of [the line “The Seller represents and warrants to the Buyer as follows”], every statement in the sections that followed would be both a representation and a warranty.”<sup>9</sup>

Stark goes into greater detail later in that book. Regarding the sentence *Party A represents and warrants to Party B as follows*, Stark says the following:

The language introducing representations and warranties is simple and results in each statement of fact being both a representation and a warranty.

...

Using *represents and warrants* together, rather than either term alone, precludes any ambiguity as to the contract's meaning. It plainly states the parties' intent: that a party both represents and warrants the statements that follow.

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<sup>8</sup> Glenn D. West & W. Benton Lewis, Jr., *Contracting to Avoid Extra-Contractual Liability—Can Your Contractual Deal Ever Really Be the “Entire” Deal?*, 64 BUS. LAW. 999, 1008 (2009) (footnotes omitted); see generally RICHARD A. LORD, 18 WILLISTON ON CONTRACTS § 52:45, §69:5 (4th ed.) [hereinafter WILLISTON ON CONTRACTS] (general discussion of warranties and misrepresentation).

<sup>9</sup> TINA L. STARK, *DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO* 15 (2d ed. 2014).

The phrase *represents and warrants* differs from other couplets and triplets where the words are synonymous. With respect to those phrases, a drafter can safely omit all but one of the words without changing the phrase's meaning. But using just *represents* or *warrants* could create different legal consequences because those terms have different substantive meanings. Using only one of them raises the possibility that the parties intended the consequences of only that term. It invites litigation. ... By using both *represents* and *warrants*, a drafter reduces a client's litigation risk by explicitly saying what the parties mean—a cardinal principle of good drafting.<sup>10</sup>

Whether a contract party is able to bring a claim for misrepresentation or a claim for breach of warranty for an inaccurate statement of fact by the other party can have significant practical implications. According to the remedies rationale, a drafter can ensure that a statement of fact is treated as a representation, as a warranty, or as both by introducing that statement of fact with *represents*, *warrants*, or both, respectively, or by identifying that statement as a representation, a warranty, or both.

The remedies rationale comes in two flavors, which this article calls “permissive” and “restrictive.” Under both the permissive remedies rationale and the restrictive remedies rationale, explicitly describing a statement of fact as a representation, a warranty, or both, by means of an introductory verb or otherwise, is sufficient to make it so.

Where the permissive and restrictive rationales differ is how they treat a statement of fact that isn't introduced by *represents* or *warrants*, or both, or otherwise explicitly characterized as a representation, a warranty, or both. Under the permissive version, such a naked statement of fact could still be deemed a representation or warranty, respectively, depending on the nature of the statement itself. By contrast, the restrictive version holds that a statement of fact will support a claim for misrepresentation only if it is introduced with *represents* or is referred to as a representation, and a statement of fact will support a claim for breach of warranty only if it is introduced with *warrants* or is referred to as a warranty. So under the restrictive version, failure to use *represents*, *warrants*, or both, or to otherwise explicitly characterize a statement of fact as a representation, a warranty, or both, should prevent that statement from being deemed a representation or a warranty, or both, respectively.

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<sup>10</sup> *Id.* at 137–38 (citations omitted).

Stark has stated that she doesn't suggest that using *represents* or *warrants* is the only way to make something a representation or warranty.<sup>11</sup> That means she in effect endorses the permissive remedies rationale.

By contrast, the restrictive remedies rationale is on display in the entry for *representations and warranties* in *Garner's Dictionary of Legal Usage*. After suggesting what distinguishes representations from warranties, it says the following:

Some have asked this: if the warranty gives so much more protection than a representation, why not simply use warranty alone—without representation? It's a fair point, perhaps, but here's the reason for sticking to both: some parties to a contract don't want merely a guarantee that so-and-so will be so in the future; they also want an eye-to-eye statement (representation) that the thing is so now. If it later turns out not to have been so when the representation was made, the party claiming breach can complain of a lie. ... If only a warranty were in place, the breaching party could simply say, "I'll make good on your losses—as I always said I would—but I never told you that such-and such was the case." Hence representations and warranties.<sup>12</sup>

In other words, Bryan Garner suggests that if a statement of fact is introduced by only *warrants* and not *represents*, it wouldn't constitute a representation supporting an action for misrepresentation: the drafter would be in a position to limit what sort of claims could be brought for an inaccurate statement of fact regardless of the nature of that statement of fact. So Garner in effect endorses the restrictive remedies rationale.

To find others of like mind, look to commentary on the English caselaw to the effect that the one or more verbs you use to introduce statements of fact can limit the remedies available.<sup>13</sup> Two commentators in the United States have said that the English approach might apply equally in the United States.<sup>14</sup> That

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<sup>11</sup> Tina L. Stark, Comment to Kenneth A. Adams, *The Semantics Fallacy Underlying "Represents and Warrants,"* ADAMS ON CONTRACT DRAFTING (Sept. 24, 2013, 2:38 PM), <http://www.adamsdrafting.com/the-semantics-fallacy-underlying-represents-and-warrants/> ("Nowhere in my textbook or in any of my other writings do I state or suggest that the only way to create representations and warranties is to precede statements of fact with the words 'represents and warrants.'").

<sup>12</sup> BRYAN A. GARNER, *GARNER'S DICTIONARY OF LEGAL USAGE* 775 (3d ed. 2011).

<sup>13</sup> See *infra* text accompanying note 43, 51.

suggests those commentators see some validity in the restrictive remedies rationale.

Both flavors of the remedies rationale fall short in several respects.

### 1. It Seeks to Apply to All Kinds of Contracts

First, *represents and warrants* is used in every kind of contract. It's well known that the law of warranties applies to the sale of goods,<sup>15</sup> but even if you also take into account the role of the law of warranties in negotiable instruments, bank deposits and collections, letters of credit, documents of title, and investment securities, all sorts of contracts that use *represents and warrants* would fall outside the scope of the law of warranties as it's generally understood.<sup>16</sup> It follows that treating as a warranty any contract statement of fact introduced by *warrants* or referred to as a warranty would require extending the law of warranties to statements of fact to which the law of warranties as it is generally understood wouldn't apply. There's no principled basis for doing so.

