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Does Vague and Subjective Wording Imply A Meaningless Contract?

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Practices: Commercial, Competition & Trade, Litigation

Contracts should be precise and objective. Drafters should avoid subjective and vague language that could be subject to conflicting interpretations. This is good advice, although sometimes difficult to put in practice.

Of course, courts would also prefer precise and objective contracts. This makes judges' work easier. Judges often complain about vague and poorly drafted contracts.

So what to do with a contract that has terms such as:

- The obligation to "negotiate[e] the best possible Warranty Program. . ."
- "research and document[]. . . warranty information"
- "provide ongoing Project Management services"
- take "direct control and responsibility", meeting all expectations?

Recently, the 7th Circuit Court of Appeals had to deal with a contract with these terms. Rather, than complaining about vague and imprecise terms, Judge Rovner, who wrote the opinion, had no trouble in affirming a trial court that imposed liability on a party that had agreed to these terms. (*CNH Industrial America, LLC, v. Jones Lang LaSalle Americas, Inc., 7th Circuit Court of Appeals*, No. 16-3800, February 15, 2018)

CNH manufactures farming and construction machinery, sold under the New Holland brand name. It's Italian parent, Fiat, decided that the New Holland brand needed updating. This updating program was a complex, long and expensive process. CNH had 1,442 independent dealerships in North America that had signage that would need to be replaced as part of the program. The typical dealer would require five signs, including a pylon sign mounted on a large pole, a dealership name sign, an outdoor wall-mounted logo sign, a "parts" sign and a "service" sign. In turn, the sign replacement required site surveys, landlord approval, permits from governmental entities, manufacturing and installing the new signs, and disposing of the old signs. Dealers balked at the cost - $10,500 which could be reduced to $7,000 if dealers installed their own signs.

CNH decided to hire Jones Lang LaSalle Americas, Inc. (JLL) to oversee this complex program. According to the opinion by Judge Rovner, JLL represented to CNH that it had experience with large-scale signage replacement programs and the ability to provide "turnkey" management of all aspects of the re-branding program. So CNH and JLL entered into a Service Agreement in April 2008.

JLL made some broad and comprehensive promises as part of the Agreement. As noted above, JLL would:

- "negotiate[e] the best possible Warranty Program for the Family of Signs manufactured and disclose all elements of [the] Warranty Program to CNH and Dealers";
- "research and document [] . . . warranty information for all raw materials and sub components";
- "provide ongoing Project Management services for Warranty within One [] Year from the date of installation" for each sign; and
- Take "direct control and responsibility of all manufacturing including quality control meeting all [JLL] and CNH expectations."

As can be seen, many of JLL's obligations were subjective, vague and imprecise. But the 7th Circuit, affirming the trial court, found that JLL was liable for failure to meet the obligations. What happened?

The sad events are set forth in detail in Judge Rovner's 42 page opinion. To summarize,

- To reduce shipping costs, three different sign manufacturers were chosen to produce the new signs. Also to reduce costs, CNH accepted a one-year warranty, reduced from a three-year warranty from the sign manufacturers to JLL, to be passed on to CNH.
- A company called Arlon, Inc. was selected as the exclusive supplier of the vinyl used to manufacture the new signs. Arlon's standard warranty was a seven-year warranty, pro-rated, for replacement of the vinyl only (not covering labor and shipping). Arlon tried to demonstrate that it's warranty was superior to 3M, its major competitor.
- JLL accepted Arlon's warranty terms. Significantly, Judge Rovner noted that JLL did not attempt to negotiate better warranty terms. Further, there was question as to what the terms actually were. The warranty was summarized in an exhibit attached to the sign-manufacturing contracts, but Arlon said it did not prepare the summary and said it was inaccurate. JLL also said it did not know who drafted the summary.
- It did not take long for the Arlon vinyl to show problems. The vinyl failed during the manufacturing process with Arlon agreeing to replace the defective vinyl. Another manufacturing problem occurred due to failure to properly cure the vinyl, a problem which Arlon also appeared to solve. The most serious problem arose in late 2010 and early 2011 after the signs had been installed. The blue vinyl on the signs showed signs of cracking and peeling. Numerous dealers reported problems with these signs.
- In October, 2011 Arlon agreed to pay for replacing the defective vinyl, but this agreement was never reduced to writing. Eventually, the costs of replacing became too great and Arlon "would eventually walk away from its commitment to replace the defective signs." Judge Rovner appears to fault both sides for passively waiting for complaints (called a "break and fix approach") rather proactively examining the signs to determine the scope of the problem.
- In a determination undisclosed to JLL or CNH, in early 2012, Arlon found that there had been a failure in the formulation of all versions of the custom blue vinyl CNH was using. So Arlon knew that the failures were not isolated and would only escalate. Arlon could not sustain the expense and could not keep up with the sign replacement. In May 2014, Arlon claimed that the applicable warranty was a three year warranty, which had expired. Arlon offered to contribute $3,000 per dealer site for replacing defective signs, but no more. CNH filed suit in California against Arlon, a suit that was still pending as of February, 2018.

