

Contractors' Construction Warranties

Prepared by:
Mark C. Friedlander

Owners of construction projects are virtually never a position to be able to thoroughly supervise and inspect a construction contractor's work. Whether an owner retains a design professional or construction manager or uses its own employees to observe the construction, it is neither practical nor possible for the owner to assure itself fully that the construction is being performed in a proper manner and in accordance with the design.

Contractor's warranties in construction contracts are designed to meet this need. Sometimes referred to as a guarantee, a warranty is an assurance by one party to an agreement of the truth of certain facts upon which the other party may rely and is intended precisely to relieve the other party of any duty to ascertain these facts for itself by promising to reimburse that party for any loss if the facts warranted prove to be untrue.¹

The purpose of this *Construction Briefing* is to survey the law of contractors' construction warranties and frequently-arising issues pertaining to these warranties. Among the topics which will be discussed in this *Briefing* are: (1) Explicit warranties; (2) Implied warranties; (3) Remedies for breach of warranty; (4) Time limitations on enforcement of warranties; and (5) Disclaimers of warranties.

The typical construction contract contains numerous different types of warranties. The owner may impliedly warrant the accuracy and completeness of the plans and specifications, and may explicitly warrant the availability of funds for the construction. The contractor may warrant its licensure or status as an entity and that the individual signing the contract is authorized to do so. However, those warranties are beyond the scope of this *Briefing*. This *Briefing* concerns only those warranties which the contractor, expressly or impliedly, makes to the owner for the purpose of assuring the owner as to the quality, appropriateness and completion of the construction work. This *Briefing* will also analyze the impact of the accelerating trend toward design-build methods of project delivery on the types and consequences of contractors' warranties of quality.

Explicit Warranties

Some owners' interests are common to virtually every construction project and are written into most construction contracts. A warranty that is spelled out in writing in a construction contract is called an explicit warranty. The following are the most typical explicit warranties in construction and design-build contracts.

Materials and Equipment

An important interest of any owner of a construction project is that the materials and equipment used by the contractor and incorporated into the construction be proper, functional and in accordance with the design. The vast majority of construction contracts contain a provision in which the contractor warrants these facts to the owner. The General Conditions of the Contract for Construction published by the American Institute of Architects² (the "AIA General Conditions") contains a common version of an express warranty of materials and equipment:

"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 with the requirements of the Contract Documents. Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective. The Contractor's warranty excludes remedy for damage or defect caused by abuse, modifications not executed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear under normal usage. If required by the Architect, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment."³

The above warranty provision is really an amalgam of several different related and overlapping warranties. It includes representations that the materials and equipment will be of "good quality" and that they will be "new," unless the plans and specifications permit otherwise. It also includes the representation that the "Work" (which is defined to include services as well as materials and equipment)⁴ will be "free from defects" for the type of services or products specified and will be in conformity with the plans and specifications.

The above warranty provision excludes problems caused by the owner or for which the owner is legally responsible, such as improper operation, normal wear and tear, etc. Note, however, that this exclusion is drafted narrowly, rather than excluding, for example, "all damages or defects not caused by the Contractor and beyond the Contractor's control." In ordinary construction practice, this latter exclusion would be overbroad and undesirable, at least from an owner's viewpoint. It would be inconsistent with the purpose of a warranty, which is to guarantee a set of facts regardless of fault.⁵

Construction Services

Although the warranty quoted above includes construction services because of the broad definition of the term “Work,” construction contracts often contain explicit warranties of the adequacy of construction services. An example of such a warranty is the following:

“Contractor warrants to Owner that all construction and related services provided hereunder shall be performed in a good and workmanlike manner, by workers who are appropriately trained and experienced in the work being performed, and in accordance with all requirements of the contract documents, industry standards for projects of similar type and quality, and all applicable laws, codes, regulations and other requirements, including safety requirements.”

This warranty provision is also an amalgam of several different related and overlapping warranties. It states that the construction work will be “good and workmanlike,” a standard which at least one court has defined to mean “reasonableness in terms of what the workman of average skill and intelligence (the conscientious worker) would ordinarily do” but with “no requirement of perfection.”⁶ The warranty provision requires the construction workers to have appropriate training and experience. The warranty also stipulates that the services will comply with all procedures or other standards that may be applicable to the work, whether explicitly incorporated into the construction contract or inferable from relevant legal requirements and industry standards.

Callback (Repair) Warranty

In the ordinary construction contract, the contractor warrants the completed construction work for a period of one year after substantial completion of the project. This warranty often takes the form of the contractor’s promise to return to the jobsite to repair or replace any work found to be defective during this period. Although it is not worded as a warranty, a typical version of this callback or repair warranty is found in the AIA General Conditions:

“If, within one year after the date of Substantial Completion of the Work or designated portion thereof, ... 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. This period of one year shall be extended with respect to portions of the Work first performed after Substantial Completion by the period of time between Substantial Completion and the actual performance of the Work. This

obligation under this Subparagraph 12.2.2 shall survive acceptance of the Work under the Contract and termination of the Contract. The Owner shall give such notice promptly after discovery of the condition.”⁷

In essence, this provision combines a warranty with a remedy. It is equivalent to the contractor warranting that no defects or deficiencies will develop in its construction work for a period of a year, combined with a promise to return to the jobsite to repair or replace any work which is found to be defective or deficient before the expiration of the one year period. Because the provision contemplates actions being taken after final payment and completion or termination of the contract, it explicitly provides for survival of these obligations beyond those events.

The distinction between the callback warranty and the earlier-quoted warranties of materials/equipment and services is not entirely clear. They overlap to a considerable extent because, at least in theory, unless the products, equipment or services were somehow defective or deficient, there would be no defect in the construction work to trigger the callback warranty. The major difference between the callback and the other warranties is that the callback warranty includes a specific remedy: it obligates the contractor to repair or replace the defective work.

Many practitioners fail to understand the distinction between these two types of warranties. It is a common misconception for a contractor (or an owner) to believe that the one year callback warranty somehow includes under its umbrella the earlier-described warranties of materials/equipment and services so that they too are limited in duration to one year. The drafters of the AIA General Conditions found it necessary to include a full paragraph in the document to negate this misconception:

“Nothing contained in this Paragraph 12.2 shall be construed to establish a period of limitation with respect to other obligations which the Contractor might have under the Contract Documents. Establishment of the time period of one year as describe in Subparagraph 12.2.2 relates only to the specific obligation of the Contractor to correct the Work, and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Contractor’s liability with respect to the Contractor’s obligations other than specifically to correct the Work.”⁸

This provision makes it clear that the one year time period in the callback warranty has no applicability to claims against the contractor based on violation of other provisions of the contract. In particular, it ensures that the one year duration does not apply to the warranties of

materials/equipment and services. A claim for breach of these later warranties would be time-bared only by the applicable statutes of limitation or repose. Issues involving timing or duration of warranties and claims under them are discussed later in this Briefing.

Vendor Warranties

Another type of explicit warranty frequently given in construction projects is a warranty of a product or system directly from the vendor who manufactures and/or distributes it. These warranties are not contained in the construction contract itself, although the terms of the contract may require the contractor to furnish the warranty. These warranties are made directly by the vendor in favor of the owner (or else they are assigned to the owner) and create a relationship of contractual privity between them. The contractor is not ordinarily a party to a vendor warranty.

A typical example is a vendor's warranty of a roofing system. Roofing warranties of five or ten years are common, extending well beyond the contractor's typical one year callback warranty. Some vendors, including many roofing vendors, include installation within the warranty, provided that the installation is performed by a subcontractor affiliated with or approved by the vendor. If the roofing system fails after the expiration of the contractor's one year callback warranty but during the duration of the vendor warranty, the vendor may be liable for the ensuing damages even if the contractor is not.

