Hindsight Isn't So Reliable After All

By Vincent A. Wellman

The adage claims that hindsight is always 20-20, and it's a useful reminder. Problems, and their appropriate solutions, that seem so obvious in retrospect can often be hard to discern during an event. A famous football coach offered his twist on the adage: "[W]hen you're up to your butt in alligators, it doesn't do any good to remember that what you meant to do was drain the swamp."[1] However one makes the point about hindsight's advantages, it can be misleading when it comes to drafting contracts.

The following story is well-known in some circles because it's usually credited as the beginning of what's now called "operations research."[2] During World War II, Allied Air Forces suffered fearsome losses from Nazi anti-aircraft fire. A clever fellow was asked to help, and he inspected bombers when they returned from their missions. He walked under the planes, noting where they had been hit by fire and where they had not. He then recommended how protection should be added to the underside of the bomber force.

On hearing the beginning of this story, many listeners assume the recommendation was for more armor on the places where anti-aircraft holes were found. In fact, the engineer is famous because he urged the opposite—namely, that the planes be reinforced on the *undamaged* areas. Why reinforce areas that had not been damaged? Because the planes he inspected had returned,

and the damage they suffered had proven to be survivable. There would be no reason to reinforce places that weren't vital. In contrast, the planes that didn't survive weren't available for review, so air command couldn't know for sure what damage caused those planes to go down. But protecting the areas that might have been critical seemed like a good way to maximize the value of the reinforcement.

The moral, of course, is that hindsight isn't always so reliable; when you're viewing events in retrospect, it can be hard to know what you're seeing and even harder to know what to make of it. Similar problems can arise when lawyers use hindsight to revise existing contracts or as a guide to draft new contracts for clients. I'll discuss two such situations in which a lawyer uses either a judicial decision or a customer dispute as a guide to drafting. In both, the reminder about hindsight's uncertain guidance becomes important: drafting by hindsight can often be a mistake.

Suppose you learn that a relevant court has ruled on a contract dispute, upholding a litigant's interpretation of a clause (or sentence or paragraph), and that clause (or sentence or paragraph) is very similar to a clause (or sentence or paragraph) in a client's agreement. Perhaps the court has favored one party's interpretation of a covenant not to compete that resembles the provision your client likes to use, or perhaps the court has scorned a litigant's argument about a liquidated damages clause similar to your client's. The particular example isn't essential to my point; whatever clause is salient in the litigation, the problem arises when drafting advice is gleaned from a judicial decision. Frequently, in fact, lawyers will regard a judicial decision as *pro tanto* a decision "upholding the clause" (or sentence or paragraph). In other words, the decision is treated as a kind of benediction, and the clause in question is thereafter deemed to have been blessed.

FAST FACTS

Contracts must be interpreted as a whole; they should be drafted as a whole as well.

Judicial decisions are unreliable guides for drafting. A decision doesn't necessarily validate a drafter's choices—in many instances, the court chooses the lesser of two evils.

Disputes are uncertain guides to drafting. When a dispute arises, it alerts the drafter that a problem might exist, but it doesn't reveal how the drafter should fix the problem.

What do we learn from a judicial decision that upholds one side's interpretation of a disputed contract provision? Some reflection shows such holdings are, in fact, quite unreliable guides.

In the first place, a contract must always be interpreted as a whole,[3] and this means the proper interpretation of any particular clause depends on the rest of the contract. One and the same clause (or sentence or paragraph) can mean different things when found in different contracts, depending on what else is in the respective agreements. The interpretational "authority" of the holding could well be obviated by differences in other related provisions of the contract.

Beyond that, no holding can truly validate the wisdom of a particular clause (or sentence or paragraph). In litigation, a court must choose between competing interpretations of the contested clause, and the legal winner is the better of the two alternatives. But that's only a comparison and *not* a validation. The fact that litigation is involved at all should raise questions about the wisdom of drafting another contract in the same way. Why should the rest of us want to be guided by a litigant's disputed interpretation of contract language that prompted a lawsuit? Shouldn't the fact of the lawsuit suggest there was something less than ideal about the contract clause?