### 2. It Seeks to Override Actual Meaning

Second, caselaw and, with respect to *warranty*, the Uniform Commercial Code specify the elements of a claim for misrepresentation and a claim for breach of warranty. Allowing drafters to designate what constitutes a representation or a warranty just by saying so would render those requirements irrelevant.

Imagine that a contract contains the following sentence: *Acme represents that it shall promptly replace defective Equipment.* Even though it uses *represents*, that sentence imposes an obligation, so according to caselaw on the elements of a claim for misrepresentation, it wouldn't constitute a representation supporting a

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<sup>14</sup> See Glenn D. West, *That Pesky Little Thing Called Fraud: An Examination of Buyers' Insistence Upon (and Sellers' Too Ready Acceptance of) Undefined "Fraud Carve-Outs" in Acquisition Agreements*, 69 BUS. LAW. 1049, 1058 n.47 (2014) (noting that a recent English case, *Sycamore Bidco Ltd. v. Breslin*, [2012] EWHC (Ch) 3443 (Eng.), suggested that the debate over whether there is a difference between representations and warranties in the United States could be reopened); Claude Serfilippi, *A New York Lawyer in London: Representations and Warranties in Acquisition Agreements—What's the Big Deal?*, CORP. PRAC. NEWSWIRE (Chadbourne & Parke LLP, New York, N.Y.), Dec. 2012, at 1, 2, available at <http://goo.gl/dOHzsK> ("What most U.S. lawyers might not appreciate, however, is that the distinction in remedies that forms the basis for the solicitor's objection to include both representations and warranties in an acquisition agreement, is also present under the laws of most U.S. states. Yet, U.S. lawyers routinely include both representations and warranties in an acquisition agreement.").

<sup>15</sup> See *infra* note 72 and accompanying text.

<sup>16</sup> See U.C.C. §§ 3-416, 3-417, 4-207, 5-110, 7-507, 7-508, 8-108, 8-109.

claim for misrepresentation. It would elevate form over substance to suggest that use of *represents* would be enough to make that sentence a representation.

The preceding example is intentionally an extreme one, but the problem isn't one of degree. Instead, it's inherent in the remedies rationale.

It would be equally bizarre to conclude, as the restrictive remedies rationale requires, that an intended remedy isn't available because it's not introduced by the appropriate verb. For example, if a party's statements of fact are introduced by neither *represents* nor *warrants*, according to the logic of the restrictive remedies rationale the counterparty would have no remedy, regardless of the nature of those statements. It would be hard to justify that.

### 3. It's Not Supported by the Law

Third, U.S. caselaw supporting the remedies rationale is elusive.

This author has found no U.S. caselaw supporting the notion that if you use *represents* in a sentence, what follows will as a matter of law constitute a representation supporting an action for misrepresentation, regardless of what the sentence says, or that if you use *warrants* in a sentence, what follows will as a matter of law constitute a warranty supporting an action for breach of warranty, regardless of what the sentence says.

Stark has pointed to five cases that support “the contention that the use of ‘warrants’ creates warranties.”<sup>17</sup> As this author reads those cases, four do not in fact address the point at issue,<sup>18</sup> and the fifth, mentioned below,<sup>19</sup> appears to support the restrictive version of the remedies rationale—that if *represents* or *warrants* is absent, so is the related remedy.

And in seeking to rebut earlier expressions of this author's views on *represents and warrants*, Stark has twice pointed to the “seminal” case of *CBS Inc. v. Ziff-Davis Publishing Co.*,<sup>20</sup> in which the court held that knowing that a warranty

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<sup>17</sup> Stark, *supra* note 11.

<sup>18</sup> *Metromedia Co. v. Fugazy*, 983 F.2d 350, 360 (2d Cir. 1992); *Ainger v. Michigan Gen. Corp.*, 476 F.Supp. 1209 (S.D.N.Y. 1979) *aff'd*, 632 F.2d 1025 (2d Cir. 1980); *Hawkins v. Pemberton*, 51 N.Y. 198, 202 (1872); *Century 21, Inc. v. F.W. Woolworth Co.*, 181 A.D.2d 620, 624, 582 N.Y.S.2d 101, 104 (App. Div. 1992) (although the court noted that “[t]he word ‘warranty’ does not appear in any of the parties’ agreements,” that has no bearing on what the implications would have been had the word *warranty* been used).

<sup>19</sup> See *infra* note 28 and accompanying text.

<sup>20</sup> 553 N.E.2d 997 (1990).

had been breached did not preclude the buyer from seeking indemnification.<sup>21</sup> But the *Ziff-Davis* court didn't attribute any significance to the one or more verbs used to introduce the relevant statement of fact, so *Ziff-Davis* cannot be cited in support of the remedies rationale.

Stark suggests that two law-review articles support the notion that use of the verb *warrants* creates warranties.<sup>22</sup> One, a 1980 article by Richard A. Lord, states that "[t]he clearest case of warranty being created is found in oral or written warranties denominated as such."<sup>23</sup> But Lord says only that use of the words *guaranty*, *warranty*, *promise*, and *affirm* "will aid a court in imposing warranty liability."<sup>24</sup> That falls well short of the certainty promised by the remedies rationale. Furthermore, Lord acknowledges that what follows such a word can muddy the waters.<sup>25</sup>

The second article, published in 1923, states that "use of the word 'warrant' by the seller has been held sufficient proof of an intent to warrant."<sup>26</sup> But saying that a contract party intended to create a warranty is different from saying that the party in fact created a warranty. Furthermore, the only support for that statement is a 1911 opinion of the Supreme Court of Iowa in which the court noted that "[t]he petition declared upon a 'warranty' in express terms."<sup>27</sup> That doesn't allow one to conclude that the court attributed more importance to the word "warranty" than the rest of the statement in question. And more broadly, that one century-old case is a slim basis for a general pronouncement.

As for the restrictive version of the remedies rationale, there's scant support for the notion that to constitute a representation, a statement must be introduced by *represents* or referred to as a representation, and to constitute a warranty, a statement must be introduced by *warrants* or referred to as a warranty.