Most vendor warranties are limited as to scope and remedy. They ordinarily exclude certain kinds of problems or failures as well as certain categories of damages or remedies. This may pose a trap for the unwary contractor who signs a contract agreeing to warrant or obtain a warranty for a product or system which is broader in scope or remedies than the warranty offered by the vendor. The contractor may find itself liable to the owner on account of a defect in the vendor's product or system or for a particular remedy or measure of damage which is not covered by the vendor's warranty.

Design-Build Warranties

Design-build is an increasingly popular project delivery method. It arises when the owner hires a single entity (or joint venture) both to design and construct the project. The owner enters into a contract with the design-builder which incorporates most aspects of typical construction contracts as well as several additional provisions made possible by the different relationship (*i.e.*, design professional as a "teammate" of the contractor rather than a consultant of the owner). The structure of the design-build relationship

allows the owner to obtain two additional types of warranties not usually found in construction contracts.

One of the warranties unique to design-build contracts is a warranty of professional services. In a traditional project, the owner's design professional normally refuses to warrant the adequacy of its services since it is well-established that architects and engineers do not warrant the adequacy or ultimate success of their professional services.⁹ However, most courts that have analyzed the issue consider a design-build contract to be more nearly akin to a construction contract than to a design professional agreement and hold that the design-builder does warrant the adequacy of its professional services.¹⁰

Most warranties of professional services in design-build contracts are fairly innocuous, doing little more than restating the appropriate standard of care. The following warranty is typical:

"Design-Builder warrants to Owner that all engineering and other professional services provided under this contract will be provided in accordance with the terms of the contract and will, at a minimum, conform to the standard of care required of similarly situated professional engineers performing similar services. Owner's review or approval of any plans, specifications, or other instruments of professional service shall not constitute a waiver by Owner of any of Design-Builder's warranties or obligations under this paragraph."

Since performance of professional services with the levels of skill and care that the average, typical similarly-situated design professional would employ is an implied term of every contract for professional services,¹¹ the first sentence of the warranty adds little or nothing of substance to the owner's contractual rights. The last sentence in the above warranty provision follows from the special status given by the law to professional services and reflects the professional's superior knowledge and skill by not permitting the owner's non-professional review or approval of professional services to authorize a relaxation of the required standard of care.

However, many design-build contracts contain considerably more meaningful warranties of the professional services provided. It is not ordinarily possible to formulate this warranty in qualitative terms, such as by warranting accuracy and completeness of the design, because in a design-build project the design-builder often does not prepare fully detailed plans and specifications, preferring less formal and more efficient means of communicating the design intent to the constructors. Instead, this warranty often takes the form of a performance warranty, whereby the contractor warrants

that the completed project will meet certain minimum performance levels, which, depending on the nature of the facility, may be measured in widgets produced per hour, minimum temperature differentials, kilowatt hours, etc. In essence, the performance warranty is a combination of design and construction warranties in which the contractor warrants that both the design and the construction will be adequate to achieve the performance criteria.

It may be necessary for the performance warranty to be conditional. If feedstock or other raw materials for the facility must be within certain parameters for proper functioning (such as average particle size in a sludge treatment facility), the contractor's performance warranty may have to be conditioned on the feedstock or raw materials being within those parameters. If the design is based on an unproven or non-standard process supplied by the owner, the contractor may be able to give only a conditional performance warranty that excludes failure of the basic underlying process. A conditional performance warranty may also be necessary if important equipment is being supplied by the owner or others outside the contractor's control.

A performance warranty may warrant the actual performance of the facility while in use for some period of time, or it may simply warrant that at substantial or mechanical completion the facility will pass a performance test designed to simulate or predict its actual performance. There are two significant differences between a performance warranty which warrants actual performance of a facility and which one merely warrants that the facility will pass one or more performance tests shortly after the construction is substantially or mechanically complete. The first difference is that a warranty of actual performance depends on the actual operation of the facility, a concern that is ordinarily not present in a performance test warranty. The second difference is that an actual performance warranty extends for a fixed and agreed period of time after completion, whereas a performance test warranty does not have this element of duration.

Design-builders are often hesitant to give actual performance warranties because they usually cover a period of time during which the contractor has turned over operating control of the facility to the owner. The process of determining whether substandard performance of the facility is due to its operation or due to factors that the contractor has warranted is often quite difficult. It may not be possible or feasible to distinguish the performance of a component from that of its operator. The owner's representative or advisor may have a vested interest in avoiding or deflecting criticism of the facility's operation, particularly if that person or entity is also responsible for

operating the facility. Warranties of actual performance run a higher risk of owner dissatisfaction, uncompensated "trouble-shooting" time spent by contractor personnel, and litigation.

The durational aspect of actual performance warranties also carries additional risk. It is simply an engineering fact that the failure rate of materials and equipment increases over time, even for materials and equipment that were new and free from defects when installed. Material fatigue, cosmic rays striking computer chips and numerous other uncontrollable (and sometimes unidentifiable) factors cause the risk of substandard performance of the facility to increase with time. It is natural for a contractor to want to minimize its liability by minimizing the duration of any actual performance warranty, or preferably by warranting only that shortly after substantial or mechanical completion the facility will pass performance tests that accurately simulate actual performance. This is functionally similar to a warranty of actual performance of zero duration.

The various kinds of explicit warranties found in construction contracts, particularly design-build contracts, are the subject of considerable confusion. The chart below identifies and categorizes contractor's explicit warranties that are often found in design-build contracts and notes those which are also found in ordinary construction contracts for projects not being constructed in a design-build manner.

Contractor's Explicit Warranties of Quality in Design-Build Contracts

Implied Warranties

In addition to express warranties, most jurisdictions hold that a contractor implies certain warranties in a construction contract that does not disclaim them. The source of the implied warranties may be statutory or may be the common (court-made) law. Implied construction warranties are generally similar from state to state, although there are some notable exceptions. Although there are several different kinds of warranties implied in construction contracts, many courts treat them somewhat interchangeably or fail to distinguish among them, resulting in some confusion among the warranties.

A warranty need not be in writing to be enforceable. Spoken words or similar communications made to the owner by or on behalf of the contractor may establish a warranty that is every bit as binding and enforceable as a written warranty.¹² The primary difference between oral and

written warranties is that it is more difficult to prove the existence and content of an oral warranty; however, once the existence and content of the oral warranty is established, the oral warranty has the same legal effect as if it were in writing.

Good Workmanship

Most jurisdictions follow the rule that an implied term of every construction contract is that the construction services will be performed in a good and workmanlike manner.¹³ Each jurisdiction formulates the standard in a somewhat different manner,¹⁴ but this warranty does not guarantee a perfect result.¹⁵ One court has defined “good and workmanlike” as: “that quality of work performed by one who has the knowledge, training, or experience necessary for the successful practice of a trade or occupation and performed in a manner generally considered proficient by those capable of judging such works.”¹⁶

The warranty of good workmanship applies to construction services. Most states do not recognize a similar warranty as to construction materials.¹⁷ The more commonly accepted rule is that a contractor is not liable for the consequences of latent defects in materials purchased from a reputable dealer in the absence of negligence.¹⁸ Furthermore, when an owner specifies a particular material, the owner’s implied warranty of the specifications supersedes the contractor’s implied warranty of good workmanship.¹⁹ However, at least one court has held that a jury instruction was erroneous when it stated that a contractor could not be liable under a theory of implied warranted for latent defects in its paint.²⁰

Habitability

With the decline of the doctrine of *caveat emptor* in the purchase and sale of real estate, most states now recognize an implied warranty on the part of a builder/vendor of a new residence that the structure will be suitable for habitation.²¹ In general, this warranty applies only to residential construction, not to commercial property.²² Various courts have held the implied warranty of habitability to cover a large range of defects, including a defective septic system,²³ roof leaks,²⁴ a foul odor,²⁵ and uneven settlement.²⁶ A homeowner merely needs to prove that the residence is uninhabitable, and does not need to establish the source of the defect or that it was caused by defective workmanship, to recover under a theory of breach of an implied warranty of habitability.²⁷

At least one court has held that the warranty of habitability applies even to amateur builder/vendors, not merely construction companies.²⁸ However, mere performance of limited rehabilitation work may not give rise to an implied

warranty of habitability.²⁹ Many jurisdictions extend the warranty of habitability to subsequent purchasers of a residence,³⁰ but some jurisdictions do not recognize an implied warranty of habitability running in favor of subsequent purchasers.³¹ Issues of the extent and duration of implied warranties of habitability are unresolved and subject to debate in many jurisdictions.

