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Watertight? Royalty Indemnity Ruling Is Not

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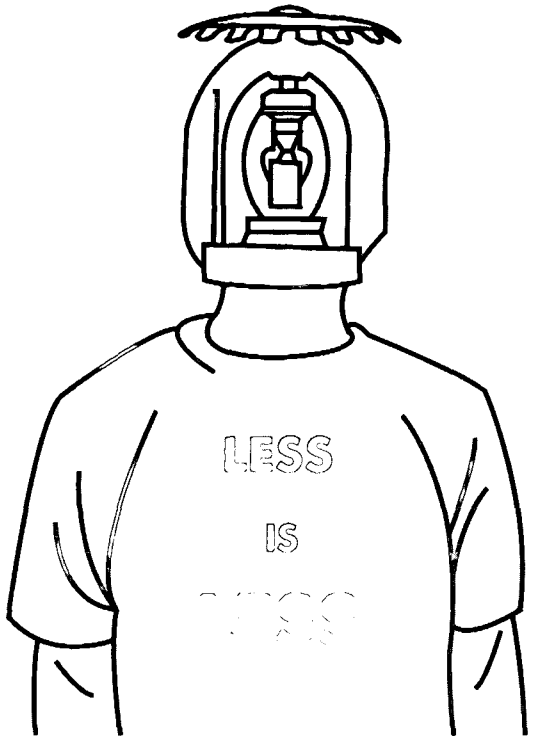
Ambiguity often results when concision trumps clarity

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 explications render opaque what would otherwise, if more neatly written, be translucently clear.[1] In all forms of legal writing-from affidavits to zoning regulations-Hemingway is preferred to Faulkner.[2] Concision is a virtue.[3]

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.[4] The recent decision of the Virginia Supreme Court in *Royal Indemnity Co., v. Tyco Fire Products*[5] is an example of the hazard of valuing concision over clarity.



AUNT MARY SAYS

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(1) (a provision of Virginia's codification 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.[6] 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."[7] 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."[8] 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."[9] 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."[10]

Royal Indemnity suggests another reason why the description might not have been an express warranty: "There is no evidence in the record showing that this language became 'part of the basis of the bargain.'"[11] The Court correctly notes that each of the predicates for the finding of an express warranty in UCC 2-313 (affirmation of fact or promise, description of the goods, and sample or model) requires that it be "part of the basis of the bargain." The meaning of this phrase has troubled some courts. Some have taken it as an expanded expression for the familiar

requirement of "reliance."[12] But in *Daughtrey v. Ashe*,[13] 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."[14] 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.[15]

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.[16] 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."[17] 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."[18] 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.[19] 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."[20] 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 . . . negation or limitation is inoperative to the extent that such construction is unreasonable." We can call this the principle of "non-negation." The next section reinforces this rule of construction: "[w]arranties whether express or implied shall be construed as consistent with each other and as cumulative . . . ."[21] An Official Comment to UCC 2-317 makes clear the extent to which courts should strain to maintain the effectiveness of multiple warranties: "[A]ll warranties are made cumulative unless this construction of the contract is impossible or unreasonable."[22] This is the principle of "cumulation."

No Virginia appellate court has explicitly considered the impact of UCC 2-316 or -317 on the construction of multiple express warranties in a single contract. The only reported Virginia decision on these provisions was by the federal District Court for the Western District of Virginia, which held that the existence of an express warranty by description did not negate the implied warranty of merchantability.[23] This is the common application of the principles of non-negation and cumulation.[24]

An opinion by the Illinois Appellate Court is the leading national authority on the issue of conflicting express warranties. In *Heat Exchangers, Inc. v. Aaron Friedman, Inc.*,[25] that court confronted two overlapping express warranties. One was in the buyer's purchase order, which also served as the contract: "Suppliers of materials . . . guarantee all work and materials for a period of one year . . ., and *agree to correct said defects* in work or material at their own cost and expense."[26] The seller's engineering manual, which came with all its products, contained another: "Each [good] is warranted to be free from defect in materials and workmanship . . . for a period of one year . . . The manufacturer's sole obligation under this warranty shall be *limited to furnishing replacement parts* . . . ."[27]

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 final phrase 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."[28] In other words, "[t]he more extensive obligation must control."[29] 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

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Less is less

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cause of action beyond the four-year window.[30] 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."[31] 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.[32] 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:

1. See RICHARD C. WYDICK, PLAIN ENGLISH FOR LAWYERS 7 - 10 (5th ed. 2005); JUSTICE ANTONIN SCALIA AND BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 25 (2008) ("The power of brevity is not to be underestimated."); WILLIAM STRUNK, JR. AND E.B. WHITE, THE ELEMENTS OF STYLE 72 (3d ed. 1979) ("Rich, ornate prose is hard to digest, generally unwholesome, and sometimes nauseating."); Julie Oseid, *The Power of Brevity: Adopt Abraham Lincoln's Habits*, 6 J. ALWD 28 (2009); *but see* STANLEY FISH, HOW TO WRITE A SENTENCE AND HOW TO READ ONE (2011); RICHARD A. POSNER, LAW AND LITERATURE 345 (3d ed. 2009) ("Brevity is a risk in persuasive speech, but also an opportunity.").

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 (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. 704 S.E.2d 91 (Va. 2011).

6. *Royal Indemnity* at 98:
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 operate the Bulb, the Bulb shatters and the Bulb Seat 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.

7. *Id.*

8. *Id.*

9. Official Comment 5 to UCC 2-313 supports the conclusion that Tyco's description was a warranty: "Technical specifications, blueprints and the like can afford more exact description than mere language and if made part of the basis of the bargain goods must conform with them." Other courts concur. *See, e.g., Shutter Shop, Inc. v. Amersham Corp.*, 114 F.Supp.2d 1218 (M.D. Ala. 2000); *Snelten v. Schmidt Implement Co.*, 647 N.E.2d 1071 (Ill. App. 1995); *Doe v. Southwest Grain*, 309 F. Supp.2d 1119 (D.N.D. 2004); *Taylor v. Alfama*, 481 A.2d 1059 (Vt. 1984).

10. *Martin v. American Medical Systems, Inc.*, 116 F.3d 102, 105 (4th Cir. 1997).

11. *Royal Indemnity* at 98.

12. *See, e.g., McKinney v. Bayer Corp.*, 2010 WL 3834327 (N.D. Ohio 2010); *Pentair, Inc. v. Wisconsin Energy Corp.*, 662 F.Supp2d 1134 (D. Minn. 2009) (applying Wisconsin law); *Harris Packaging Corp. v. Baker Concrete Constr. Co.*, 982 S.W.2d 62 (Tex.Civ.App. 1998).

13. 243 Va. 73, 413 S.E.2d 336 (1992).

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 v.v.s. quality" until after paying for and receiving 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 of how to install the goods 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 putative express 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 ("FloOnics used torque wrenches to tighten the stainless steel bolts to 60 foot-pounds, as it understood Banner's cut sheet to require.").

16. *Yates v. Pitman Mfg., Inc.*, 257 Va. 601, 514 S.E.2d 605 (1999). Yates was a suit for a warranty made in the sale of a crane.

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 take such affirmations, once made, out 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.).

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:

> 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.
> *Id.*

21. UCC 2-317.

22. Off. Cmt. 1 to UCC 2-317.

23. *Fournier Furniture, Inc. v. Waltz-Holst Blow Pipe Co.*, 980 F.Supp 187, 190 (W.D.Va. 1997).

24. 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.").

25. 96 Ill.App.3d 376, 421 N.E.2d 336 (1981).

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 561. The authors elaborate on their conclusion when they write that:

> 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 "lifetime guarantee" or one in which seller, for example, expressly warranted that an automobile would last for 24,000 miles or four years whichever occurred first. *Id.*

32. *See*, e.g., *Selzer v. Brunsell Bros., Ltd.*, 257 Wis.2d 809, 825, 652 N.W.2d 806, 813 (App. 2002) ("Courts have consistently held that vague statements concerning product longevity do not comply with the requirement of a 'specific reference to a future time' that would create a warranty of future performance . . . ."); see *also* Robert J. Williams, *Getting What you Bargained For: How Courts Might Provide a Coherent Basis for Damages That Arise When Remedies Fail of Their Essential Purpose*, 5 VA. BUS. & L. REV. 131, 163-66 (2010) (discussing whether remedial promises of repair or replacement of a defective part or entire good should be deemed warranty of future performance). *See generally* Annot. 81 ALR 5th 483 "What Constitutes Warranty Explicitly Extending to 'Future Performance' for Purposes of UCC § 2-725(2)" (2000).