In one of the cases Stark cites, *Pentair, Inc. v. Wisconsin Energy*, the U.S. District Court for Minnesota stated as follows:

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<sup>21</sup> See Tina L. Stark, *Another View on Reps and Warranties*, 15 BUS. L. TODAY, Jan./Feb. 2006, at 8, 8–9; Stark, *supra* note 11.

<sup>22</sup> Stark, *supra* note 11.

<sup>23</sup> Richard A. Lord, *Some Thoughts About Warranty Law: Express and Implied Warranties*, 56 N.D. L. REV. 509, 514 n.14 (1980).

<sup>24</sup> *Id.* at 514.

<sup>25</sup> See *id.* at 514 n.14.

<sup>26</sup> George Gleason Bogert, *Express Warranties in Sales of Goods*, 33 Yale L.J. 14, 28 (1923).

<sup>27</sup> *Davis v. Berkheimer*, 132 N.W. 377, 377 (1911).

If the seller merely makes a factual representation (e.g., “this car has four new tires”)—but the seller does not go further and expressly agree that his representation is a warranty (e.g., “I hereby warrant that this car has four new tires”)—the buyer cannot recover for breach of warranty unless she can prove that she relied on the factual representation.<sup>28</sup>

But according to this case, reliance is enough to make up for absence of *warrants*—a possibility not reflected in the restrictive remedies rationale. Furthermore, this one anomalous opinion is more than offset by cases in which use of *represents* or *representations* in a contract doesn’t preclude the court from concluding that the statement in question is actually a warranty.<sup>29</sup> And section 2-313(2) of the Uniform Commercial Code states that “[i]t is not necessary to the creation of an express warranty that the seller use formal words such as ‘warrant’ or ‘guarantee’ or that he have a specific intention to make a warranty.”<sup>30</sup>

#### 4. Semantically, It Makes No Sense

Fourth, the semantics of the remedies rationale makes no sense.

Consider the following statement of fact: *The Inventory is in good condition.* To be of use in a contract, it’s missing something—any indication who is making the statement. What’s required to remedy that is a subject and a verb. The subject would be one or more of the contract parties. In everyday English you would have any number verbs to choose from: *says, grunts, proclaims, screams, asserts.* But in a contract, the only purpose the verb serves, from a standard-English perspective, is to link the subject to the statement of fact.

To permit the verb to have remedies implications, or to require it do so, is to impose on the verb a semantic function it doesn’t have in standard English. It’s unreasonable to expect readers to make that connection.

#### 5. It Doesn’t Explain Current Practice

And fifth, what is the simplest explanation for prevalence of use of *represents and warrants* outside of the context of statements of fact relating to goods? It isn’t that after considering potential remedies if a dispute occurs,

<sup>28</sup> Pentair, Inc. v. Wisconsin Energy Corp., 662 F. Supp. 2d 1134, 1138 (D. Minn. 2009).

<sup>29</sup> See, e.g., Aspect Systems, Inc. v. Lam Research Corp., No. CV 06-1620-PHX-NVW, 2008 WL 2705154, at \*9 (D. Ariz. June 26, 2008) (describing as a “warranty” a contract provision introduced by the verb “represents”); Quality Wash Group V, Ltd. v. Hallak, 58 Cal. Rptr. 2d 592, 596 (Ct. App. 1996), at 596 (describing as a “warranty” a provision introduced by “makes the following representations”).

<sup>30</sup> U.C.C. § 2-313(2).

contract parties opt to make it explicit that inaccurate statements of fact could give rise to an action for misrepresentation or an action for breach of warranty, or both.

Instead, if contract parties are presented with three options with ostensibly meaningful implications—*represents*, *warrants*, or *represents and warrants*—yet overwhelmingly opt for *represents and warrants* regardless of the nature of the transaction, the simplest explanation is that they don't recognize that they're making a choice.

That impression is reinforced by the way mergers-and-acquisitions contracts generally provide for indemnification as the exclusive remedy<sup>31</sup> yet overwhelmingly use *represents and warrants*.<sup>32</sup> If use of *represents and warrants* is an empty gesture there, economy of hypothesis suggests that it's an empty gesture elsewhere. It also follows that there's no reason to attribute significance to use of either *represents* or *warrants* alone.

In addition, in its discussion of *represents* and *warrants* the *ABA Model Stock Purchase Agreement* does not mention the remedies rationale.<sup>33</sup> Either those members of the Section of Business Law of the American Bar Association responsible for the *ABA Model Stock Purchase Agreement* are unfamiliar with the remedies rationale or they felt that it wasn't worth mentioning.

So it's reasonable to conclude that in the United States, the remedies rationale for use of *represents* and *warrants* is of no practical relevance.

#### D. *The Timeframe Rationale*

The clearest articulation of the timeframe rationale for using *represents*, *warrants*, or both is that offered by the Section of Business Law of the American Bar Association in the second edition of the *ABA Model Stock Purchase Agreement*, which uses the phrase *represents and warrants*: "Representations are statements of past or existing facts and warranties are promises that existing or future facts are or will be true."<sup>34</sup> If you take that at face value, it follows that "[a] party can, for

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<sup>31</sup> See LOU R. KLING & EILEEN T. NUGENT, *NEGOTIATED ACQUISITIONS OF COMPANIES, SUBSIDIARIES AND DIVISIONS* § 15.02[4] (2011).

<sup>32</sup> See *supra* text accompanying note 2.

<sup>33</sup> See *infra* text accompanying note 34.

<sup>34</sup> I COMMITTEE ON MERGERS AND ACQUISITIONS, SECTION OF BUSINESS LAW, AMERICAN BAR ASSOCIATION, *MODEL STOCK PURCHASE AGREEMENT WITH COMMENTARY* 77 (2011) [hereinafter *ABA MODEL STOCK PURCHASE AGREEMENT*]; *id.* at 82, 192 (instances of use of *represents and warrants*).

instance, represent and warrant that as of a prior date his net worth was \$75,000; he can also warrant that as of a future date his net worth will be that amount.”<sup>35</sup>

If one looks hard enough, one can find caselaw and other commentary that endorses the timeframe rationale.<sup>36</sup> But the timeframe rationale suffers from flaws that render it untenable as an explanation of how one should use *represents* and *warrants* in contracts.