Vendor Literature

Another source of implied warranties of construction materials or equipment may be literature or other representations by a manufacturer or vendor of a product. Even where the construction contract does not require a particular material to be warranted for a specific length of time, when a contractor submits to an owner vendor literature containing such a warranty to an owner as part of the process of obtaining approval to use the material, courts have frequently held that the warranty in the literature may be implied into the contract between the owner and the contractor. This is based primarily on the theory that the owner’s approval of the use of the material was based at least in part on the existence of the warranty.

Cases involving implied warranties from vendor literature usually arise from the failure of specific systems or equipment that commonly carry extended warranties, such as roofing systems. In one recent and well-publicized case, a contractor obtained a project to re-roof a country club by supplying a brochure describing a proposed roofing system which included a 20-year warranty.³² When the roof failed slightly more than one year after its construction, the court held the contractor liable to the owner under the implied 20-year warranty, despite the construction contract’s general one-year warranty, on the grounds that the 20-year warranty was a special warranty specific to the project and thus excepted from the one-year time limitation.³³ The court further refused to consider limitations on the 20-year warranty contained in the vendor literature because the print was so small as to be “unreadable by the naked eye,” and it refused to allow the party drafting the warranty to do so in such a fashion “as to mislead the other party by setting forth a clearly apparent promise or representation in order to induce acceptance and then designedly bearing elsewhere in the document, in fine print, provisions which purport to limit or take away the promise or preclude recovery for the failure to fulfill it.”³⁴

There need not be an express warranty in the vendor literature. When a manufacturer/vendor knows that its product is defective at least in certain circumstances but continues to disseminate literature which encourages the product to be used or installed in those circumstances, the court may find that the manufacturer/vendor has breached

a warranty to or committed fraud on purchasers of the product, resulting in liability for the cost of repairs as well as possible punitive damages.³⁵ Similarly, when a contractor submits a request to use an alternative material from that specified, the contractor may be held to have warranted that the substitute material will function appropriately or as well as the specified material for the application in question.³⁶

UCC Warranties

The Uniform Commercial Code (“UCC”) is a statute enacted by virtually every jurisdiction to govern commercial transactions. The UCC contains certain specific warranties which are implied in contracts for the sale of “goods,” which are defined as those “things (including specially manufactured goods) which are movable at the time of identification to the contract for sale...”³⁷ The UCC generally does not apply to construction contracts, which are normally deemed to be primarily contracts for the provision of services, but the UCC has been held to apply to certain construction contracts where the essence of the contract was the furnishing and installation of a piece of equipment, such as a large water tank,³⁸ bowling alley equipment,³⁹ windows,⁴⁰ or a pulp mill boiler and related equipment.⁴¹ To determine whether the UCC applies to a construction contract, most courts examine the substance of the contract and the scope of work to determine whether the goods or the services portion of the contract predominates.⁴²

The UCC contains three implied warranties that may be applicable to construction contracts: a warranty of merchantability,⁴³ fitness for a particular purpose⁴⁴ and good title.⁴⁵ The warranties of merchantability and fitness for a particular purpose are similar: the warranty of merchantability implies that the goods are not defective and are of at least average quality for the trade in question, whereas the warranty of fitness for a particular purpose implies that the goods will fulfill the purpose for which they are being purchased. When a vendor is aware of the purpose for the purchase of the product and that the buyer is relying on seller to furnish appropriate goods, the UCC implies a warranty of fitness for a particular purpose.⁴⁶ The UCC provides that a warranty is created by any description of goods which is made part of the basis of the bargain or by any affirmation of fact or promise relating to the goods that is made by the seller to the buyer and which becomes part of the basis of the bargain.⁴⁷ However, modification of the goods after they leave the vendor’s shop may render the warranty unenforceable.⁴⁸

There is a four-year statute of limitations on claims for breach of an implied warranty under the UCC.⁴⁹ Unlike

many other statutes of limitations, which begin to run upon discovery of the defect or other basis for the claim, the UCC provides that the statute of limitations begins to toll with the tender of delivery, regardless of the claimant’s lack of awareness of the breach. There is an exception for warranties relating to future performance, such as when a seller explicitly states that a product will last for a longer period of time.⁵⁰

Although most frequently applicable to a dispute between a contractor and a vendor, the “battle of the forms” provision at Section 2-207 of the UCC may apply between an owner and a contractor as well. Such conflicts frequently arise when broad liability provisions in a purchase order are “accepted” with disclaimers or additional terms more strictly limiting liability. The general rule is that minor differences of the terms of an acceptance from those in the offer become part of a contract if the offeror does not object to them, but if the differing terms “materially alter the contract,” they do not become part of the contract unless the offeror expressly agrees to them.⁵¹

Remedies For Breach

Warranties, whether express or implied, are contractual provisions and subject a contractor who breaches a warranty to the typical measure of damages available to redress breach of contract. In general, the measure of damages that an owner may recover from a contractor for breach of a warranty is the difference in value between the construction actually performed and the value that the construction would have if it possessed the warranted qualities.⁵² This difference in value is ordinarily measured as the cost of repair or replacement of the defective work.⁵³ However, if the contractor can prove that repair or replacement would result in excessive injury to the structure or other economic waste, the difference in value is usually measured by the difference between the economic value of the actual project and the value that the project would have had if it had been built as warranted, known as the diminution in value.⁵⁴ In certain limited circumstances, courts will award a combination of the above measures of damages where, after the defective work is repaired, there still remains a diminution in the value of the property.⁵⁵

In appropriate circumstances, other measures of damages may be appropriate. For example, if a contractor substituted cheaper materials of a lower quality for those specified, the measure of damages may be the savings kept by the contractor from the substitution.⁵⁶ The owner may also be able to recover any sums spent in reliance on the breached warranty.⁵⁷ However, even for breach of a callback warranty in which the contractor agrees to repair

defective work, a court will not force a contractor to physically return to the site to make the repairs and will merely award the owner the cost of hiring a different contractor to make them.⁵⁸

Consequential damages may be recovered for breach of a warranty if they are natural consequences of the breach and reasonably foreseeable when the contract was made.⁵⁹ Consequential damages have been defined as damages which do not arise within the scope of the immediate transaction, but rather stem from losses incurred by the non-breaching party in its dealings, often with third parties, which were a proximate result of the breach.⁶⁰ Consequential damages are distinguished from incidental damages, which result more directly from the breach of warranty, and may include any commercially reasonable charges, expenses or commissions incurred in connection with the goods or services warranted,⁶¹ such as costs of additional inspection due to nonconforming construction work. It is not uncommon for an owner in a construction or design-build contract to exculpate the contractor from liability for consequential damages resulting from breach of a warranty or other provision of the contract. Unlike incidental damages, consequential damages frequently have no relationship to the magnitude of the construction defect, being instead a function of the owner's business situation, so that the risk to the contractor is disproportionate to the services being provided. The owner may receive some or all of the benefit of eliminating the contractor's liability for consequential damages in the form of a lower construction price resulting from a smaller premium for risk.