- CNH also filed suit against JLL in August 2015, resulting in this litigation. In February, 2016, JLL notified CNH that it was terminating the Service Agreement (the one with the broad and vague promises by JLL) effective March 31, 2016.

A bench trial resulted in a judgment of $3,026,361.60 against JLL. The court determined CNH's damages to be $5,482,375, but honored a limitation of liability in the Service Agreement that limited JLL's liability to the amount CNH had paid JLL plus any recovery from sign manufacturers, Arlon or insurance. The 7th Circuit, in an opinion written by Judge Rovner, affirmed.

Judge Rovner first dismissed a jurisdictional argument presented by JLL that questioned the federal court's jurisdiction. She concluded that the district court properly exercised jurisdiction over dealer claims that were assigned to CNH.

Second, although JLL successfully limited its liability at trial, it argued for another provision in the Service Agreement that would have limited its liability even more. Judge Rovner found that JLL had not only waived this argument but actually made an inconsistent argument at trial. Judge Rovner acknowledged that the case becomes complicated with the concurrent proceedings (CNH's claim against Arlon, as well as JLL's claim against the sign manufacturers). But, even if JLL would be successful against the sign manufacturers, it would be obligated to forward any recovery to CNH.

The third part of Judge Rovner's opinion discussed the breach of contract claim, including the vague and imprecise language in the Service Agreement. The breach of contract claim had four elements.

First, JLL agreed to supply "[r]esearch and documentation of warranty information for all raw materials and sub components" and to "disclose all elements of [the] Warranty program to CNH and Dealers." The trial court found that JLL "had essentially paid little attention to the warranty terms and demonstrated 'a complete abdication of responsibility' in ascertaining and documenting those terms." Judge Rovner agreed. The warranty was only a summary, of unknown authorship, that may or may not have accurately reflected the actual warranty.

Second, CNH's breach of contract claim included JLL's failure to negotiate the "best" possible warranty. JLL conceded that it could have obtained a longer and better warranty from Arlon, but would CNH have paid for it? JLL argued that CNH accepted a reduction in the length of the warranty from the sign manufacturers from three years to one to save expense. But Judge Rovner disagreed, noting:

> "The important point, to our mind, is that the record reflects no effort at all by JLL to negotiate more favorable warranty terms on CNH's behalf, or even to ascertain what the possibilities were. . . . To be fair, the record indicates that none of the parties gave much thought to the warranty terms. But the obligation to do so was JLL's, and so far as the record reveals, it simply accepted the terms as Arlon offered them – and . . . did nothing whatsoever to document them."

Rather than expressing frustration over how to define a "best warranty", Judge Rovner focused on JLL's lack of efforts to secure a better warranty. Judge Rovner was apparently not bothered by such subjective language. JLL's failure was not just failing to secure the "best" warranty, but in not making the effort. Even if JLL had

made the effort, it would have needed to carefully document these efforts to show it met the requirements of the Service Agreement. Taking action without documentation in this context is the same as taking no action.

The third element of the breach of contract claim was JLL's failure to manage the warranty program. As noted above, JLL failed to document Arlon's warranty. But, in addition:

> "The critical failure insofar as this claim is concerned is JLL's failure to pursue a more proactive, global approach to warranty management once it became clear that the vinyl on significant numbers of installed signs was failing in the field. . . . But it is also reasonable to expect that JLL, a sophisticated party with extensive experience and expertise in the logistics of large-scale projects like CNH's re-branding program, would anticipate and plan for the worst-case scenario. . . . Once it was clear that the issue with the vinyl was not isolated, it was JLL's obligation to take all reasonable steps to ascertain the scope of the problem and to ensure that all failures were detected and remediated in a timely manner, so that its client would obtain the full benefit of the relevant warranties."

Judge Rovner specifically criticized JLL for passively accepting Arlon's assurances to replace any defective signs. Again, this is a situation where the lack of documentation reflected the lack of action by JLL. But if JLL had taken any action, it would have been critical to document its actions to show it complied with the Service Agreement.

The fourth element of CNH's breach of contract claim was JLL's failure to exercise quality control. Again, Judge Rovner chides JLL for its lack of action.

> "When sign after sign was reported to JLL as being defective, JLL arguably was obliged to look beyond what Arlon was telling it about the vinyl and to take steps to independently evaluate the nature of the problem. . . . .
>
> "[O]nce it became clear that the failures were not an isolated problem, JLL became obligated to do *something* other than rely on Arlon's assurances." (emphasis in original)

Many of JLL's obligations in the Service Agreement were vague, imprecise and difficult to define. But they were not meaningless. It is interesting that Judge Rovner did not dwell on the vague terms, but emphasized JLL's failure to take any action (or to document any action it did take).

A product seller or service provider might think that using such ambiguous language gives it an advantage. The other party would have difficult proof problems to bring a claim with such vague obligations. But, as the opinion points out, such language is not meaningless. It imposes obligations which should be performed and documented. Relying on ambiguous language to take no action is not an option.