

# Drafting Representations and Warranties



- Using the phrase *represents and warrants together*, rather than using either term alone, prevents ambiguity as to the contract's meaning.
- Language introducing *representations and warranties* results in each statement of fact being both a representation and a warranty.  
EX: Bart represents and warrants to Lisa as follows:
- Individually, the words *represent* and *warrant* do not have the same meaning. Therefore, if the drafter omits one or the other of these two words instead of using the phrase “*represents and warrants*” this would create different legal consequences because the words have different substantive meanings.
- By using the phrase *represents and warrants*, a drafter reduces a client's litigation risk by explicitly saying what the parties mean.

# Drafting Representations



- When drafting a representation, remember that representations allocate risk by establishing a standard of liability. The standard of liability *is* the statement of fact. Why? If the statement of fact is false, the person who made the representation is liable.
- If you represent the party *making* the representations, minimize the number of representations being used, and ensure that the representations are accurate.
- If you represent the party *receiving* the representations, your client benefits more by receiving representations that are broad and as unqualified as possible.

**Materiality Qualifiers:** Reduces a maker's (of the statement) risks by limiting a representation's focus to the most important facts. Something is material if it would affect a person's decision regarding the contract.

# Drafting Representations



- Generally, the facts in a representation must exist in the present or have existed in the past. If the representation exists in the present, draft it using present tense verbs. If the representation existed in the past, draft it using past tense verbs.
- If using the words *currently* or *presently*, their use affects the meaning of a condition that provides that representations must also be true on the closing date.
- **Promissory Fraud**- A party has a cause of action when another party promises to perform but knows it will not.
- Representations making reference to the future are generally disguised as covenants. So, to carry out the seller's intent, the provision should be redrafted as two provisions—one a representation, and the other, a covenant.

# Drafting Representations



## Active vs. Passive Voice

- The active voice is preferred over the passive voice.
- In the active voice, the subject of the sentence acts upon an object.  
**EX:** Martin (subject) bought (verb) a car (object).
- In the passive voice the subject of the sentence is acted upon by an actor.  
**EX:** The car (subject) was bought (verb) by Martin (actor).
- When the issue is the action rather than the actor, the passive voice is appropriate.

# Drafting Warranties



- When using the phrase *represents and warrants* together, one party promises to indemnify the other with respect to a state of facts currently existing or that existed in the past.
- A party can warrant that a state of facts will exist in the future because the recipient does not have justifiable reliance with respect to a warranty.
- So, a statement that cannot be a representation, because it deals with the future, can be a warranty. (See Slide 3 for week).

# Drafting Covenants



- Remember, a covenant is a promise to do or not do something. It creates a duty (obligation) to perform.
- To determine the substance of a covenant, ask these questions:
  - Who** is obligated to whom?
  - What** is the obligation?
  - When** must the obligation be performed?
  - Where** will performance take place?
  - Why** must a party perform?
  - How** is the obligation performed?
  - How much** will performance cost (if performance involves money or goods).

# Drafting Covenants



## DRAFTING GUIDELINES:

1. To obligate a party to perform, use the word **shall**.
2. Do not state what a party has a right to do; state what the other party's obligation is.
3. Do not use any form of the word agree.
4. Do not say that a party **is responsible** for doing something.
5. If the sentence uses a negative subject, use **may** instead of **shall not**.

# DRAFTING COVENANTS



## DRAFTING GUIDELINES:

6. To obligate a party not to do something, use **shall not** (except as stated in number 5 above).
7. To negate a duty to perform, use either **is not required** or **is not obligated to**.
8. Draft covenants using the active voice.
9. Beware of covenants posing as declarations!
10. Do not draft a provision so that it appears to bind a nonparty.



# Conditions



- A condition is a state of facts that must exist **before** a party is obligated to perform.
- Conditions can also be based upon the failure of facts to occur.
- A party's own actions cannot be a condition to its obligations.
- The passage of time cannot be a condition because it is certain to occur.
- Courts dislike conditions because they often result in a party forfeiting a right. Courts would rather construe a provision as a covenant than a condition.

**QUIZ TIME!**

# Conditions



- To ensure (as much as you possibly can) that a court will construe a provision as a condition, do one or more of the following:
  1. State that a provision is a condition;
  2. Use *must*;
  3. Include an interpretive provision that *must* signals a condition;
  4. Construct the sentence using an *if/then* formulation;
  5. State that consequences of the failure to satisfy a condition.

## Common Words of Condition:

- ✓ If/then
- ✓ must
- ✓ when
- ✓ subject to
- ✓ provided that
- ✓ if
- ✓ Conditioned upon
- ✓ upon