### 1. It Seeks to Apply to All Kinds of Contracts

First, as with the remedies rationale,<sup>37</sup> the timeframe rationale is inconsistent with the law of warranties, because it suggests that a statement of fact can be a warranty not just in contracts for the sale of goods and other contracts to which the law of warranties has been held to apply but in any kind of contract.

### 2. It's Not Supported by the Law

Second, one requirement of an action for misrepresentation is indeed that a party have made a false representation as to fact with regard to a past event or present circumstance, but not a future event<sup>38</sup>—when a statement as to future circumstances is made there is no way to determine when it is made whether it's accurate or not. But nothing in the law of warranties suggests that to be a warranty a statement of fact must pertain only to existing or future facts. Instead, the Uniform Commercial Code says 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” is sufficient to create an express warranty.<sup>39</sup> One could conclude that the timeframe rationale was devised by commentators overeager for a way to distinguish between *represents* and *warrants*.

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<sup>35</sup> I BUSINESS ACQUISITIONS 170 (John W. Herz & Charles H. Baller, 2d ed. 1981).

<sup>36</sup> See, e.g., *Krys v. Henderson*, 69 S.E.2d 635, 637 (1952) (“Generally, warranties relate to future events, and representations to past or existing facts ... .”); Mark A. Primack, *Representations, Warranties and Covenants: Back to the Basics in Contracts*, NAT’L L. REV. (Dec. 1, 2009) (“The key difference among these words is temporal—past and present for representations; past, present, but mainly future for warranties ... .”).

<sup>37</sup> See *supra* text accompanying notes 15–16.

<sup>38</sup> See 26 WILLISTON ON CONTRACTS, *supra* note 8, § 69:5 (“[A] false representation made by a defendant, to be actionable, must relate to an existing fact or a past event.”).

<sup>39</sup> U.C.C. § 2-313.

### 3. Semantically, It Makes No Sense

And third, even if the law of warranties were to apply to every contract, and even if warranties were to pertain only to existing or future facts, the timeframe rationale would still fail because as a matter of semantics, it doesn't make sense.

For the timeframe rationale to apply to contract language, a drafter would have to choose the verb that introduces a statement of fact based on the nature of that fact. As the *ABA Model Stock Purchase Agreement* suggests, that would be “a drafting nuisance”<sup>40</sup>—drafters would have to use *represents* or *warrants* to introduce a given statement of fact, depending on whether that fact is a past or existing fact or a future or existing fact, respectively. But more to the point, that exercise would be a charade. It would be evident from a statement of fact itself whether it's a past fact, existing fact, or future fact, so taking the time to make sure that the verb used to introduce that statement of fact matches its content would add no value. And the timeframe rationale suggests the bizarre result that if a statement of past fact were introduced by *warrants* instead of *represents*, it wouldn't constitute a past fact and so couldn't be used to support an action for misrepresentation.

So as an explanation for why contracts use the phrase *represents and warrants*, the timeframe rationale is as lacking as the remedies rationale.

## II. ENGLISH LAW AND PRACTICE

### A. Usage

Whereas in the United States courts and practitioners mostly treat both *represents* and *warrants* as meaning the same thing when used to introduce a statement of fact, in England a different view prevails. There, it appears to be standard practice to use only *warrants*. The concern is that a claim for misrepresentation could give rise to the remedy of rescission, with the parties being returned to the situation they were in before they entered into the contract.<sup>41</sup> The idea is that by using only *warrants*, the party making the statements of fact avoids making representations and so avoids being subject to a claim for misrepresentation.<sup>42</sup>

<sup>40</sup> See ABA MODEL STOCK PURCHASE AGREEMENT, *supra* note 34, at 77.

<sup>41</sup> See 1 CHITTY ON CONTRACTS ¶¶ 6-103 to -133 (H. G. Beale ed., 30th ed. 2008) (discussing rescission for termination).

<sup>42</sup> See Claude Serfilippi, *A New York Lawyer in London: Representations and Warranties in Acquisition Agreements—What's the Big Deal?*, CORP. PRAC. NEWSWIRE (Chadbourne & Parke LLP, New York, N.Y.), Dec. 2012, at 1, available at <http://goo.gl/dOHzsK> (“In contrast, in an acquisition

*B. Caselaw*

This view was recently endorsed by the English High Court in *Sycamore Bidco Ltd. v. Breslin*.<sup>43</sup> Sycamore purchased the shares of a company from Breslin and another. After the transaction was consummated, Sycamore found errors in the company's audited accounts. The sellers had made statements regarding the accounts in the share purchase agreement, so Sycamore sued for breach of warranty and misrepresentation. The relevant language was introduced using the verb *warrant*, and the statements were referred to as warranties.<sup>44</sup> Sycamore argued that "the warranties are also capable of being representations so that, if there is a contravention of their terms, there is also a misrepresentation,"<sup>45</sup> but Justice Mann held that "I find that they are warranties only, and not representations," primarily because "[t]he warranties in this case are clearly, and at all times, described as such, and are nowhere described as representations."<sup>46</sup> This is the restrictive remedies rationale, offered without explanation.

*Sycamore Bidco* is no anomaly. Another case to similar effect is *MAN Nutzfahrzeuge AG v. Freightliner Ltd.*, where the court said, "By drafting the clauses in question as both representations and warranties the parties have attached different characteristics to the statements they contain which, depending on the circumstances, may give rise to different consequences and different measures of loss."<sup>47</sup>

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agreement governed by English law, counsel for sellers and buyers would generally agree that it is standard market practice to provide solely warranties and to not make any representation with respect to the business to be sold. English counsel for a seller is vigilant in ensuring that none of the factual statements regarding the business to be sold are in any way described as a representation."); Leona N. Ferera, John R. Phillips, Julian Runnicles & Jeffery D. Schwartz, *Some Differences in Law and Practice Between U.K. and U.S. Stock Purchase Agreements*, MONDAQ, Apr. 16, 2007, available at <http://goo.gl/AnfWc3> [hereinafter Jones Day Newsletter] ("In the U.K., it is common for the seller to resist giving representations as well as warranties and to delete the word 'representation' from the agreement. The deletion of the term 'representation' is considered, in some quarters, to minimize the risk of a tortious claim for damages under the Misrepresentation Act 1967 and to remove the possibility that the buyer will attempt to rescind the agreement ab initio under the provisions of that Act.").