An owner has an obligation to the contractor to mitigate damages, but only to the extent reasonably possible.⁶² The general rule is that an owner may not recover damages that the owner could have avoided without undue risk, burden or humiliation, but he is not barred from recovery of damages that he has made reasonable but unsuccessful efforts to avoid.⁶³ Thus, a contractor cannot recover the money spent performing a contract after the owner has repudiated or terminated it, unless it was reasonably necessary to continue the construction work.⁶⁴ Similarly, if a contractor defaults under a warranty, the owner's damages would ordinarily be limited to the cost of hiring a replacement contractor to perform the work, and the owner ordinarily cannot decline to hire a replacement contractor in order to seek a larger quantum of damages against the original contractor.⁶⁵ When defects are discovered during the callback warranty period, the owner must give the contractor a reasonable opportunity to make appropriate repairs, but this does not require an owner to tolerate patchwork repairs which do not fully correct the defect;

instead, the owner can hire a different contractor to make the proper repairs and may collect the cost of these repairs from the original contractor.⁶⁶

An owner is not entitled to damages representing betterment for breach of a warranty. The word "betterment" has been defined as "compensation for disappointment over nonrealization of an expectation."⁶⁷ Sometimes called "enhancement," the doctrine prohibits an owner's remedy for a contractor's breach of contract from exceeding the value of performance in accordance with the contract. Thus, if the contractor's breach of warranty requires the owner to purchase and install more valuable materials than what the contract originally called for, the owner may not recover as damages the incremental extra value of the better materials; otherwise, the owner would be unjustly enriched, receiving value for which he never paid.⁶⁸

Liquidated Damages

Damages for breach of a warranty must be intended to compensate the owner for actual or expected losses, not merely to punish or incentivize the contractor. Even if the contract stipulates a particular penalty for breach of a warranty, courts will not award such penalties for breach of contract.⁶⁹ However, a court will award liquidated damages despite their similarity to penalties and the fact that they are frequently called "penalty clauses." A liquidated damages clause is enforceable when it represents, at the time the contract was entered into, a reasonable forecast of the damages that would probably result from breach of the warranty and when the damages would likely be difficult to quantify precisely.⁷⁰

Liquidated damages are rarely stipulated for breach of a warranty because the parties cannot predict in advance how the warranty is likely to be breached or what the cost of correction will be, and the cost of repair or replacement can usually be quantified relatively precisely. However, some warranties lend themselves quite well to liquidating the consequence of a breach, particularly a performance warranty which provides a formula for calculating liquidated damages based on incremental failures of performance. This is most common in design-build contracts in which the contractor guarantees performance of the facility. For example, in a contract to design and build a power plant which is supposed to develop a capacity of a certain number of kilowatt hours, failure of the facility to develop its full capacity may be liquidated by calculating the present value of the cost of purchasing the additional kilowatt hours from another source over the useful life expectancy of the plant. Both parties benefit from the greater predictability resulting from linking substandard performance of the

facility with liquidated damages which increase incrementally with the magnitude of the failure.

Magnuson-Moss Warranty Act

The Magnuson-Moss Warranty Act⁷¹ is a federal law which gives consumers statutory remedies for breach of a manufacturer's or vendor's warranty of a consumer product. Somewhat like the UCC, the Magnuson-Moss Warranty Act may apply to construction contracts where a product is being purchased for attachment or installation to real property or a structure on the property if the product is one which is normally used for personal, family, or household purposes.⁷² This includes paneling, dropped ceilings, siding, roofing, storm windows and other similar products which may be the subject of a construction contract.⁷³ However, the Magnuson-Moss Warranty Act does not apply if the consumer is contracting for the construction of a structure, or a substantial addition to a structure, into which the products will be integrated.⁷⁴ The term "consumer" is broadly defined to include buyers of any consumer product or persons to whom a consumer product is transferred during the duration of its warranty.⁷⁵ Upon establishing that the warrantor breached its obligations, the consumer may elect any of three remedies: refund, repair or replacement,⁷⁶ and may also recover attorney's fees.⁷⁷

The leading case that applies the Magnuson-Moss Warranty Act to construction contracts⁷⁸ involved a homeowner's claim against a roofing contractor for breach of a written warranty of materials and workmanship for a re-roofing project. The court held that under the regulations described above, the products used in the re-roofing project were consumer products covered by the Magnuson-Moss Warranty Act and affirmed a jury verdict for the cost of replacement of the failed roof.⁷⁹ The court also affirmed an award of attorney's fees in an amount more than 50% greater than the replacement cost of the roof.⁸⁰

Exclusivity

A warranty is just one of many representations and promises that a contractor makes in a construction contract. A contractor's performance may constitute a breach of any, all or none of these provisions. However, some contractors have argued that the callback warranty constitutes the exclusive remedy for construction defects after completion or the making of final payment for the project.

Most of the time, this position is rejected. The warranty scheme in the AIA General Conditions clearly states that the callback warranty does not affect the time during which a breach of any other provision of the contract may be

remedied.⁸¹ The courts generally do not interpret a callback warranty as an exclusive remedy for post-completion claims unless the parties have clearly manifested an intention in the contract to render it an exclusive remedy.⁸² Of course, court decisions on this issue vary with the precise language in each contract. A few courts have held standard callback warranty provisions to constitute an exclusive remedy,⁸³ but most courts that have considered this issue have held that the callback warranty is not an exclusive remedy.⁸⁴

Time Limitations

A claim for breach of warranty, like any other claim for breach of contract, must be filed within the time allowed by any applicable statute of limitations or repose, which may often be a special statute applying only to claims arising out of construction projects.⁸⁵ However, most jurisdictions allow the parties to a contract to extend or shorten the applicable statute of limitations by agreement in the contract.⁸⁶ If the construction contract contains such a provision, then any claim must be filed in accordance with its terms.

An issue frequently arises as to whether the typical one-year callback warranty is an agreement to shorten the statute of limitations to one year. Although it is possible to draft the callback warranty so that it has this effect, most typical callback warranties are not interpreted as shortening the statute of limitations.⁸⁷ In one representative case in which a homeowner sued a roofing contractor for breach of a two-year warranty, the court held that as long as the owner gave notice of roof leaks to the roofer within the two-year period, the lawsuit for the cost of repairing the leaks was timely even if filed after the two-year period, and the contractor remained liable for the cost of repairing the roof.⁸⁸ However, the mere fact that a contractor has performed warranty work during the one-year callback period does not mean that the warranty extends for an additional year from the date of the repair work.⁸⁹

Performance vs. Qualitative Warranties

Particularly in design-build projects, where the contractor is warranting the performance of the completed facility, there is a great deal of confusion and misunderstanding regarding the various types of warranties that the contractor typically gives and the length of time during which a claim may be made under a warranty. It is routine for the warranty of actual performance of the facility to be for a specified limited duration, but many construction industry practitioners mistakenly believe that the warranties of materials/equipment and services in the construction contract are thereby limited to the same period of time.

This belief is both illogical and incorrect. Unless there is explicit language in the contract to the contrary, the contractor's warranties of materials/equipment and services (sometimes collectively referred to as "qualitative" warranties) are not limited or in any way affected by a time limitation in the performance warranty.

The distinctions between performance and qualitative warranties are not entirely clear. At least on the surface, it appears that they are largely redundant. If all of the contractor's services were performed properly and all of the materials and equipment were appropriate and free from defects, then the facility should operate properly (assuming that there are no problems for which the owner is responsible). Similarly, warranting proper operation of the facility might logically render it unnecessary to make individual warranties for the services and materials/equipment.

But there are some differences in the scope of performance and qualitative warranties. One such difference is that qualitative warranties apply to issues not directly affecting performance of the facility. For example, the flooring or roofing systems might not be directly important to the operation of an industrial plant and, therefore, would not be covered under a warranty of plant performance. However, such items would be warranted under the general, qualitative warranties of the materials/equipment and services provided.

Probably the most important difference between performance and qualitative warranties concerns the issue of latent defects. By definition, a latent defect is an item of construction which was defective when installed but whose defective nature and the consequences of the defect do not become apparent until after the passage of a period of time.⁹⁰ Qualitative warranties cover such latent defects because the equipment/materials or services were, by definition, defective at the time of installation. However, latent defects may or may not be covered under a warranty of plant performance depending on whether their consequences become apparent and are first detected within the time period during which the warranty is effective.

