



Construction Warranties

Jon W. Gilchrist
Payne & Jones, Chartered

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What is a “warranty?”

- Definition:
 - An express or implied promise that something in furtherance of the contract is guaranteed by one of the contracting parties. See Black's Law Dictionary 1618 (8th ed. 1999)



Warranties:

- Warranties can be express or implied



Express Warranties

- A statement or representation made by a seller of goods and/or services as a part of a sales transaction that the character and quality of the goods and services are as they are represented to be.

Express Warranties

- Can be written or verbal expressions
- Advertisements can be the basis of an express warranty

Implied Warranties

- A promise implied by law.
- The two most common implied warranties include:
 - Implied Warranty of Merchantability; and
 - Implied Warranty of Fitness for a Particular Purpose
- Courts have expanded implied warranties to apply to services and goods

Implied Warranties

- Some states have adopted laws that impose an implied warranty that goods/services will perform in a workmanlike manner in the absence of express warranty concerning workmanship.
- Most express warranties will attempt to limit or exclude all implied warranties.

Implied Warranties

- Similar to implied warranty of merchantability is the implied warranty of habitability.
- Although not recognized in every state, some courts have imposed an implied warranty of habitability on residential property that the property will be constructed in a skillful manner free from material defects.

Construction Specific Warranties

- Warranty of Plans. A party who furnishes construction plans impliedly warrants that a contractor, by following the plans, can produce an operating, satisfactory, useful structure, and also impliedly warrants that the plans faithfully represent existing jobsite conditions.

Construction Specific Warranties

- *Fitness for Construction Warranty*: When an owner supplies drawings, plans, and specifications to a contractor for use in the construction of a project, the owner impliedly warrants to the contractor that the plans, if followed, are suitable for construction.

Construction Specific Warranties

- *Implied Warranty of Site Conditions:*
When an owner issues plans, test reports, and other construction documents to the contractor, and the documents purport to represent that certain conditions exist at the job site, the owner warrants that the actual job conditions will be as represented.

Measure of Damages for Breach of Warranty

- Typically, the measure of damages for a breach of warranty is the cost of repairing the defective construction.
- However, if the cost of repair is so great that the repair would be considered economic waste, then the measure of damages is the diminution in the market value of the property.

Privity

- Some courts require that the plaintiff have “privity” or some type of direct contact with the warrantor before the plaintiff will be allowed to sue for breach of warranty.

Negligence

- Negligence is a tort that can be described as the failure to use such care as a reasonably prudent and careful person would use under the same or similar conditions. It is also described as any conduct that falls below the legal standard established to protect others against unreasonable risk of harm.

Negligence

- To be successful, a plaintiff must prove all of the elements of negligence:
 - Duty
 - Breach of Duty
 - Reliance
 - Causation
 - Proof of Damages

Negligence

- The same act may constitute both a breach of contract (or warranty) and negligence.
- Different statute of limitations will apply to a contract claim vs. a claim for negligence. In addition, there may be different measurement of damages depending upon if the claim is based on contract or negligence.

Negligence

- **Contributory Negligence:** the doctrine of contributory negligence holds that any negligence committed by the plaintiff, no matter how small, eliminates the plaintiff's cause of action against the defendant based upon negligence because the plaintiff, in part, contributed to his own injury.
- **Comparative Negligence:** The doctrine of comparative negligence holds that fault should be apportioned on a percentage basis among any number of parties whose negligent conduct is a proximate cause of a single injury.

Statute of Limitations

- Created by state law that sets the time in which a plaintiff may bring a cause of action against a defendant.
- Different statutes of limitations apply to different types of causes of action.
- For example, the time in which a plaintiff can bring an action based on breach of contract may be different from the statute of limitations for bringing a cause of action based on negligence.

Statute of Limitations

- State laws differ as to when the statute of limitations starts to run. Some examples include:
 - When the wrongful act occurred;
 - When the project was completed;
 - When the damage occurred;
 - When the plaintiff knew or should have known of the damage; and
 - When the plaintiff knew or should have known of the damage and the identity of the wrongdoer.

Strict Liability

- The doctrine of strict liability is the product of a social policy that requires persons who produce injurious products, whether or not they are negligent, to be liable for injuries caused by those products.

Construction Contracts - Forms

- Most of the construction industry's standard forms include express warranties with regard to services and goods.
- The Associated General Contractors of America ("AGC") Document No. 200 (2000 ed.) Warranty Section provides that: materials and equipment will be new; of good quality and free from defective materials and workmanship; and that the work will be free from material defects.

Construction Contracts - Forms

- The Canadian Construction Documents Committee's standard forms, provide for an overall warranty period for the Work is one year from the date of substantial performance of the work.
- The Contractor is responsible to correct at the Contractor's expense, defects or deficiencies in the Work which appear during the one-year warranty period.
- Warranties for longer periods may be specified for certain products or portions of the Work by adding language in the specification sections of the documents.