<sup>43</sup> [2012] EWHC (Ch) 3443 (Eng.).

<sup>44</sup> *Id.* appendix ("The SPA," clause 5).

<sup>45</sup> *Id.* ¶ 200.

<sup>46</sup> *Id.* ¶ 203.

<sup>47</sup> [2005] EWHC 2347, 2005 WL 2893816, at \*32 (QBD (Comm Ct) 2005).

Indeed, the restrictive remedies rationale has a long history in England. The 1603 case *Chandelor v. Lopus*<sup>48</sup> involved a dispute between the buyer and the seller of a bezoar stone—a concretion found in the gut of certain animals and believed by some to have occult qualities. The seller had “affirmed” to the buyer that the item in question was a bezoar stone. The court held that as the seller hadn’t stated that he was “warranting” that the item was a bezoar stone, the buyer couldn’t bring against the seller a claim for breach of warranty.

Nevertheless, English law is not settled on the matter. For example, the opinion in *Sycamore Bidco* discusses the 2009 High Court opinion by Justice Arnold in *Invertec Ltd v De Mol Holding BV*.<sup>49</sup> In that case, the defendants argued that because the claims were “all framed by reference to warranties” in the underlying share purchase agreement, the claimant couldn’t bring a claim for misrepresentation. But the court held that “the warranties in question also amount to representations of fact.” It continued (emphasis added):

In those circumstances I cannot see any reason in principle why [the claimant] cannot claim that it was induced to enter into the agreement by *the representations made by those warranties* so as to found a misrepresentation claim if they were false, particularly if they were fraudulently made.<sup>50</sup>

In other words, by finding that something the contract referred to as a warranty was also a representation supporting a misrepresentation remedy, Justice Arnold in effect rejected the restrictive remedies rationale. Justice Mann’s perfunctory analysis in *Sycamore Bidco* provides no reason to consign *Invertec* to oblivion.

*Sycamore Bidco* was greeted with deference by English practitioners,<sup>51</sup> but a 2007 analysis by the London office of the international law firm Jones Day expresses little enthusiasm for the restrictive remedies rationale:

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<sup>48</sup> 79 Eng. Rep. 3 (Ex. Ch. 1603).

<sup>49</sup> [2009] EWHC 2471 (Ch).

<sup>50</sup> *Id.*

<sup>51</sup> See, e.g., Emma Dolphin, *Warranties and Representations? Why It Matters* (Shoosmiths), Jan. 17, 2013, available at <http://goo.gl/oh5TbB>; Daniella Lloyd, *When Is a Representation Also a Warranty? The £10 Million Question* (Farrer & Co.), Feb. 2013, available at <http://goo.gl/Ueo2Xz>; Raymond L. Sweigart & Christopher D. Gunson, “Reps” and Warranties: One Could Cost More Than the Other Under English Contract Law (Pillsbury Winthrop Shaw Pittman LLP), Aug. 5, 2013, available at <http://goo.gl/JNXIUU>; David Vaughan & Clark Sargent, *Representations and Warranties: Can One*

In reality, the simple categorization of a statement as a warranty (without any further provisions) probably has little bearing on whether the statement is susceptible to being treated as a representation for purposes of [the Misrepresentation Act of 1967].<sup>52</sup>

### C. Rationale

In sum, English courts and practitioners differ from those in the United States by giving significant but not overwhelming support to the restrictive remedies rationale. Yet the remedies rationale suffers from some of the same weakness for purposes of English contracts as it does for U.S. contracts: First, it applies the law of warranties where it doesn't belong. Second, allowing drafters to designate what constitutes a representation or a warranty just by saying so would make a mockery of the substantive law regarding what's required to bring a claim for misrepresentation and what's required to bring a claim for breach of warranty. And third, in terms of semantics, it doesn't make sense.

## III. AN ALTERNATIVE EXPLANATION

Why in the United States is the phrase *represents and warrants* generally used to introduce statements of fact? In this author's experience, hardly any transactional lawyers attribute meaning to the individual components of the phrase. Instead, they think of it as meaning simply that a party is asserting the facts stated. So it's not surprising that the *ABA Model Stock Purchase Agreement* states that although it follows common practice in using both *representations* and *warranties* in the model agreement, "The technical difference between the two has proven unimportant in acquisition practice."<sup>53</sup> Additionally, in his book *Anatomy of a Merger*, James Freund uses *representation* and *warranty* interchangeably.<sup>54</sup>

That indifference to refined meanings for *represents* and *warrants* in mergers-and-acquisitions practice could be because mergers-and-acquisitions contracts generally specify that indemnification is the exclusive remedy,<sup>55</sup> making other remedies irrelevant. But lack of interest isn't limited to the mergers-and-acquisitions world. For example, a treatise on drafting commercial contracts uses just "Seller warrants" to introduce what it refers to as "the representations and

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*Clause Be Both at the Same Time?* (Wragge & Co LLP), Jan. 30, 2013, available at <http://us.practicallaw.com/3-523-7944>.

<sup>52</sup> Jones Day Newsletter, *supra* note 42.

<sup>53</sup> See I ABA MODEL STOCK PURCHASE AGREEMENT, *supra* note 34, at 77.

<sup>54</sup> See JAMES C. FREUND, ANATOMY OF A MERGER 153 n.33 (1975).

<sup>55</sup> See *supra* note 31 and accompanying text.

warranties of the seller.”<sup>56</sup> And neither it nor another treatise on drafting commercial contracts<sup>57</sup> offers any explanation for the dual terminology.

