

White Paper

Key Warranty Issues

I. INTRODUCTION

Imagine: You install a metal roof on a commercial building. Years later the property manager calls your office and angrily demands that you fix the leaky roof. The property manager says you are at fault, the roof is covered under warranty, and you must repair the defective work immediately.

Upon inspection, you discover that the property manager completely remodeled the building to accommodate exterior window washing. The property manager added a positioning system for window washers and eye-bolts undermining the roof integrity.

Who is responsible for the repair and warranty work? The answer often depends on the warranty provisions contained in your contract. This paper provides a basic framework of warranties, and examines some common warranty issues related to construction. The paper also provides helpful hints of items to include and exclude when issuing a written warranty.

As this paper will address, a warranty signifies that your company is reputable and will stand behind its work. However, a poorly drafted warranty may expose you to indefinite liability and warranty demands.

II. WARRANTIES 101¹

A. What Is a Warranty?

According to the Merriam-Webster Dictionary, a warranty is a written guarantee of the integrity of a product and of the maker's responsibility for the repair or replacement of defective parts. There are two types of warranties: (1) express, or (2) implied.

1. Express Warranties

Express warranties are actual promises communicated from the contractor to the other party of a contract. For instance, a contract may represent that "ZZZ HVAC's dampers will not fail during the first 10 years of standard operation." ZZZ HVAC expressly warranted that its dampers will not fail for at least 10 years.

¹ See "*Warranties 101*," SMACNA Contracts Bulletin #77 (July 6, 2004).

Standard “form” contracts commonly contain express warranties. For example, the ConsensusDOCS 750 Standard Form of Agreement between Contractor and Subcontractor expressly warrants that:

“3.21 WARRANTIES The Subcontractor warrants that all materials and equipment shall be new unless otherwise specified, of good quality, in conformance with the Subcontract Documents, and free from defective workmanship and materials. The Subcontractor further warrants that the Work shall be free from material defects not intrinsic in the design or materials required in the Subcontract Documents. The Subcontractor's warranty does include remedies for defects or damages caused by normal wear and tear during normal usage, use for a purpose for which the Project was not intended, improper or insufficient maintenance, modifications performed by Others, or abuse. The Subcontractor's warranties shall commence on the date of Substantial Completion of the Work or a designated portion.”

Express warranties benefit property owners, and are obligations of the contractor.²

Spotting an express warranty is often easy. In standard form contracts, like the ConsensusDOCS, the word “warranty,” “guarantee,” or “assurance” usually appears. However, express warranties need not contain such language. An express warranty may be formed whenever a buyer can show that a seller overtly promised something that became a material element of the contract.

2. Implied Warranties

Unlike express warranties, implied warranties are a creature of law; they are not formed by specific contractual language. Implied warranties are considered inherent within the contract and a “natural” function of fulfilling the contract terms. Implied warranties are meant to protect consumers when a product fails to meet commercial standards or a buyer’s stated purpose. There are two categories of implied warranties: (1) that contractors’ products be fit for the ordinary purposes for which it is used (often called the “implied warranty of merchantability”); and (2) the product conforms with the buyer’s expectations (often called the “implied warranty of fitness for a particular purpose”).

The implied warranty of merchantability provides that air conditioners should cool air. Accordingly, if an air conditioner fails to cool air, the implied warranty of merchantability is breached.

The implied warranty of fitness for a particular purchase protects consumers who do not have the same expertise as a professional contractor. For example, a property owner may enter into a contract for an entire-building HVAC system where the contractor’s chooses and installs a proper system. If the HVAC system fails to sufficiently heat and cool the building, the contractor will have breached its implied warranty of fitness for a particular purchase.

² See generally David A. Senter, *Construction Warranties and Guarantees: A Primer*, 23 *Construction Law* 17 (Winter 2003).

B. Modification of Warranties

The law permits parties to modify both express and implied warranties under most circumstances. Indeed, warranty modification is an integral part of the bargaining and contract process since form contracts often benefit the buyer/owner. Modifying contract terms is often easier said than done. Contractors who modify warranties must be sure that the contract language is clear and reflects the parties' intentions.