This is why owners desire to have both performance and qualitative warranties in a design-build contract. A performance warranty guarantees the facility's performance without fault — even if the reason for the facility's failure to perform properly cannot be traced back to defective equipment/materials or services (provided that it also cannot be traced to the owner's failure) — but it lasts for a limited duration. The qualitative warranty protects against the facility's failure due to fault — it applies only if

the contractor's equipment/materials or services were defective — but there is no limit on the time (other than an applicable statute of limitations) during which it can be enforced.

It is not logical to put a time limit on the qualitative warranties that the contractor's equipment/materials and services are not defective. The qualitative warranties focus on a single point in time, ordinarily the moment that the material or equipment is installed into the project. A defect in a piece of equipment may manifest itself immediately (the first time it is operated or observed), or it may not manifest itself until some subsequent time, such as if it were to break down and cease functioning much later, but well before the end of its normal useful life expectancy. However, the mere fact that a piece of equipment has broken down before it should have, does not necessarily mean that it was defective when installed. Otherwise, the definition of "defective" would render the qualitative warranties redundant and functionally identical to the performance warranty.

Claims Against Sureties

Contractor's warranties bind not only the contractor, but also the contractor's surety under a performance bond. Most performance bonds incorporate the construction contract by reference to define the performance that the surety is guaranteeing, and the general rule of law is that a surety's liability corresponds exactly with that of its principal so that if the contractor can be held liable for breach of a construction contract, so may the surety.⁹¹ This rule is sometimes in conflict with another general rule governing performance bonds on construction projects: that the surety's obligations are discharged when the owner accepts the contractor's completed performance and makes final payment.⁹²

A surety's liability for the contractor's breach of a warranty in the construction contract usually arises in the context of a warranty which extends beyond completion of the project, such as the typical one-year callback warranty or the extended warranty of a particular system or piece of equipment. In the most common scenario, the owner makes a claim against the surety for a latent defect which constitutes a breach of a warranty surviving completion of the project. When a latent defect manifests itself during the period covered by the one-year callback warranty, for example, most courts hold that the surety remains liable to the owner in the event that the contractor does not honor its obligation to fix the defect.⁹³ However, at least one court has held that a performance bond only guaranteed the contractor's completion of the construction work, not the ten year warranty contained in the construction contract,

relying in part on a clause in the bond which required suit to be instituted prior to two years from the date on which final payment under the construction contract fell due.⁹⁴

Disclaimer of Warranties

Frequently, a construction contractor wants the contract to reflect clearly that it is not making a particular warranty. Consequently, the contractor includes language in the contract which disclaims the warranty in whole or in part. This is relatively easy in the case of an explicit warranty because any obligations or remedies that are created by the language of the construction contract can be limited, modified or even eradicated by additional language in the contract which has that effect. Courts will generally allow the parties to a contract containing explicit warranties to limit or modify the warranty in any reasonable way by the addition of other language to the contract.⁹⁵ However, a substantial body of law has accumulated in cases for the sale of goods which holds that disclaimers which are wholly inconsistent with the language of an express warranty are deemed inoperative in order to protect a buyer from unexpectedly losing the benefit of his or her bargain.⁹⁶ Furthermore, particularly in contracts prepared exclusively by one party in which the language is not subject to negotiation, courts often do not permit the party who drafted the contract which contains a clearly expressed warranty to rely on fine print buried elsewhere in the document which purports to limit or take away the warranty so as to preclude recovery for failure to fulfill it.⁹⁷

It is more usual and logical for a contractor to want to disclaim an implied warranty, rather than an explicit warranty. By definition, an implied warranty does not appear in the language of the contract itself, and the contractor has a interest in adding explicit language to the contract that limits or disclaims the implied warranty. Particularly when the construction agreement contemplates using services or materials in a way which would ordinarily be a breach of an implied warranty, it is important for the contractor to protect itself by explicitly disclaiming the implied warranty in question, at least for the goods or services that will be in violation of it. For example, if the owner desires to save time or money by having the contractor provide incomplete services or supply substandard materials, an explicit provision should be included in the construction contract reflecting these facts so that the ordinary implied warranties would not apply to the services or materials in question.

Disclaiming certain implied warranties in a construction contract may be impossible or more difficult than one might expect. Particularly where implied warranties are the product of public policy choices, made either statutorily or

by the courts, they may not be able to be disclaimed simply by including language in the contract which purports to do so. Some jurisdictions place significant restrictions on a contractor who desires to disclaim the implied warranty of habitability of a residence.⁹⁸ The Uniform Commercial Code provides that to exclude or modify the implied warranty of merchantability, "the language must mention merchantability and in case of a writing must be conspicuous," and that any language excluding or modifying an implied warranty of fitness must be in writing and conspicuous.⁹⁹ To be "conspicuous," a disclaimer should usually be printed in all capital letters or in a larger or contrasting type or color.¹⁰⁰

Many construction contracts contain an "integration clause," which provides that the document contains the entire agreement of the parties; that there are no antecedent or extrinsic representations, warranties or other provisions; and that all such prior representations, warranties and other provisions are merged into the document. Unless procured by fraud, such integration clauses are valid and enforceable and operate like a general release of all antecedent claims.¹⁰¹ Although an integration clause of this type is generally deemed sufficient to disclaim any express warranties not found in the contract, the courts have been divided as to the extent to which an integration clause may effectively disclaim implied warranties.¹⁰² Accordingly, a contractor who desires to ensure that implied warranties are disclaimed should expressly refer to and disclaim them in the contract rather than relying on an integration clause, and owners who desire to ensure that implied warranties are not disclaimed by an integration clause should so state in the contract.

Conclusion

The function of a warranty in a construction contract is to allocate risks between the parties to the contract. At least in theory, by warranting that certain facts are or will be true, the contractor agrees to be responsible for causing the facts to be true and obviates the need for the owner to monitor or verify the circumstances surrounding those facts. Thus, warranties are not substantially different from other obligations that the contractor incurs in a construction contract, such as covenants and representations, and similar remedies govern actions for their breach.

In virtually all construction contracts, the law implies certain minimum levels of performance. This usually takes the form of implied warranties derived either from the common law or from statutory law. Because these warranties represent a balancing of societal interests, it may be difficult or impossible, in some cases, to waive them.

Explicit warranties in construction contracts are usually a function of negotiations between the parties. They are generally commercial in nature, representing a balancing of interests of the parties to the contract, rather than societal interests, and their terms may be enlarged, diminished or disclaimed in accordance with the value being received by the contractor in exchange for the warranties.

Guidelines

The following are some practical guidelines for owners and contractors to follow to help ensure that they are not subsequently surprised to their detriment by the existence or non-existence of warranty obligations arising out of the construction contract.