Practitioners appear not to distinguish between *represents* and *warrants*, but they do tend to use both verbs in a doublet. Perhaps an explanation for that lies in remedies terminology. The word *misrepresentation* and phrase *breach of warranty* are both couched in terms of a violation, inviting one to refer to that which was violated as a *representation* and as a *warranty*, respectively. Because the two words each have a verb form, one easily falls into saying that in making a representation, a contract party *represents*, and in making a warranty, a contract party *warrants*.

That might seem obvious, but you can’t say the same for another remedy for inaccurate statements of fact, a claim for fraud. The term *fraud* refers just to the end result of violation, so there’s no scope to derive from *fraud* a term for that which was violated or, it follows, a verb for uttering that which was violated. If it were otherwise, the doublet *represents and warrants* might instead have been part of a triplet.

But the fact that both *represents* and *warrants* were theoretically available doesn’t explain how they ended up in contracts. The simplest explanation is that lawyers—ever prone to verbosity—tend to import into contracts terms of art developed in jurisprudence. Once in contracts, such terms tend to supplant simpler ones. Witness use in contracts of the terms of art *allonge*, *attorn*, and *novation*.<sup>58</sup>

As to how drafters came to use both *represents* and *warrants* in a doublet, that can be explained by the urge to redundancy that has given rise to doublets such as *indemnify and hold harmless*.<sup>59</sup> Because an inaccurate statement of fact can give rise to an action for misrepresentation, an action for breach of warranty, or both, lawyers prone to redundancy would naturally include both.

#### IV. A SOLUTION

The main problem with the verbs *represents* and *warrants*, used together or apart, is that some think, despite lack of any plausible basis for doing so, that they

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<sup>56</sup> ROBERT A. FELDMAN & RAYMOND T. NIMMER, *DRAFTING EFFECTIVE CONTRACTS: A PRACTITIONER’S GUIDE* § 2.02 (2015).

<sup>57</sup> See VLADIMIR R. ROSSMAN & MORTON MOSKIN, *COMMERCIAL CONTRACTS: STRATEGIES FOR DRAFTING AND NEGOTIATING* § 2.03[E] (2015).

<sup>58</sup> See ADAMS, *supra* note 3, ¶ 1.17, ¶ 13.7 (*allonge*), ¶¶ 13.56–62 (*attorn*), ¶¶ 13.478–80 (*novation*).

<sup>59</sup> See *id.* ¶¶ 13.323–33; see generally BRYAN A. GARNER, *GARNER’S DICTIONARY OF LEGAL USAGE* 294 (3d ed. 2011) (entry for “Doublets, Triplets, and Synonym-Strings”).

imply particular remedies. One can expect that practitioners, commentators, and judges who embrace or tolerate the remedies rationale despite its weaknesses will continue spreading confusion. That could lead to time wasted in negotiations, as well as time and money wasted in contract disputes that could have been avoided.

Furthermore, by using *represents* or *warrants* or both to introduce statements of fact, one unnecessarily injects jurisprudence terms of art into contracts. That makes contracts less clear, even for those who aren't inclined to see the verbs as having remedies implications.

There's a simple two-part solution: use *states* to introduce facts and address remedies directly.

#### A. Using States

The first part of the solution aims to eliminate confusion: Don't use *represents*, *warrants*, or the phrase *represents and warrants* to introduce statements of fact.

It would be best to introduce statements of fact using the simplest verb available, namely *states*. Other alternatives, such as *asserts* and *confirms*, carry unnecessary rhetorical baggage. Use of *states* suggests use of the corresponding noun phrase *statement of fact* instead of *representation* and *warranty*.

In addition to stating facts, one can also state opinions. But no reader could reasonably conclude that what follows *states*—as in *Acme states that the Equipment is in good condition*—is anything but a statement of fact. Similarly, no one could reasonably doubt that a party making statements introduced by the verb *states* is asserting that those statements are accurate. Nevertheless, when introducing a series of statements of fact, it would be best to use as the introductory phrase *[Party name] states that the following facts are accurate*, if only to ensure that you have a full independent clause before the colon that follows.<sup>60</sup> One wouldn't need to signal that an inaccurate statement of fact can give rise to a remedy, just as one doesn't need to signal that failure to comply with an obligation gives rise to a remedy.<sup>61</sup>

Using *states* to introduce statements of fact would be a complete break with current practice. But the test of drafting usages isn't profession-wide consensus—they're not subject to a popular vote. Anyone who drafts or reviews contracts has the power, and the responsibility, to express the transaction as clearly as possible, even if doing so requires embracing change.

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<sup>60</sup> See ADAMS, *supra* note 3, ¶ 4.32.

<sup>61</sup> See 23 WILLISTON ON CONTRACTS, *supra* note 8, § 63:1.

One can expect resistance to using *states*, at least initially. In some practice areas, particularly mergers-and-acquisitions and financing, that resistance will likely be stiff. It makes sense to preempt resistance by explaining in a cover note, perhaps as part of a general explanation of contract usages,<sup>62</sup> why a given draft uses *states*.

Lawyers on one or both sides of a transaction might be concerned that *states* has unknown implications for remedies. You could allay those fears by adding to a contract the following: *The verb used to introduce a statement of fact in this agreement does not affect the remedies available for inaccuracy of that statement of fact.*

A drafter stuck with using *represents* or *warrants* or both could also use that sentence. That situation might arise if using *states* would meet too much resistance or provoke too much discussion. That's more likely to be the case when you propose revising the other side's draft to use *states* as opposed to using *states* in your own draft.

### B. *Addressing Remedies Directly*

The second part of the solution to problems posed by *represents* and *warrants* aims to establish clear meaning: If remedies are an issue, address remedies explicitly. Putting one's faith instead in the smoke-and-mirrors of any combination of *represents* and *warrants* is nothing short of irresponsible.