1. Modifying Express Warranties

A court will generally enforce a modification of an express warranty if the language and acts of the contracting parties are consistent and reasonable. If the parties' actions or warranty language are deemed unreasonable under the circumstances, the modification will likely fail judicial scrutiny. "Unreasonable" modifications include "unconscionable" provisions that may arise where the parties have significantly unequal bargaining power, or where a disclaimer is not conspicuously included in the contract.³ For example, a provision found only in small print that expressly disclaims all prior representations and warranties is likely unenforceable.

2. Modifying Implied Warranties

Unlike express warranties, implied warranties are an inherent part of a transaction and do not arise out of express contract language. All modifications of implied warranties must be "conspicuously stated" in the written contract. Capitalized, bold, or larger or different colored text generally satisfies the conspicuous requirements.⁴ Blanket disclaimers (e.g., broadly waiving responsibility for "all defective work") will not be upheld. Courts narrowly construe implied warranty disclaimers and resolve any ambiguities in favor of the property owner.⁵ In fact, as described below, Congress approved legislation to limit warranty modification abuses.

C. Residential Contractors and the Magnuson Moss Warranty Act

The Magnuson Moss Warranty Act⁶ was established by Congress in order to prevent abusive warranty disclaimers. Federal law does not require a written warranty to be included in a contract; however, if a written warranty is included, specific requirements must be met. Contractors should be familiar with the Act's requirements, especially when performing work for residential customers.⁷

³ Senter, 23 Construction Law at 19.

⁴ Uniform Commercial Code ("UCC") § 1-201(10).

⁵ R. Harper Heckman, *Drafting the "Perfect" One-Year Warranty*, 27 Construction Law 5, 8 (Summer 2007).

⁶ Also known as the Federal Trade Commission Improvement Act of 1975. See 15 U.S.C. 2301 et. seq.

⁷ For more detail on the Magnuson-Moss Act, see Contracts Bulletin #77, and contact your legal counsel.

The Act most likely applies to situations where a contractor's products are used by consumers (e.g., not part of a commercial transaction). The Act has three basic requirements:

1. A written warranty for products over \$10 must be designated as either "full" or "limited." A "full" warranty must meet all the requirements outlined under the Act, including no limit on the duration of implied warranties. Warranty service also must be provided free of charge. If these requirements are not met, then the warranty must be labeled "limited."
2. Certain specified information about the warranty must be included in a single, clear, easy-to-read document for all consumer products costing more than \$15. Examples of information that must be included are the period of coverage, details of what is (and is not) covered, and whom to contact about warranty service.
3. Warranties must be made available to consumers to read before buying.

If a "limited" warranty confines the duration of an implied warranty, or restricts or eliminates a contractor's liability for consequential damages (discussed below), the contractor must include a disclaimer that state law may override the restriction. The Federal Trade Commission ("FTC") has provided sample language: "Some states do not allow the exclusion or limitation of incidental or consequential damages, so the above limitation or exclusion may not apply to you." The FTC's proposed language emphasizes the need for contractors to be familiar with the applicable state law.

In addition to the three requirements listed above, the Act also has three key prohibitions:

4. The Act prohibits disclaiming or modifying implied warranties. However, if a contractor offers a "limited" written warranty, the law allows the contractor to include a provision that limits the implied warranty's timeframe to be equal to the duration of the limited warranty.
5. "Tie-in sales" provisions are prohibited. This type of prohibited provision requires a consumer to purchase another product in order to receive a remedy under the warranty. However, if the contractor can demonstrate to the FTC that its product will not work properly without a specified item or service, a tie-in provision may be allowed.
6. Warranties may not contain deceptive or misleading items. For example, a warranty covering only electronic components in an item with no electronics would be unlawful.

Most state laws also impose some implied warranties for residential construction and repair. For example, in Minnesota, Minn. Stat. § 327A.02 provides a two-year warranty on mechanical systems (like HVAC) for both construction and repair. Contractors should consult an attorney to learn what local warranties, if any, may apply to the contractors' work.

D. Conclusion

Warranties are a critical part of construction contracts. Contractors should not do business without a basic understanding of their warranty responsibilities and legal ways to modify warranties. Laws governing warranties vary by state. State and federal laws govern the responsibilities of owners and contractors should a defect occur.