1. Both parties should carefully read the proposed contract and evaluate the meaning of the language in the provisions in question. It is surprising how frequently one or both of the parties skim over the warranty provisions, assuming that they are standard legal boilerplate. In fact, there is no such thing as standard legal boilerplate. Even when using a standard form document, such as the AIA General Conditions, the parties should carefully read the warranty and other legal provisions if for no other reason than to verify their assumptions regarding the project.
2. Both parties should identify and note any unusual aspects of the project that might affect warranty liability. For example, from the contractor's point of view, if the owner or other prime contractors will be providing services or materials for the project, the contract should clearly state that the contractor's warranties do not extend to such services or materials. From the owner's point of view, if the contractor has held itself out as having special skills or access to superior products, the warranty provisions should reflect these higher standards.
3. When the contract contains some warranties of a fixed duration, such as a callback warranty, as well as other warranties without a durational aspect, both parties should examine the language of the contract closely to make sure that any language fixing a specific duration for making claims is limited only to the callback or other "durational" warranties.
4. When negotiating warranty provisions in construction contracts, contractors, and to a lesser extent owners, should resist the temptation to treat them as independent provisions not related to payment, time and other negotiated provisions. Warranties are risk-shifting devices, and at least in theory, the amount of risk that a party is willing to absorb should be directly related to that party's compensation or similar benefits from the project. It is often very effective for a contractor to respond to an owner's demand for excessively strong warranties by quantifying the additional price that the contractor would charge for agreeing to the warranty language.
5. Similarly, the contractor should include a factor for warranty liability in its bidding and estimating process. This factor would be a function of the likelihood, scope and magnitude of any liability under the warranty, as well as the contractor's ability to "lay off" some or all of that liability on other parties such as subcontractors and vendors.
6. With respect to vendor warranties, both parties should carefully read and evaluate the language on all applicable vendor literature. The contractor must be careful, before signing the contract where possible, to make sure that its warranty obligations to the owner for equipment that will be purchased from vendors parallel the obligations that the vendor will have to the contractor. Unless the contract specifies to the contrary, the contractor's liability to the owner may be broader in scope and magnitude than the vendor's liability to the contractor under the limited warranties that most vendors offer with their products. The contractor should seek to include a clause in the construction contract limiting its liability to the owner for defective equipment supplied by vendors to the extent of the vendor's liability to the contractor.
7. The contractor should be careful not to get caught between inconsistent warranty provisions in subcontracts and the prime contract. All subcontracts should refer to the applicable portions of the prime contract, including the warranty provisions, and incorporate them by reference, so that the subcontractors' obligations to the general contractor parallel the general contractor's obligations to the owner. Where necessary and appropriate, the general contractor may require the subcontracts to be bonded in order to guarantee that warranty liability can successfully be passed through to the responsible trade.
8. Both parties should be aware of the nature of the construction services that the contractor will be providing. Determine whether the construction work for the project will be deemed to be the sale of goods, which would bring it within the gambit of the Uniform Commercial Code, or of consumer goods, which

would render the Magnuson Moss Warranty Act applicable.

9. To the extent possible, a contractor should attempt to disclaim all warranties not expressly set forth in the construction contract and to limit the owner's remedies for breach of a warranty, such as by excluding recovery for consequential damages, etc.
10. Both parties should know the law in the jurisdictions in which projects are located and develop their strategy for contracting and negotiating in light of the prevailing jurisdiction's laws. For example, if the project is in a jurisdiction which requires disclaimers of implied warranties to be of a particular type size or face, the contractor must make sure that any such disclaimers in the contract comply. If the jurisdiction forbids a party from obtaining indemnity in certain circumstances, this factor must be a part of the parties' strategy for protecting themselves from potential liability.
11. Neither party should fall into the trap of thinking that the contractor does not have obligations to the owner regarding the quality of the project unless those obligations are set forth in a warranty provision. Warranties are just one of many types of provisions in a construction contract that create obligations between the parties. The fact that an owner does not have a claim against the contractor for breach of a warranty regarding a particular construction item does not mean that the claim cannot be brought as one for breach of a different provision in the contract or under some other theory entirely.
12. The contractor should warn employees and other representatives not to make any statements or representations to the owner that could be construed as warranties. A warranty need not be in writing to be valid. Oral warranties are as binding as written warranties — they are just more difficult to prove.
13. The owner should review the contractor's performance bond thoroughly to determine whether it contains any language that might be inconsistent with the surety's general obligation to guarantee the contractor's performance of all aspects of the construction contract. If there is doubt or ambiguity, the issue should be clarified, set forth in writing and signed by all parties.
14. In design-build projects, the owner should be aware that the usual standard by which a design professional's performance is judged (*i.e.*, the level of skill and care that the average similarly-situated design professional would employ) need not apply. It

is not unreasonable, in appropriate circumstances, for an owner to request a design-builder to warrant the overall performance of the facility to be constructed, which subsumes warranties of both construction and design. This may result in a higher standard of care for design services.

15. If one of the parties wants to provide for liquidated damages for breach of a warranty, attention should be paid to the language of the liquidated damages provision. It should not be referred to as a penalty clause, and the clause should recite the likelihood and difficulty of quantifying actual damages that would result from the breach of warranty.
16. Design-build projects allow for innovative and creative use of warranties to accomplish an owner's objectives. By linking liquidated damages (or bonuses) to achievement of particular performance levels, a certainty or predictability of result may be achieved that may facilitate sponsorship or financing of the project. By including other functions, such as operation or provision of feedstock, under the umbrella of services to be provided by the design-builder, the owner may be able to expand the scope of the performance warranty since many or all of the other variables that might affect performance would be under the design-builder's control.

Endnotes

- ¹ Black's Law Dictionary, p. 1586 (6th ed. 1990), citing *Paccon, Inc. v. U.S.*, 399 F.2d 162 (Ct. Cl. 1968).
- ² AIA Document A201, "General Conditions of the Contract for Construction" (1987 ed.).
- ³ *Id.* at § 3.5.1.
- ⁴ *Id.* at § 1.13.
- ⁵ See n.1, *supra*.
- ⁶ *Sundance Development, Inc. v. Standard Lumber and Hardware Company*, 520 P.2d 1056, 1058 (Colo. App. 1974).
- ⁷ *Supra*, n.2 at § 12.2.2.
- ⁸ *Id.* at § 12.2.6.
- ⁹ See, e.g., *Mississippi Meadows, Inc. v. Hodson*, 13 Ill. App. 3d 24, 26, 299 N.E.2d 359, 361 (1973); *Allied Properties v. John Blume & Associates*, 25 Cal. App. 3d 848, 851, 102 Cal. Rptr. 259, 263-64 (1972); *White v. Pallay*, 119 Or. 97, 247 P. 316, 317 (1926).
- ¹⁰ See, e.g., *Louisiana Molasses Co. v. Le Sassier*, 52 La. Ann. 2070, 28 So. 217, (1900); *Stevens Constructions Corp. v. Carolina Corp.*, 63 Wis. 2d 342, 217 N.W.2d (1974); *McDermott v. Vessel Morning Star*, 431 F.2d 714, (5th Cir. 1970), cert. denied, 409 U.S. 948 (1972). See generally, Hal G. Block, "As the Walls Came Tumbling Down: Architects' Expanded Liability Under Design-Build/Construction Contracting", 17 *The John Marshall Law Review* 1, 16-17 (1984).
- ¹¹ See, e.g., *Bloomsburg Mills, Inc. v. Sordoni Construction Co.*, 401 Pa. 358, 164 A.2d 201 (1960); *Union Marine & General Ins. Co. v. American Export Lines*, 274 F. Supp. 123 (S.D.N.Y. 1966); *Wolfe v. Virusky*, 306, F. Supp. 519 (S.D. Ga. 1969).
- ¹² See, *Welch v. Lee*, 93 So. 2d 427 (Ala. 1957).
- ¹³ See, e.g., *Tonkin v. Bob Eldrich Construction Co.*, 808 S.W.2d 849 (Mo. App. 1991); *Kubby v. Crescent Steel*, 105 Ariz. 459, 466 P.2d 753 (1970); *Mann v. Clowser*, 190 Va. 887, 59 S.E.2d 78 (1950).
- ¹⁴ E.g., *Mann v. Clowser*, *supra* n.13 ("in accordance with good usage and accepted practices in the community in which the work is done"); *Wawak v. Stewart*, 247 Ark. 1093, 449 S.W.2d 922 (date) ("sound workmanship ... proper construction"); *Kubby v. Crescent Steel*, *supra* n.13 ("workmanlike manner and without negligence").
- ¹⁵ *Melody Homes Manufacturing Co. v. Barnes*, 741 S.W.2d 349 (Tex. 1987); *Smith v. Old Warson Development Co.*, 479 S.W.2d 795 (Mo. 1972).
- ¹⁶ *Melody Homes Manufacturing Co. v. Barnes* at 354, *supra* n.15.
- ¹⁷ E.g., *Cantrell v. Woodhill Enterprises, Inc.*, 160 S.E.2d 476 (N.C. 1968); *Wood-Hopkins Contracting Co. v. Masonry Contractors, Inc.*, 235 So. 2d 548 (Fla. App. 1970). See generally, 61 ALR3d 792.
- ¹⁸ See *Wood-Hopkins Construction Co. v. Masonry Contractors, Inc.*, *supra* n.17, citing 17A C.J.S., "Contracts" § 515d, p. 857.
- ¹⁹ *Trustees of Indiana Univ. v. Aetna Cas. & Sur. Co.*, 920 F.2d 429 (7th Cir. 1990); *Wood-Hopkins Construction Co. v. Masonry Contractors, Inc.*, *supra* n.17.
- ²⁰ *Clark v. Campbell*, 492 S.W.2d 7 (Mo. App. 1973).
- ²¹ See, e.g., *Petersen v. Hubschman Construction Co.*, 76 Ill. 2d 31, 389 N.E.2d 1154 (1979); *Vanderschrier v. Aaron*, 140 N.E.2d 819 (Ohio App. 1957); *McDonald v. Miannecki*, 398 A.2d 1283 (N.J. 1979). See also Shedd, *The Implied Warranty of Habitability: New Implications, New Applications*, 8 *Real Estate Law J.* 291 (1980); Spragens, *Builders' New Home Warranties*, CONSTRUCTION BRIEFINGS No. 81-3 (1981).
- ²² See *Schulman v. Vera*, 108 Cal. App. 3d 552, 166 Cal. Rptr. 620 (1980). See also Murray, "The Evolution of Implied Warranties in Commercial Real Estate Leases", 28 *U. Rich. L. Rev.* 145 (1994).
- ²³ *George v. Veach*, 280 N.C. 310, 313 S.E.2d 920 (1984).
- ²⁴ *Dillig v. Fisher*, 142 Ariz. 47, 688 P.2d 693 (1984).
- ²⁵ *Roper v. Spring Lake Development Co.*, 789 P.2d 483 (Colo. App. 1990).
- ²⁶ *Redarowicz v. Ohlendorf*, 92 Ill. 2d 171, 441 N.E.2d 324 (1982).
- ²⁷ *Roper v. Spring Lake Development Co.*, *supra*, n.25.
- ²⁸ *Pracht v. Rollins*, 779 P.2d 57 (Mont. 1989) (amateur builder was a pharmacist by profession).
- ²⁹ *Kelley v. Astor Investors, Inc.*, 123 Ill. App. 593, 462 N.E.2d 996 (1984).
- ³⁰ E.g., *Redarowicz v. Ohlendorf*, *supra* n.26; *Keyes v. Guy Bailey Homes, Inc.*, 439 So. 2d 670 (Miss. 1983); *Degnan v. Executive Homes, Inc.*, 696 P.2d 431 (Mont. 1985).
- ³¹ E.g., *San Francisco Real Estate Investors v. J.A. Jones Construction Co.*, 703 F.2d 976 (6th Cir. 1983); *Clark v. Landelco, Inc.*, 657 S.E.2d 634 (Mo. App. 1984); *Evans v. Mitchell*, 329 S.W.2d 681 (N.C. App. 1985).
- ³² *Hillcrest Country Club v. N. D. Judds Co.*, 461 N.W.2d 55 (Neb. 1990).