That's what led the London office of Jones Day to recommend as follows in 2007:

[A] well-advised seller will always seek to exclude the remedies of tortious claims and rescission by express provision to that effect ... , rather than by arguing that those rights are excluded by virtue of simply characterizing the statement as a "warranty" and not a "representation."<sup>63</sup>

Stark does not see addressing remedies explicitly as an alternative to using *represents* and *warrants*:

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<sup>62</sup> See ADAMS, *supra* note 3, at xxxiii; Kenneth A. Adams, *A Real-World Example of a Preempt-the-Traditionalists Cover Note*, ADAMS ON CONTRACT DRAFTING (Nov. 4, 2013), <http://www.adamsdrafting.com/a-real-world-example-of-a-preempt-the-traditionalists-cover-note/>; Kenneth A. Adams, *Preempting Pushback from Traditionalists*, ADAMS ON CONTRACT DRAFTING (Oct. 14, 2013), <http://www.adamsdrafting.com/preempting-pushback-from-traditionalists/>.

<sup>63</sup> Jones Day Newsletter, *supra* note 42.

The existence of remedy provisions does not change the general efficacy of or need for the phrase “represents and warrants.” ... [A]lthough some lawyers go to great lengths to structure contractual remedy provisions to preclude tort remedies, that approach is transaction specific. Many deals cannot afford the transaction costs associated with detailed remedy provisions. Instead, they provide for termination and rely on the parties having the rights and remedies afforded by law and equity.<sup>64</sup>

But this compares apples and oranges. Contract provisions aimed at precluding extra-contractual tort liability can indeed be elaborate,<sup>65</sup> but they go beyond whatever a drafter might be trying to accomplish with *represents* or *warrants* or both.

Expressing the equivalent of *represents* or *warrants* or both is more straightforward. Instead of using *represents and warrants* to introduce statements of fact, a drafter who embraces the remedies rationale could achieve the same effect by stating that each party may bring a claim for misrepresentation, a claim for breach of warranty, or both if the other party makes inaccurate statements of fact. And instead of using just *warrants*, a drafter who embraces the restrictive remedies rationale could achieve the same effect by stating that each party waives any right to bring a claim for misrepresentation if the other party makes inaccurate statements of fact; one could also make it explicit that each party may instead bring a claim for breach of warranty. (The mirror-image of that provision would express the restrictive-remedies-rationale equivalent of using just *represents*.)

Electing one remedy over the other might offer advantages. For example, a claimant might prefer being able to bring a misrepresentation claim over a breach-of warranty claim if doing so offers a longer statute of limitations or seems likely to permit a claim for a greater amount damages,<sup>66</sup> even if the claimant would have to meet a greater burden to prevail.<sup>67</sup>

But for five reasons, the utility of such provisions is uncertain.

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<sup>64</sup> Stark, *supra* note 11.

<sup>65</sup> See West & Lewis, *supra* note 8, at 1036–38 (offering model contract provisions intended to exclude extra-contractual tort liability).

<sup>66</sup> Cf. Rafal Zakrzewski, *Representations and Warranties Distinguished*, BUTTERWORTHS J. OF INT’L BANKING AND FIN. L. 341, 342–43 (2013) (offering an illustration of the difference under English law between damages for breach of warranty and damages for misrepresentation).

<sup>67</sup> See *supra* text accompanying note 8.

First, the likelihood of being able to enforce such provisions is mixed. Saying that a party may bring a particular kind of claim doesn't guarantee that a court would find that a party had met the requirements for that kind of claim. But courts in both the United States<sup>68</sup> and England<sup>69</sup> generally accept that parties may exclude remedies by contract, subject to a fairness or reasonableness standard.

Second, such provisions are limited in scope. A simple statement that a party waives any right to bring a claim for misrepresentation presumably leaves plenty of room for claimant mischief of the sort drafters seek to avoid by using provisions excluding extra-contractual liability.

Third, rote limiting of remedies might not make sense. For example, the English aversion to rescission as a remedy, regardless of the context, has the merit of simplicity but doesn't take into account that rescission might sometimes be an appropriate remedy for either party, depending on the circumstances. It's reminiscent of another knee-jerk remedies strategy, eliminating consequential damages.<sup>70</sup>

Fourth, for many contract parties, considering the potential sources of dispute and the remedies implications of any such dispute could be distracting, time-consuming, and ultimately speculative.

And fifth, if a party wishes to control remedies, it might well elect to do so more simply and assertively by providing for indemnification<sup>71</sup> or liquidated damages or by imposing limits on liability, bearing in mind that doing so effectively poses a different set of challenges.

But all those issues are beyond the scope of this article. What's relevant for present purposes is that instead of using *represents*, *warrants*, or both with the aim of including or excluding particular remedies, it would be clearer to express the intended meaning explicitly, although it's a separate question whether doing so would be worthwhile.

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<sup>68</sup> See HOWARD O. HUNTER, MODERN LAW OF CONTRACTS § 17:12 (courts are more likely to respond favorably to contractual modifications of remedies if they are fair).

<sup>69</sup> See Misrepresentation Act, (1967) § 3 (Eng.) (stating that a term that excludes or restricts any liability or remedy for misrepresentation "shall be of no effect except in so far as it satisfies the requirement of reasonableness"; Zakrzewski, *supra* note 66, at 343 (noting that in England the judicial policy has been to uphold exclusions of liability for misrepresentation in commercial contracts)).

<sup>70</sup> See ADAMS, *supra* note 3, ¶¶ 13.105–24.

<sup>71</sup> See *supra* note 31 and accompanying text.

## V. USE OF *WARRANTS* IN THE CONTEXT OF SALE OF GOODS

This article has thus far considered use of *represents* or *warrants*, or both, to introduce statements of fact other than statements of fact regarding goods in a contract for sale of those goods. In the context of sale of goods, use of *warranty* relates to the law on warranties in sale of goods<sup>72</sup> and, to some extent, services,<sup>73</sup> so in that context *warranty* serves a different function than it does when *represents* or *warrants*, or both, are used elsewhere. That's why it's routine for a contract for the sale of goods to use the verb *warrants* or the noun *warranty* to make assertions regarding the goods and also to use *represents and warrants* to introduce other statements of fact.