III. NOTICE OF OPPORTUNITY TO REPAIR (“NOR”) STATUTES

If a warranty claim arises, a typical resolution requires the owner to alert the contractor of the problem and if possible, promptly fix the defect. This “Notice and Opportunity to Repair” (“NOR”) remedy is commonly governed by individual state statutes. Contractors should be aware of their obligations under the statutes if defect notices are received. Since the requirements vary greatly by state, it is important to know what requirements apply to each state.⁸

Most (but not all) states have adopted NOR statutes, which require homeowners to notify new homebuilders and remodelers of alleged construction defects. Contractors can then perform an inspection and make an offer to repair before homeowners file lawsuits. While these statutes generally benefit contractors, they may require modification.

As mentioned above, while NOR statutes are becoming more widespread, no single statute has been used uniformly adopted. For example, Minnesota and Wisconsin are neighboring states with similar populations and geography, yet they have taken entirely different approaches to NOR statutes. On one hand, Minnesota’s statute is less than a page long and contains a few major provisions. On the other hand, Wisconsin has a much more detailed law, which requires modification of all contracts and the attachment of a brochure created by Wisconsin’s Department of Commerce. Additionally, Wisconsin’s law contains explicit provisions requiring notification to subcontractors of defects. These differences are not necessarily attributable to the political persuasion of the state legislatures, rather they mirror and reflect the differing NOR statutes adopted throughout the country.

If a contractor receives a notice from a homeowner or general contractor, there is a good chance that a NOR statute requires a prompt written response. Failure to respond may result in judicial sanctions or prejudice.

IV. WARRANTY IMPLICATIONS OF COMPLETING ANOTHER CONTRACTOR’S WORK

In a challenging economic environment there are likely to be increased instances of one contractor starting a project, but being replaced by another contractor when the first contractor declares bankruptcy, leaves the job, or otherwise fails to complete the project. This type of situation raises important warranty issues for the contractor completing the work. For instance,

⁸ For a more detailed overview of NOR statutes, see “*Notice and Opportunity to Repair Statutes*,” SMACNA Contracts Bulletin #95 (December 1, 2006).

if a property owner finds a latent defect, is the second contractor liable for the initial contractor's mistake?

As mentioned above, a contractor's warranty obligations stem from two primary areas: (1) state statutes, and (2) the contract. You should consult your attorney for more information about state laws that may affect you if you resume another contractor's work.

Regardless of whether any state laws apply, contractors can take steps to insulate themselves from liability by limiting warranty coverage to work actually performed and completed by the contractor. The contractor should carefully document the status of the project prior to beginning work. Among other things, taking pictures of the existing project and including the pictures as an exhibit to the contract will help ensure the prior contractor's work is excluded from warranty coverage.

To the extent an owner wishes to have the subsequent contractor warranty all of the project's work (e.g., the contractor's work and the existing work), the subsequent contractor should negotiate a price premium for the job and/or include terms that the contractor will only warranty items visible work inspected by the contractor. Additionally, the contractor should consult with its insurance agent to confirm coverage issues relating to the work performed by prior contractors.

V. WARRANTIES RELATED TO DEFECTIVE DESIGN

One of the first things a contractor should consider when an owner provides plans for a job is "what if these plans are inaccurate?" Unsurprisingly, damages due to defective designs have resulted in many lawsuits over the decades.

When an owner gives a contractor plans, the owner is also providing an implied warranty that the plans are accurate and free from defects. This is referred to as the *Spearin* doctrine, named after a United States Supreme Court case from 1918.⁹ For nearly 100 years, the *Spearin* doctrine has protected contractors who fully comply with owner-provided design specifications. The *Spearin* doctrine does not allow a contractor to stick its head in the sand and ignore the obvious – but where an owner's plans contain more subtle defects, the contractor's liability is limited, and the owner bears the cost of correction.¹⁰

For example, in a 2002 court case, an owner provided a builder with detailed drawings which were later discovered to be in violation of the local building code. The owner, and not the contractor, was responsible for the revisions to the plans, as well as the demolition and reconstruction of the roof.¹¹ The court specifically said that "a contractor who completes a construction project in a workmanlike manner and in strict compliance with plans furnished by the owner will not be held liable for damages resulting from defects in the owner's specifications." The court reached its conclusion in part because the contractor had specifically disclaimed in its contract any liability for problems associated with plans provided by the owner.