³³ Id. at 63-64.

³⁴ Id. at 63.

³⁵ State ex rel. *Stephan v. GAF Corp.*, 242 Kan. 152, 747 P.2d 1326 (1987).

³⁶ Appeal of *Norair Engineering Corp.*, 92-2 BCA 25,009 ENG BCA No. 5244 (1992).

³⁷ UCC § 2-105(1) (1978).

³⁸ *Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co.*, 532 F.2d 572 (7th Cir. 1976).

³⁹ *Bonebreak v. Cox*, 495 F.2d 951 (8th Cir. 1974).

⁴⁰ *Barrington Corp. v. Patrick Lumber Co., Inc.*, 447 So. 2d 785 (Ala. App. 1984).

⁴¹ *Lincoln Pulp & Paper Co. v. Dravo Corp.*, 436 F. Supp. 262 (D. Me. 1977).

⁴² E.g., *Lincoln Pulp & Paper Co. v. Dravo Corp.*, supra, n.41; *Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co.*, supra, n.38; *Bonebreak v. Cox*, supra, n.39. See generally, Marshall, "The Applicability of the Uniform Commercial Code to Construction Contracts," 28 *Emory L.J.* 335 (1979).

⁴³ UCC § 2-314 (1978).

⁴⁴ UCC § 2-315 (1978).

⁴⁵ UCC § 2-312 (1978).

⁴⁶ *Barrington Corp. v. Patrick Lumber Co., Inc.*, at 787, supra, n.40.

⁴⁷ *Hillcrest Country Club v. N. D. Judds Co.*, at 61, supra n.32.

⁴⁸ See, *Tex-La Properties v. South State Ins. Co.*, 514 So. 2d 707 (La. App. 1987).

⁴⁹ UCC § 2-725(1) (1978).

⁵⁰ See, *Hillcrest Country Club v. N. D. Judds Co.*, at 63, supra n.32. But, see, *Grand Island School District v. Celotex Corp.*, 279 N.W.2d 603 (Nev. 1979).

⁵¹ Vendor's limitations held enforceable: *Matco Electric Co., Inc. v. American District Telegraph Co., Inc.*, 549 N.Y.S.2d 843 (App. Div. 1989) (vendor's quote containing limitation clause incorporated by reference into contractor's purchase order); *Mace Industries, Inc. v. Paddock Pool Equipment Co., Inc.*, 339 S.E.2d 527 (S.C. App. 1986) (vendor's quote not incorporated and purchase order had integration clause, but contractor never took express exception to disclaimer). Vendor's limitation not enforceable: *Westinghouse Electric Corp. v. Neilsons, Inc.*, 647 F. Supp. 896 (D. Colo. 1986) (inconsistent clauses cancel each other out); *Westech Eng., Inc. v. Clearwater Constructors, Inc.*, 835 S.W.2d 190 (Tex. App. 1992) (vendor proceeded with sale in face of contractor's objection to limitation).

⁵² See, generally, 11 *Williston on Contracts* § 1391, at p. 433 (3rd ed. 1968).

⁵³ See, e.g., *Winney v. William E. Dailey, Inc.*, 636 A.2d 744 (Vt. 1993); *Wolf v. Stein*, No. CA93-08-154, 1994 WL 462202 (Ohio Ct. App. Aug. 29, 1994); *Jesse v. White*, 633 S.W.2d 767 (Tenn. Ct. App. 1982). See generally 5A *Corbin on Contracts* § 1089 (1964).

⁵⁴ See, e.g., *Winney v. William E. Dailey, Inc.*, at 752, supra, n.52; *Engel v. Dunn County*, 77 N.W.2d 408 (Wis. 1956); *Redbud Coop. Corp. v. Clayton*, 700 S.W.2d 551 (Tenn. Ct. App. 1985). See generally 5A *Corbin on Contracts*, at § 1089, supra, n.53.

⁵⁵ See, e.g., *Marchesseault v. Jackson*, 611 A.2d 95 (Me. 1992); *Italian Econ. Corp. v. Community Eng'rs*, 514 N.Y.S.2d 630 (N.Y. Sup. Ct. 1987); Cf. 5A *Corbin on Contracts* § 1090 (1964) ("Existing remedial rules are not so dogmatic and inflexible as to prevent the court from varying the remedy to suit the special facts.")

⁵⁶ See, *Eastlake Constr. Co., Inc. v. Hess*, 102 Wash. 2d 30, 686 P.2d 465 (1984) (upholding lower court's award of damages in amount of difference in value between certain fixtures specified in construction contract and lesser-quality fixtures actually used); *Jacob & Youngs, Inc. v. Kent*, 230 N.Y. 239, 129 N.E. 889 (1921) (Cardozo, J.) (owner allowed to recover "difference in value" between piping called for contractually and piping actually installed by contractor); *Kendrick v. White*, 75 Ga. App. 307, 43 S.E.2d 285 (1947) (in suit by owner against contractor for breaching construction contract by using inferior materials in construction of house and in manner in which contractor built house, held that owner entitled to "the difference in value between the house as finished by the contractor and the house as it ought to have been finished" under the contract).