Construction Contracts - Forms

- “The Contractor warrants to the Owner and Architect that materials and equipment furnished under the Contract will be of good quality and new unless otherwise required or permitted by the Contract Documents, that the Work will be free from defects not inherent in the quality required or permitted, and that the Work will conform to the requirements of the Contract Documents.” Para 3.5.1 AIA Form A201 (1997)

Construction Contracts - Forms

- “Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective.” Para 3.5.1 AIA Form A201 (1997)
- “The Contractor’s warranty excludes remedy for damage or defect caused by abuse, modifications not executed by the Contractor, improper or insufficient maintenance, improper operations, or normal wear and tear and normal usage.” Para 3.5.1 AIA Form A201 (1997)

Construction Contracts - Forms

- It is important to note that nowhere in § 3.5.1 of AIA's form A201 is a timeframe provided for these warranties.
- The warranty obligation will be enforceable until barred by the applicable statute of limitation or statute of repose. Statute of limitations vary greatly from state to state and range from as short as 4 years to as long as 13 years.
- In the AIA contract documents, the stated warranties differ from "correction periods."

Construction Contracts - Forms

- "In addition to the Contractor's obligations under Paragraph 3.5, if, within one year after the date of Substantial Completion of the Work or designated portion thereof or after the date for commencement of warranties established under Subparagraph 9.9.1, or by terms of an applicable special warranty required by the Contract Documents, any of the Work is found to be not in accordance with the requirements of the Contract Documents, the Contractor shall correct it promptly after receipt of written notice from the Owner to do so unless the Owner has previously given the Contractor a written acceptance of such condition." Para 12.2.2.1, AIA Form A201 (1997)

Construction Contracts - Forms

- In the event of a breach of a warranty, the Owner has several options as provided in Form A201. The owner's remedies include:
 - The right to reject work during construction;
 - The right to require the Contractor to come back and make repairs for a period of one year; and
 - Right to sue the Contractor for money damages.

Warranty Evaluation Checklist

- Exhibit "A"
- **Warranty Evaluation Checklist**
 - Name of Owner: _____
 - Name of Design Professional: _____
 - Name of Contractor: _____
 - Name of Subcontractor # 1: _____

Manufacturer Warranty -Sample #1

- Manufacturer warrants to you, the Building Owner, that, for a ***period of 5 years from the date of purchase*** the above-grade surfaces of the building to which the Manufacturer coating (the "Coating") has been applied ***will not suffer through water penetration***. The Coating is designed to provide above grade through water penetration protection when properly applied to sound surfaces.

Manufacturer Warranty -Sample #1

- This warranty is subject to the limitations and conditions stated below and is ***effective only if the Coating is applied in strict accordance with Manufacturer's published application procedures*** and any project specific recommendations from Manufacturer.
- Warranty will be considered ***null and void if seller has not received payment*** for the product used.

Manufacturer Warranty -Sample #1

This warranty does not cover:

- Faults attributable to workmanship (e.g., improper surface preparation, use of non-approved materials, insufficient coating thickness, or deviation from Manufacturer recommended application procedures), or
- Failure of the coating due to:
 - Natural causes, or
 - Surface abrasion, vandalism, mechanical damage caused by individuals, tools or other outside agents, etc., or
 - Disintegration of the underlying substrate, structural defects, faulty construction materials, or building joint requiring caulking, scaling, or repointing, etc.

Manufacturer Warranty -Sample #1

This Warranty Does Not Cover:

- Changes in the appearance of the coating due to the accumulation of contaminants deposited on the coating.
- Use in single-family residential structures.

Manufacturer Warranty -Sample #1

REMEDIES

- In the event of a claim under this warranty, you must notify Manufacturer within thirty (30) days of the claimed defect and provide Manufacturer with the opportunity to inspect. For a period of five (5) years from the date of purchase, Manufacturer shall be responsible for the cost of replacement coating for any areas in which the Manufacturer coating fails to protect the above-grade substrate from through-water penetration and for the cost of labor to apply such replacement coating, up to a maximum of five times the cost of the replacement coating. Manufacturer's warranty does not cover faults attributable to workmanship.

Manufacturer Warranty -Sample #1

- **MANUFACTURER SHALL NOT BE LIABLE FOR AND EXPRESSLY DISCLAIMS ANY LIABILITY FOR ANY DAMAGE TO THE CONTENTS OF THE STRUCTURE FOR CONSEQUENTIAL OR INCIDENTAL DAMAGE, WHETHER IN CONTRACT OR IN TORT, INCLUDING NEGLIGENCE. THIS WARRANTY IS IN LIEU OF ALL OTHER WRITTEN OR ORAL, EXPRESS OR IMPLIED WARRANTIES.**

Manufacturer Warranty -Sample #1

- All claims or controversies between Manufacturer and the Owner arising out of, or relating to the performance of the Manufacturer products or to any alleged breach of this Warranty which cannot be resolved by mutual agreement among the parties shall be decided by arbitration in Kansas City, Missouri, in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association.
- This agreement to arbitrate shall be specifically enforceable.
- Any award rendered by the arbitrators shall be final, and judgment may be entered in accordance with applicable law in any court having jurisdiction.