⁹ United States v. Spearin, 248 U.S. 132 (1918).

¹⁰ For further analysis of owners' responsibility to provide accurate plans, see *Owners' Plans – What if They Are Wrong?*, SMACNA Contracts Bulletin #64, (March 7, 2003).

¹¹ Associated Builders, Inc. v. Oczkowski, 801 A.2d 1008, 1012 (Me. 2002).

A key to the *Spearin* doctrine is that the contractor must “substantially” follow the owner’s plans. Owners have a defense if they can establish that the contractor failed to follow the owner’s plans and specifications (even if the specifications were defective). Further, owners may assert that where a defect is reasonably discoverable or (worse) “glaring or obvious,” the contractor is liable.¹² Many standard contracts require the contractor to advise the owner of obvious or glaring defects – and some contracts even attempt to completely shift the responsibility to the contractor for all defects. A contractor should be on the lookout for such provisions before signing a contract.

SMACNA members would do well to insert provisions in their warranties to provide that the owner (and not the contractor) is responsible for defects in plans provided by the owner. Be vigilant in deleting clauses from contracts that attempt to shift the burden of responsibility for defects to the contractor. Contractors have a duty to investigate or inquire about a clear ambiguity, inconsistency or mistake in the specifications or drawings. In other words, the general rule is to act professionally, and bring to everyone’s attention defects that an experienced contractor would normally identify in reviewing plans. Beyond that, a contractor takes comfort that it may not be responsible for subtle defects in plans provided by owners.

Ultimately, there is an extensive amount of litigation on the *Spearin* doctrine and contractors need to be careful when they are completing projects based on a third-party’s plans. Liability under the *Spearin* doctrine must be determined on a case-by-case basis after a careful factual analysis of the situation. As a rule of thumb, there probably will not be liability for a contractor who is merely having discussions (without compensation) with an architect about the building plans. However, if a contractor is involved in any design-build contract, the contractor most likely will incur liability for any defects. Contact your attorney for additional guidance.

VI. LIMITATIONS OF LIABILITY

Unlike *Spearin*, other legal doctrines do not protect the contractor. Most warranties contain a section entitled “Limitation of Liability”; such provisions generally limit the warranty to replacement of the product/parts and excludes consequential damages.¹³ This section describes a few common ways for contractors to reasonably limit liability.

A. Exclusivity of Warranty as Remedy

Unless the contract between the parties says otherwise, liability for damages (a/k/a “remedies”) are presumed to be unlimited. Courts are generally more protective of consumers, however, sophisticated commercial parties have more latitude to limit one another’s warranty liability.¹⁴

¹² Steven B. Lesser and Daniel L. Wallach, *The Twelve Deadly Sins: An Owner’s Guide to Avoiding Liability for Implied Obligations During the Construction of a Project*, 28 Construction Law 15 (Winter 2008).

¹³ For an in-depth discussion of limitation of liability clauses, see *Limitation on Damages’ Clauses – We Made a BIG Mistake!*, SMACNA Contracts Bulletin #67 (May 30, 2003).

¹⁴ Senter, 23 Construction Law 18.

The simplest way to limit damages is to expressly indicate a limitation provision in the contract.¹⁵ Consider this example from a SMACNA member, (note the conspicuous bolded and capitalized print):

THE REMEDIES STATED HEREIN ARE THE SOLE AND EXCLUSIVE REMEDIES FOR FAILURE OF THE ROOFING SYSTEM OR ITS COMPONENTS. CONTRACTOR SHALL NOT BE LIABLE FOR ANY INCIDENTAL, CONSEQUENTIAL OR OTHER DAMAGES INCLUDING, BUT NOT LIMITED, TO, LOSS OF PROFITS OR DAMAGE TO THE BUILDING OR ITS CONTENTS UNDER ANY THEORY OF LAW.