⁵⁷ See, *Yost v. City of Council Bluffs*, 471 N.W.2d 836, 840 (Iowa 1991). See also, *Sullivan v. Oregon Landmark-One, Ltd.*, 122 Or. App. 1, 856 P.2d 1043, 1046 (1993) (damages "may include out-of-pocket expenses incurred in reliance on the agreement, particularly those expenses that were necessary to prepare for performance of the contract"). See generally 5 *Corbin on Contracts*, at § 1031, supra, n.53.

⁵⁸ See, State ex rel. *Park County v. Montana Sixth Judicial Dist. Court*, 253 Mont. 331, 833 P.2d 210 (1992) (stating that courts will not generally order specific performance in building and construction contract disputes because "damages at law are an

adequate remedy, and ... because of the incapacity of the court to superintend their performance.”); *Northern Del. Indus. Dev. Corp. v. E.W. Bliss Co.*, 245 A.2d 431 (Del. 1968). See generally, 71 Am. Jur. 2d Specific Performance § 165 (1973).

⁵⁹ See, *supra* at pp. 448-450 (3rd ed. 1968), and cases cited therein.

⁶⁰ *USX Corp. v. Union Pacific Resources Co.*, 753 S.W.2d 845, 856 (Tex. App. 1988).

⁶¹ *Id.*

⁶² See, e.g., *Lange Indus., Inc. v. Hallam Grain Co.*, 507 N.W.2d 465 (Neb. 1993); *Marchesseault v. Jackson*, at 99, *supra*, n.53a; *LeBaron & Assoc., Inc. v. Rebel Enters., Inc.*, 823 P.2d 479 (Utah 1991).

⁶³ Restatement of Contracts 2d, § 350 (1981).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Sanborn Electric Co. v. Bloomington Athletic Club*, 433 N.E.2d 81, 86 (Ind. App. 1982).

⁶⁷ *St. Joseph Hospital v. Corbetta Construction Co., Inc.*, 21 Ill. App. 3d 925, 376 N.E.2d 51, 61 (1974). See also, *Bachman v. Parkin*, 19 Mass. App. 908, 471 N.E.2d 759 (1984); *Henry J. Robb, Inc. v. Urdahl*, 78 A.2d 387 (D.C. App. 1951).

⁶⁸ *Id.*

⁶⁹ Title I of the Magnuson-Moss Warranty — Federal Trade Commission Improvement Act of 1975, 15 U.S.C. § 2301 et seq. (1982).

⁷⁰ See, *Godbee v. Clement Investments, N.V.*, 177 Ga. App. 81, 338 S.E.2d 486 (1985).

⁷¹ Title I of the Magnuson-Moss Warranty — Federal Trade Commission Improvement Act of 1975, 15 U.S.C. § 2301 et seq. (1982).

⁷² 16 CFR § 700.1(a). See, generally, Peters, “How the Magnuson-Moss Warranty Act Affects the Builder/Seller of New Housing,” 5 Real Est. L.J. 338 (1977).

⁷³ 16 CFR § 700.1(e).

⁷⁴ 16 CFR § 700.1(f).

⁷⁵ 15 U.S.C. § 2301(1)(3).

⁷⁶ 15 U.S.C. § 2301(10).

⁷⁷ 15 U.S.C. § 2310(d)(2).

⁷⁸ *Muchisky v. Frederic Roofing Co., Inc.*, 838 S.W.2d 74 (Mo. App. 1992).

⁷⁹ *Id.* at 78.

⁸⁰ *Id.* at 78-79.

⁸¹ See, n.8, *supra*.

⁸² E.g., *Bender-Miller Co. v. Thomwood Farms, Inc.*, 211 Va. App. 585, 179 S.E.2d 636 (1971); *Philco Corp. v. “Automatic” Sprinkler Corp. of America*, 337 F.2d 405 (7th Cir. 1964).

⁸³ E.g., *Independent Consolidated School District No. 24 v. Carlstrom*, 277 Minn. 117, 151 N.W.2d 784 (1967); *Philco Corp. v. “Automatic” Sprinkler Corp. of America*, *supra* n.72.

⁸⁴ E.g., *Norair Engineering Corp. v. St. Joseph’s Hospital, Inc.*, 147 Ga. App. 595, 249 S.E.2d 642, 647 (1978); *Baker-Crow Construction Co. v. Hames Electric, Inc.*, 566 P.2d 153, 156 (Okla. App. 1977); *Board of Regents v. Wilson*, 27 Ill. App. 3d 26, 326 N.E.2d 216, 225 (1975).

⁸⁵ See, *155 Harbor Drive Condominium Assoc. v. Harbor Point, Inc.*, 209 Ill. App. 3d 631, 568 N.E.2d 365 (1991).

⁸⁶ See, e.g. *Rudin v. Disanza*, 608 N.Y.S. 2d 216 (App. Div. 1994) (No. 51089); *Monti v. League Life Ins. Co.*, 151 Mich. App. 789, 391 N.W.2d 490 (1986). But see, *City of Weippe v. Yarno*, 94 Idaho 247, 486 P.2d 268 (1971) (holding that parties can contractually lengthen, but not shorten, applicable limitations period).

⁸⁷ See, n.8, *supra*.

⁸⁸ *Beckstead v. Deseret Roofing Co., Inc.*, 8312 P.2d 130 (Utah App. 1992). See also, *Spinoso v. Rio Rancho Estates, Inc.*, 96 N.M. 5, 626 P.2d 1307 (N.M. App.), cert. denied, 96 N.M. 17, 627 P.2d 412 (1981).

⁸⁹ Appeal of *Humphrey Heating and Roofing, Inc.*, 85-1 BCA 17,769, ASBCA No. 29,730 (1984).

⁹⁰ *Black’s Law Dictionary*, p. 883 (6th ed. 1990).

⁹¹ *Hunters Pointe Partners Limited Partnership v. United States Fidelity & Guaranty Co.*, 194 Mich. App. 294, 486 N.W.2d 136 (1992).

⁹² See, 17 Am. Jur. 2d § 34 at p. 771 (1990).

⁹³ See *Hunters Pointe Partners Limited Partnership v. United States Fidelity and Guaranty Co.*, *supra* n.89, and cases cited therein.

⁹⁴ *Kiva Construction and Engineering, Inc. v. International Fidelity Insurance Co.*, 749 F. Supp. 753 (W.D. La. 1990).

⁹⁵ See, e.g., *Wilk Paving, Inc. v. Southworth-Milton, Inc.*, Case No. 93-487, 1994 WL 518899 (Vt. Sept. 16, 1994); *Martin Rispens & Son v. Hall Farms, Inc.*, 621 N.E.2d 1078 (Ind. 1993).

⁹⁶ E.g., *Wenner v. Gulf Oil Corp.*, 264 N.W.2d 374 (Minn. 1978). See also, White and Summers, 1 Uniform Commercial Code § 12-3 at pp. 565-67 (3rd ed. 1988).

⁹⁷ See, *Hillcrest Country Club v. N.D. Judds. Co.*, at p. 63, supra n.32; *Seal v. Tayco, Inc.*, 16 Utah 2d 323, 400 P.2d 503 (1965).

⁹⁸ Cf. *Pontiere v. James Dinert, Inc.*, 627 A.2d 1204, 1207 (Pa. 1993) (“a builder-vendor may not exclude the implied warranty of habitability absent ‘particular’ language which is designed to put the buyer on notice of the rights he is waiving”); *Bridges v. Ferrell*, 685 P.2d 409, 411 (Okla. App. 1984) (“[i]n the absence of a clear and conspicuous disclaimer, there can be no waiver of the implied warranty of habitability”).

⁹⁹ UCC § 2-316(2).

¹⁰⁰ UCC § 1-201(10).

¹⁰¹ See, 3 Corbin On Contracts § 578 (1960).

¹⁰² *Id.* at n.49, 50.