Manufacturer Warranties

- Additional Issues Covered in Express Warranties:
 - Restriction on the ability to assign warranty to new owner.
 - Waiver of any liability caused by Manuf. while inspecting property for warranty claim.
 - Requirement that Manuf. inspect installation while product is being installed.
 - Requirement that Owner maintain building.
 - Requirement that Manuf. approve any repairs.
 - Requirement that Manuf. be allowed to direct repair.

Manufacturer Warranties

- Additional Issues Covered in Express Warranties:
 - Requirement that both owner and Manufacturer sign warranty document.
 - Warranty does not cover failure as a result of building alternations, cracks or ruptures in structure, industrial pollution, chemically reactive aggregate, chloride levels exceeding current ACI limits, ingress of moisture, inadequate distribution or design of expansion joints.

Manufacturer Warranties

- Additional Issues Covered in Express Warranties:
 - Disclaimer of any communication from any employee or agent of Manufacturer that is inconsistent with written warranty.

Case Study #1

Current Status of Project.

- Five year old building that involved improper through wall flashing allowing water to infiltrate causing significant interior finish damage.
- The building owner has hired a designer to correct the problem.

New Specification:

- Mass tuck pointing of masonry walls.
- Application of clear penetrating water repellent.
- 10-year waterproof guarantee.
- Did not request any changes to windows.

Case Study #1

■ Issues.

- Was there an investigation of the true source of water intrusion?
- Was the leak due solely to improper through wall flashing or did the windows contribute to the water leak?
- Products available for water repellent may have warranty but with many disclaimers.
- By agreeing to the specifications, did the Contractor provide a warranty to the owner separate from the manufacturer's warranty?
- Did the Design Professional specify a specific product?
- Did the Design Professional or Contractor prepare a mock-up of the proposed corrective measures to stop the leaks?

Case Study #1

- Assumptions.
 - Design Professional did minimal investigation to determine leaks.
 - Design Professional and Contractor did not prepare mock-ups.
 - Contract between Design Professional and Contractor had standard language for Contractors (1 year warranty of workmanship) but Contractor also agreed to the Design Professional's specifications (including the 10-year waterproof guarantee) (the specification did not distinguish between the Contractor and manufacturer).
 - Contractor used a clear penetrating water repellent that had a 10-year warranty with many disclaimers.
 - Water leaks are discovered 2 years after completion of the repairs.

Case Study #1

- Is the Design Professional on the Hook?
 - Negligence.
 - failure to investigate leaks. Was it the flashing or the windows.
 - failure to prepare mock-up of proposed repair.
 - improper specification of the repair needed.
 - Contract.
 - did the Design Professional provide a guarantee/warranty to Owner, actual or implied?

Case Study #1

Is the Contractor on the Hook?

- Negligence.
 - Should the contractor have prepared a mock-up of the specified correction?
 - if Contractor discovered improper installation of windows and failed to notify designer.
 - if Contractor knew or should have known that specified repair would not work
 - if Contractor is found negligent, he could be responsible for damages based upon comparative fault between all parties.

Case Study #1

Is the Contractor on the Hook?

Contract:

- Contractor agreed to specification. Although Contractor's standard contract limited his warranty to one year, the specification required a 10-year waterproof warranty.
- Courts may find that the 10-year warranty in the specification supersedes the one year workmanship warranty.
- Depending upon the contract language, the Contractor may be responsible for labor and material.
- Unless specifically limited, the Contractor could also be responsible for incidental and consequential damages.

Case Study #1

Is the Manufacturer on the Hook?

- Contract/Warranty.
 - the product used was a water repellent.
 - if the water intrusion was due in part to the water saturation of the masonry, then the manufacturer may be on the hook.
 - The courts will look at the 10-year warranty to see if any of the exceptions/disclaimers apply to the current situation.

Case Study #1

Is the Manufacturer on the Hook?

- Possible disclaimers:
 - the water repellent must be properly installed.
 - the masonry must be cleaned and properly prepared before the water repellent is applied to the building.
 - requirements for yearly maintenance.
 - was there a failure of the water repellent?
 - manufacturer's limited warranty indicates that it is only responsible for replacement of product and is not responsible for incidental or consequential damages.

Case Study #1

- What did the Owner get out of the warranties?

Other Case Studies

- Case Study # 2: The Failed Sealant
- Case Study # 3: The Failed Waterproofing Membrane
- Case Study # 4: Water Damage to Building Facade



Thank
You