The clause above both indicates that the exclusive remedy is contained in the agreement and it bars incidental and consequential damages (discussed below).

B. Limitations on “Consequential Damages”

“Consequential” damages are damages that are not directly caused by a breach of contractor or warranty. For example, an HVAC system may fail and direct damages are the costs of repairing the HVAC system. Consequential damages could include any personal injury which may have resulted from the failure (e.g., if it collapsed and fell on someone), or any damages that resulted from the delay in the overall project, including interest costs, costs incurred by other contractors, lost profits, etc. A clause limiting consequential damages prevents the contractor from being liable for more than direct damages, and may cap the amount paid by the contractor related to any breach or defect.

C. Liquidated Damages Clause¹⁶

Another way to limit damages is a “liquidated damages” clause. This clause lists a specific amount a party will pay in damages for breaching a contract or causing injury. For example, a contractor will pay a specific agreed-upon amount (e.g., \$300 per day until the breach is cured) as liquidated damages for delays in completion of a project. The number must be a reasonable estimate of an owner’s actual losses caused by delay. A limited damages clause will not be upheld if it is construed as an unreasonable penalty (e.g., \$1,000,000 if the project is a day late on a small project).

D. Time Limitations

A common way to limit liability for defects is to warrant obligations for a specified period following substantial completion of a project (e.g., one year). For example, a “one year” provision is intended to limit a contractor’s liability for “latent” defects which may reveal

¹⁵ Heckman, 27 Construction Law at 9.

¹⁶ For a more detailed analysis of liquidated damages clauses, see *Liquidated Damages’ Clause for Delays – Friend or Foe?*, SMACNA Contracts Bulletin #85 (April 12, 2005).

themselves over a much longer period or time. During the one-year warranty period, the contractor may be called back to repair or replace faulty work for virtually any reason other than abuse or neglect by the owner.

Similarly, unless otherwise prohibited by a statute, a contractor can provide that a warranty is not valid unless and until full payment is received from the property owner. Such a contract provision prevents a situation where a contractor may be liable for warranty work but the property owner has defaulted on payments.

The issue of the limitations also relates to statute of limitations for bringing lawsuits based on construction defects. States generally have adopted the “discovery rule,” meaning the statute of limitations do not begin to run until the defects have, or reasonably should have, been discovered by the owner.

Many states have enacted “statutes of repose” that set outside time limits in order to limit prospective claims regardless of when the defect was discovered. Indeed, many states have legislatively abolished or restricted the contractor’s ability to contractually impose a time limit for claims. Modifying the statute of limitations is a highly contentious, litigated and legislated issue. It is important contractors understand the law in their state before a provision is included.

If permitted by state law, contractors should consider shortening the claim period. The provision must be clear, conspicuous and unambiguously stated, and should establish a readily ascertainable accrual date from which the time will begin to run.¹⁷

E. “Repair or Replace” Clause

A contractor’s warranty should provide that the contractor’s sole obligation, and the owner’s sole remedy, is the repair or replacement of defective work or materials. If the language is clear, that the parties intend to limit the owner’s remedy and the defect can be replaced or repaired, courts are likely to uphold this limitation.

Some language to include in a “repair or replace” clause may include:

1. requiring prompt notice to contractor of alleged defects;
2. notifying owner that contractor will inspect and determine cause of defect;
3. specifying who pays if damage is outside the scope of the warranty; and
4. stating that repair or replacement is the owner’s only remedy and the contractor’s only liability.

If the “repair or replacement” clause fails its essential purpose (i.e., the repair or replacement is impossible, or where repair or replacement would not solve the problem), the

¹⁷ Heckman, 27 Construction Law at 9.

clause may be unenforceable.¹⁸ The general rule when drafting limited liability clauses is to be clear, unambiguous and reasonable.

VII. KEY WARRANTY EXCLUSIONS

In addition to liability limitations, it may be important (depending on the circumstances of a project) to specifically identify items that are not warranted.