### A. Used to Introduce Obligations

In contracts for the sale of goods, *warranty* can be used, as a matter of the law of warranties, to refer not only to a statement of fact but also to an obligation.<sup>74</sup> Use of *warrants* in contracts to introduce an obligation would seem consistent with that: *Acme warrants that it shall maintain the Equipment as stated on schedule A.*

But adding *warrants* in front of an obligation adds nothing to the obligation. Arguably it makes it clear that that obligation is a warranty, but that's not evident, as it's routine for drafters to use language of declaration unnecessarily to introduce a provision that already has an appropriate verb.<sup>75</sup> An example: *Supplier acknowledges that it shall verify the Supplier employee's identity and eligibility before assigning them to perform Services.* This use of *warrants* could simply be another example of that tendency.

Furthermore, it would seem odd to flag certain obligations in this manner, given that you don't have to use the verb *warrants* for a contract provision to be treated as a warranty.<sup>76</sup> Why single certain obligations out for special treatment?

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<sup>72</sup> See 18 WILLISTON ON CONTRACTS, *supra* note 8, § 52:45 (placing discussion of warranties in the chapter on contracts for the sale of personal property).

<sup>73</sup> See *id.* (stating that there is a division of opinion whether the express warranty concepts in the Uniform Commercial Code are also applicable or may be extended to service agreements).

<sup>74</sup> See U.C.C. § 2-313.

<sup>75</sup> See Kenneth A. Adams, *Extraneous Language of Declaration*, ADAMS ON CONTRACT DRAFTING (Mar. 19, 2014), <http://www.adamsdrafting.com/extraneous-language-of-declaration/>.

<sup>76</sup> See *supra* note 30 and accompanying text.

### B. Used to Introduce Statements of “Future Facts”

It’s commonplace for *warrants* to be used to introduce what commentators call “future facts,”<sup>77</sup> as in *The Seller warrants that the Units will comply with the Specifications*.

But such provisions don’t state facts—the circumstances in question haven’t occurred yet. Instead, a statement of “future facts” usually serves to state an obligation indirectly. It would be clearer to state the obligation directly. That involves some subtlety:

- *The Seller shall sell to the Buyer Units that comply with the Specification* could be interpreted as meaning that the Seller would comply with this obligation by selling to the Buyer some units that comply with the specifications and others that don’t comply.
- *The Seller shall sell to the Buyer only Units that comply with the Specifications* could be interpreted as meaning that the Seller may sell no other products to the Buyer.
- The shortcomings in the previous two examples would be avoided by saying *The Seller shall sell to the Buyer 5,000 Units that comply with the Specifications*.
- But it *might* be simpler to say *All Units that the Seller sells to the Buyer must comply with the Specifications*.
- Compliance with specifications could be addressed exclusively in an explicit remedy, by saying *If a Unit fails to comply with the Specifications, then . . .*. But addressing compliance in both an obligation and an explicit remedy might give the Buyer more options for remedies.

As a matter of idiom, it’s standard for people to speak in terms of “future facts”: *I promise that the cake will be ready! I guarantee that you’ll be happy*. But that doesn’t mean that couching contract provisions as “future facts” makes sense.

### C. Followed by a Noun

Although *warrants* is usually followed by a *that*-clause, it can also be followed by a noun: *The Seller warrants the Units against defects in materials or workmanship*. This too is equivalent to an obligation to sell conforming goods; it would be simpler to state it as such.

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<sup>77</sup> See *supra* note 34 and accompanying text.

#### D. Used to Introduce Statement of Facts

The verb *warrants* can be used to introduce facts relating to current circumstances (*The Seller warrants that the Equipment is in good working order*) or facts referring to the past (*The Seller warrants that the Units were manufactured in February 2015*).

Such statements are warranties as a matter of law. As such, introducing them with *warrants* would seem less objectionable than using *represents and warrants* to introduce every statement of fact in a contract. Nevertheless, it would be preferable not to use *warrants* in this context. Just as it would be odd to flag certain obligations as being warranties,<sup>78</sup> it would be odd to flag certain statement of facts as being warranties—you don't have to use the verb *warrants* for a statement of fact to be treated as a warranty.<sup>79</sup> And drafters and readers would likely be uncertain as to the implications of introducing only some statements of fact with *warrants*.

Instead, use in this context the solution advocated above for other statements of fact—in other words, use *states* to introduce all statements of fact, including those that might be warranties as a matter of law.

#### E. Using Warranty As a Heading

Whereas use of *represents and warrants* to introduce statements of fact appears to be an empty ritual, the notion of warranties in the context of sales of goods is widely understood, even by the public. So it would be unobjectionable to signal that a contract contains warranties.

Drafters have available a more straightforward way of accomplishing that than tinkering with verbs, namely by using *Warranties* as a section heading. The section itself wouldn't have to use the verb *warrants*. But anyone using this approach should bear in mind that a contract might include outside of the section entitled *Warranties* provisions that a court might conclude are warranties as a matter of law.

### VI. BROADER RELEVANCE

Purging *represents and warrants* from contracts would make contracts clearer, would save time in negotiation, and would spare contract parties and their lawyers from being caught up in term-of-art confusion.

But there are broader implications.

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<sup>78</sup> See *supra* text accompanying note 76.

<sup>79</sup> See *supra* note 30 and accompanying text.

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,<sup>80</sup> wholesale copying has given rise to a pathology this author calls “passive drafting”:<sup>81</sup>

- 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*,<sup>82</sup> and *best efforts* and *reasonable efforts* (in England, *best endeavours* and *reasonable endeavours*).<sup>83</sup> 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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<sup>80</sup> See Kenneth A. Adams, *Dysfunction in Contract Drafting: The Causes and a Cure*, 15 TENN. J. BUS. L. 317 (2014).

<sup>81</sup> 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/>.

<sup>82</sup> See ADAMS, *supra* note 3, ¶¶ 13.323–33.

<sup>83</sup> 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<sup>84</sup> and Garner,<sup>85</sup> 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<sup>86</sup> 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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<sup>84</sup> 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).

<sup>85</sup> 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*).

<sup>86</sup> 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*<sup>87</sup> 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.<sup>88</sup> 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.

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<sup>87</sup> See *supra* note 34 and accompanying text.

<sup>88</sup> See *supra* text accompanying notes 61–62.