Hindsight tells us only that one interpretation of the contested clause proved better than the other interpretation. But hindsight misleads us if we take that judicial decision as a simple guide for future contract drafting. Some might use hindsight to prefer that clause. But hindsight also tells us that the disputed contract was less than ideal in its drafting because it needed a judicial decision to resolve the interpretational difficulty. Judicial decisions would

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be a reliable guide for future drafting only if the drafter were constrained to choose between the two alternative versions to build the rest of a new contract. But when is a drafter constrained in that way? A contract must be interpreted as a whole, and a drafter should consider the contract as a whole when thinking about drafting or revising an agreement. And if you can consider the contract as a whole, why not seek to include provisions that aren't so problematic? Remember the returning bombers: instead of patching the holes that appear, why not construct a better contract?

In addition to considering the entire agreement, a drafter also needs to step back and look at the bigger picture. This is the second situation in which hindsight alone is not reliable. Suppose you and your client discuss a problem that arose with the client's customer (or supplier or co-venturer). The discussion focuses on a salient feature of the contract, and either you or your client says, "We really should change that clause."

Assume, for example, the customer focused on a warranty provision and contended that your client has not met that obligation. In particular, imagine that the problem involves the language in your client's sales literature which, the customer contends, creates a warranty that the products will perform in certain ways. When you and your client discuss the problem, one of you observes that the contract language is less clear than might be desired about the existence (or absence) of a warranty. The implication, spoken or not, is that if the language had been clearer, the problem wouldn't have arisen. So you or your client wants to change the contract to obviate any claim of warranty, and you react by adding a clause in the client's contract form to say, "No warranties, express or implied."

Here again, hindsight proves unreliable. In the terminology of the Uniform Commercial Code, the problem (if there is one) has arisen if the sales literature creates an express warranty under Section 2313.[4] But Section 2316(1) says, pretty clearly, that any blanket attempt to disclaim an express warranty is doomed to fail.[5] And if the text of the section weren't clear enough, Comment 1 of the section is even more direct: blanket disclaimers of express warranties are ineffective.[6]

There are ways to deal with the client's problem. You could revise the sales literature to make clear that its claims are merely advisory and not to be relied on—but that tends to undermine the very point of the literature. Or you could take advantage of Section 2202 (Article 2's version of the parol evidence rule) to establish that the final contract for purchase of the goods does not include any extrinsic terms, agreements, warranties, etc. not incorporated in the final contract.[7] But employing one of those solutions requires that you and your client appreciate the full extent of the problem.

Hindsight can illuminate a problem, but it isn't necessarily a good guide for fixing it. Solving the problem requires that the drafter appreciate the client's needs and the underlying structure of the transaction. Good drafters apprise themselves of those matters *before* setting out to draft. ■

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ENDNOTES

1. Maule, *It's How You Played the Game,* Sports Illustrated, August 16, 1971, available at <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1085180/2/index.htm> (accessed May 10, 2013). Although I first heard this quote from former UCLA coach Tommy Prothro, I suspect it could be traced to any number of coaches. I have also learned there's a comparable saying common in the military, but the demarcation line for alligator surfeit is either the armpits or the neck.
2. See, e.g., Operations Research: The Science of Better <http://www.scienceofbetter.org/> (accessed May 10, 2013).
3. See *Klapp v United Ins Group Agency Inc,* 468 Mich 459, 469; 663 NW2d 447 (2003).
4. See MCL 440.2313.
5. "Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed whenever reasonable as consistent with each other; but subject to the provisions of this article on parol or extrinsic evidence (Section 2202) negation or limitation is inoperative to the extent that such construction is unreasonable." MCL 440.2316(1).
6. "This section is designed principally to deal with those frequent clauses in sales contracts which seek to exclude 'all warranties, express or implied.' It seeks to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty and permitting the exclusion of implied warranties only by conspicuous language or other circumstances which protect the buyer from surprise." MCL 440.2316, Editors' Notes.

   I discuss the issues involved in this kind of attempt to cure drafting problems by using a single phrase, as if it were a magic formula, in Wellman, *Essay: The unfortunate quest for magic in contract drafting,* 52 Wayne L R 1011 (2006).
7. See MCL 440.2202.