A. Specifically Define What the Warranty Excludes

The following is a non-exclusive list of items a contractor may wish to identify as non-covered items:

- X **Defective work caused by owners' defective design.** (Discussed above related to the *Spearin* doctrine.)
- X **Suitability of owner-furnished or owner-specified equipment or materials.** (Similar to the *Spearin* doctrine, by imposing the use of specific products or materials, owners are impliedly warranting that they are suitable for the intended purpose. For example, if a project owner requires the use of rock from a particular quarry, the owner is warranting that the quality of the rock will be sufficient for the project.)¹⁹
- X **Work of other subcontractors.** (This is especially important where subcontractors are selected by owner. Alternatively, the contractor should make its warranty obligations contingent upon the owner's prior effort to hold the subcontractor responsible for the owner's loss. This can be accomplished by including a provision in the contract that each subcontractor will provide a separate warranty to the owner.)²⁰
- X **Owner's actions and normal wear and tear (e.g., abuse, misuse, improper maintenance, modifications).** (An example of such an exclusionary provision is: "Without limitation, this 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 and normal usage.")
- X **Structural failure of building.** (Especially important for roofing contractors, if the roofing system is damaged because the building's structure has failed, the roofing contractor should avoid liability for the resulting damage to the roof.)
- X **Design specifications and blue prints.** (As discussed above, liability for design plans is an important warranty issue and should be included in the contract.)

¹⁸ Heckman, 27 Construction Law at 5.

¹⁹ Lesser & Wallach, 28 Construction Law at 19.

²⁰ Heckman, 27 Construction Law at 10.

- X **Weather or natural disasters.** (If a project is located in an area where it may be subjected to severe weather conditions, include a disclaimer in the warranty so that your company is protected against damage caused by an unusually severe weather event. For this clause, the more specifically defined the better. For example, instead of generically warranting against “wind damage” state that “winds in excess of 55 mph measured at roof level or winds in excess of specified loads” causing damage will void the warranty (see further examples below.)

- X **Other project-specific risks.** (If the work will be exposed to unusual conditions, the warranty should clarify the contractor is not responsible for unreasonable repairs.)

A sample exclusions clause from a SMACNA member is as follows:

- 3. This warranty shall not be applicable if Contractor determines that any of the following has occurred:
 - (a) The roofing system is damaged by natural disasters, including, but not limited to, lightning, insects, winds in excess of 55 mph measured at roof level or winds in excess of specified loads, earthquakes, fire, tornado, and hail; or

 - (b) The roofing system is damaged by any acts of negligence, accidents, or misuse, including but not limited to, excessive traffic, recreational activities, storage of materials on the roof, vandalism, or civil disobedience; or

 - (c) The roofing system is damaged by infiltration of moisture in, through, or around walls, skylights, vents, copings, HVAC units, building structures, or underlying or surrounding areas; or

 - (d) The roofing system is damaged by the building structure failing to have adequate strength to support all live and dead loads, including water and snow loads, or by any other structural defects or failures; or

 - (e) The roofing system is damaged by settlement, distortion, cracking, movement or failure of the roof substrate, coping, walls structural members or components adjacent to the roof or foundation of said building; or

 - (f) The roofing system is damaged as a result of attack by roof top contaminants such as solvents, petroleum, oil products, acids, or other harmful chemicals.

4. This warranty shall be null and void if the Contractor determines that any of the following has occurred:

(a) If, after installation of the roofing system by the Contractor, there are any alterations, test cuts, or repairs made on or through the roof, or objects such as, but not limited to, structures, fixtures, or utilities are placed upon or attached to the roof without first obtaining written authorization from the Contractor; or

(b) Failure by the Owner to use reasonable care in maintaining the roof, including, but not limited to, periodic cleaning of drains and removal of harmful debris from the roof.

B. Statutory Exclusions

Some states have enacted statutes that exclude certain things from warranties. For example, in Minnesota, Minn. Stat. §327.03 specifically limits a builder's liability from:

- (a) loss or damage not reported by the vendee or the owner to the vendor or the home improvement contractor in writing within six months after the vendee or the owner discovers or should have discovered the loss or damage;
- (b) loss or damage caused by defects in design, installation, or materials which the vendee or the owner supplied, installed, or directed to be installed;
- (c) secondary loss or damage such as personal injury or property damage;
- (d) loss or damage from normal wear and tear;
- (e) loss or damage from normal shrinkage caused by drying of the dwelling or the home improvement within tolerances of building standards;
- (f) loss or damage from dampness and condensation due to insufficient ventilation after occupancy;
- (g) loss or damage from negligence, improper maintenance or alteration of the dwelling or the home improvement by parties other than the vendor or the home improvement contractor;
- (h) loss or damage from changes in grading of the ground around the dwelling or the home improvement by parties other than the vendor or the home improvement contractor;
- (i) landscaping or insect loss or damage;
- (j) loss or damage from failure to maintain the dwelling or the home improvement in good repair;
- (k) loss or damage which the vendee or the owner, whenever feasible, has not taken timely action to minimize;
- (l) loss or damage which occurs after the dwelling or the home improvement is no longer used primarily as a residence;
- (m) accidental loss or damage usually described as acts of God, including, but not limited to: fire, explosion, smoke, water escape, windstorm, hail or lightning, falling trees, aircraft and vehicles, flood, and earthquake, except

- when the loss or damage is caused by failure to comply with building standards;
- (n) loss or damage from soil movement which is compensated by legislation or covered by insurance;
 - (o) loss or damage due to soil conditions where construction is done upon lands owned by the vendee or the owner and obtained by the vendee or owner from a source independent of the vendor or the home improvement contractor; and
 - (p) in the case of home improvement work, loss or damage due to defects in the existing structure and systems not caused by the home improvement.

Even though a statute may provide for certain exclusions and a contractor may assume that it is covered, it is a good business practice to include the excluded warranty items within the contract, and/or include a reference to the statute. Doing so will ensure that the owner better understands warranty limitations of the project and minimize the risk for confusion that may result in litigation. Check with legal counsel to see whether your state provides such statutory exceptions, and whether they may be modified or waived.

VIII. CONCLUSION

A well-drafted warranty sends a clear message that the contractor stands behind its work while protecting the contractor from indefinite liability from unexpected defects and unreasonable repairs. A warranty also provides stability and peace of mind. When a job is finished, a warranty helps both parties determine their respective responsibilities. Understanding the nature of express and implied warranties, the contractor's responsibilities under federal and state law, and the limitations to be included in the warranty, assist the contractor in drafting the "perfect" warranty for each job.

However, "perfection"²¹ is in the eye of the beholder. The party sitting across the negotiating table will also have demands, definitions and ideas regarding each of the parties'

²¹ The Summer 2007 issue of The Construction Lawyer contains an example of a one-year warranty which includes many of the issues raised above:

Exclusive One-Year Warranty and Remedy and Disclaimer of All Other Warranties and Remedies

1. ***Exclusive Warranty.*** For a period of one (1) year following the date of Substantial Completion of the Contractor's Work, the Contractor warrants to the Owner that its Work will conform substantially with the requirements of the applicable plans and specifications. Work not conforming to the requirements of this Exclusive Warranty may be considered "Defective Work." In the event of any conflict between this Exclusive Warranty and any other provision or requirement of the Contract Documents, the terms of this Exclusive Warranty shall control. This Exclusive Warranty excludes, without limitation, any Defective Work caused, in whole or in part, by the Owner's defective or unsuitable design or abuse, misuse, modification, improper or insufficient maintenance, improper operation, or normal wear and tear of Contractor's Work.

2. ***Exclusive Remedy.*** For a period of one (1) year following the date of Substantial Completion of the Contractor's Work, the Contractor will, at its election, repair or replace

Defective Work unless said repair or replacement would be economically wasteful under the circumstances, in which event Contractor shall compensate Owner for the diminished value of Contractor's Work due to the Defective Work. The Contractor's obligation to repair or replace Defective Work (or, at its election, compensate the Owner for the diminished value of Contractor's Work) provides the sole and exclusive remedy to, and provides the sole and exclusive damages of, Owner for any cause of action asserted against Contractor arising out of or relating to Contractor's Work, whether Owner seeks to recover from Contractor under theories of contract, warranty, tort, or any other theory. In no event shall Contractor be liable for any special, indirect, incidental, or consequential damages.

3. **Owner's Notification Requirement.** In order to obtain the benefits of Contractor's Exclusive Remedy, and as a condition precedent to any obligation of Contractor under the Exclusive Remedy, the Owner shall give written notice of any allegedly Defective Work promptly upon discovery of the same (but in no event more than one (1) year following the date of Substantial Completion of Contractor's Work), and allow the Contractor a reasonable period of time within which to investigate and repair or replace the same. If the Owner fails to notify the Contractor promptly of the allegedly Defective Work, and fails to give the Contractor a reasonable period of time within which to investigate and repair or replace the Defective Work, the Owner waives the right to require repair or replacement by the Contractor or to make any claim against the Contractor based upon the Contractor's Work.

IT IS THE MUTUAL INTENT OF THE OWNER AND CONTRACTOR THAT THE EXCLUSIVE WARRANTY AND EXCLUSIVE REMEDY SET FORTH ABOVE ARE GIVEN BY THE CONTRACTOR IN LIEU OF: (1) ALL OTHER EXPRESS OR IMPLIED WARRANTIES AND REMEDIES, INCLUDING, WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF HABITABILITY, MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND WORKMANLIKE CONSTRUCTION, WHICH ARE HEREBY DISCLAIMED; AND (2) ALL OTHER CONTRACTUAL, EQUITABLE, OR TORT-BASED CAUSES OF ACTION OR REMEDIES WHATSOEVER RELATING TO THE CONTRACTOR'S WORK, IT BEING THE EXPRESS INTENT OF THE PARTIES THAT THE OWNER'S SOLE REMEDY WITH RESPECT TO CONTRACTOR'S WORK IS THE EXCLUSIVE WARRANTY AND EXCLUSIVE REMEDY.

Claims Deadline. The Owner shall file a [Demand for Arbitration] [Civil Lawsuit] against the Contractor arising out of or related in any way to the Agreement, the Project, or allegations of Defective Work (as defined in Contractor's Exclusive Warranty) or Contractor's failure to repair or replace the same, within one (1) year after Substantial Completion of the Contractor's Work. The parties agree and understand that the requirements stated herein are intended to reduce or modify statutes of repose or limitation and agree that the terms stated herein will govern their agreement to the exclusion of such statutes. The Owner waives all claims and causes of action not commenced by filing as set forth above within this one-year period, regardless of when, or whether, the Owner discovers or notifies the Contractor of the claims, demands or causes of action, or Defective Work within this one-year period and regardless of whether the Owner's claims are brought for breach of contract, tort, breach of warranty, or otherwise. The one-year period within which the Owner has to file all claims or causes of action shall not be extended by any corrective work performed by or on behalf of the Contractor or for any other reason unless the Contractor expressly agrees so in writing.

respective responsibilities. The give-and-take of negotiating contracts will undoubtedly require compromise from a document that perfectly protects a contractor while showing an owner that the contractor stands behind its work.

EXHIBIT A
ISSUES CHECKLIST FOR CONTRACTS WITH A WARRANTY

- Enter into a written contract.
- Clearly define the parties to the transaction.
- Ensure all parties are described by their correct legal names.
- Ensure all parties properly sign the contract.
- Define the type of transaction (e.g., commercial or residential).
- Understand the state law that may apply to the transaction, and ensure the contract and warranty provisions comply with the law.
- Precisely define all express warranties.
- Define the scope and duration of any warranties.
- Define any preconditions prior to the effectiveness of a warranty (e.g., full payment).
- Clarify what items are excluded from the warranty.
- Define whether the warranty is transferrable.
- Consider modifying implied warranties. If modifying warranties, ensure such modifications are conspicuously described in the contract and comply with applicable law.
- Consider terms that property owner must satisfy prior to triggering warranty provisions (e.g., notice of repair, full payment, etc.).
- Contract for special circumstances, such as when a contractor is finishing another contractor's work or you are contracting using owner's plans (*a/k/a Spearin doctrine*).
- Consider including or limiting liquidated damages clause.
- Consider limiting consequential damages.
- Confirm the applicable statute of limitations period.
- Define whether warranty repair is an exclusive remedy.

Remember: No matter what warranty provisions are contained within your contract, state or federal law may trump or modify such provisions. Accordingly, it is always advisable to have your attorney review your contract prior to its execution.