But Is She Really, Truly Dead?
Warranties, Guarantees, Decennial Liability and Statutes of Limitation/Repose

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I. **Express Warranties**

An express warranty is “an assurance by one party to a contract of the existence of a fact upon which the other party may rely.”\(^1\) As stated in the Uniform Commercial Code (UCC), “the whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell.”\(^2\) In order to recover for breach of an express warranty, a plaintiff must prove: (1) an express affirmation of fact or promise by the seller relating to the goods; (2) that such affirmation of fact or promise became a part of the basis of the bargain; (3) that the plaintiff relied upon said affirmation of fact or promise; (4) that the goods failed to comply with the affirmation of fact or promise; (5) that the plaintiff was injured by such failure of the product to comply with the express warranty; and (6) that such failure was the proximate cause of the plaintiff’s injury.\(^3\) Express warranties can be created orally or in writing. When analyzing a warranty issue, it must be determined whether the transaction relates to the sale of goods or, rather, the rendering of services. If the transaction is for the sale of goods, then the UCC will apply. Of course, in the context of construction, the rendering of services and the sale of goods is often conflated. In that case, most courts follow the “predominant factor test” set forth in Article 2 of the UCC. Under the predominant factor test, the Court looks at whether the predominant factor, thrust, and purpose of the contract, reasonably stated, is the rendition of a service, with goods only incidentally involved, or is a transaction of sale, with labor incidentally involved.\(^4\) If the later, the UCC will apply to the entire transaction.\(^5\)

A. **Form Contracts**

Every industry standard form construction contract and subcontract includes an express warranty. Under the new AIA Document A401-2017 Standard Form of Agreement Between Contractor and Subcontractor, Section 4.6.1, the subcontractor warrants to the owner, architect, and contractor that materials and equipment furnished under the Subcontract will be of good
quality and new, that the work will conform to the requirements of the subcontract documents, and will be free from defects. Similar warranty obligations are found under ConsensusDocs 450 Standard Agreement Between Design-Builder and Subcontractor and DBIA 560 Standard Form of Agreement Between Design-Builder and Design-Build Subcontractor. The subcontractor’s warranty obligations are not limited, however, to the terms as stated within the standardized (and most non-standardized) form agreements with respect to goods and workmanship but also extend to those warranties as set forth in specifications, construction documents, and other contract documents.

B. Uniform Commercial Code

Warranties and assurances with regard to goods are governed by the UCC, Section 2. While words such as “warrant,” “guaranty,” “assure,” and “ensure” all give rise to a warranty obligation, such words need not necessarily be present in order for an express warranty to arise. Any affirmation or promise is sufficient to establish a warranty obligation. For example, in *Ricwil, Inc. v. S.L. Pappas & Co.*, the manufacturer of a copper piping system provided a general warranty that the piping would be free from defects in material and workmanship, but also represented in its product brochure that the system could handle temperatures up to 250 degrees Fahrenheit. The court held that the representation in the brochure, which was provided to the seller prior to its purchase of the copper system, created an express warranty that the system would withstand temperatures of up to 250 degrees.

In making a warranty claim, the buyer must show that the representation was “part of the basis of the bargain.” Although courts are not uniformly consistent on the issue of reliance, it will typically be assumed that the representation was part of the basis of the bargain unless the seller can show otherwise. In *Kraft Foods N. Am., Inc. v. Banner Eng’g Sales, Inc.*, an
engineering company’s specification sheet provided that the bolts in the pipe joints for an oil heating system to be used in Kraft’s food manufacturing process could be torqued to 60 foot-pounds. When Kraft torqued the bolts to 60 foot-pounds, the pipe joints failed from the excessive compressive force. The court held that the specification sheet created an express warranty that the bolts could function properly when torqued to 60 foot-pounds, and that this warranty was presumed to be part of the basis of the bargain between the parties.\textsuperscript{10} This presumption could not be overcome by the engineering company’s argument that it did not intend, nor was it qualified, to provide mechanical engineering services.\textsuperscript{11}

For buyers, one of the many benefits of obtaining an express warranty is that it cannot be disclaimed.\textsuperscript{12} Words or conduct tending to create an express warranty and words or conduct tending to negate or limit an express warranty will be construed consistent with one another whenever it is reasonable to do so.\textsuperscript{13} If this cannot be done, the express warranty will prevail. Under UCC Section 2-316, where the express warranty is itself limited or where other limitations can be read consistent with the warranty, the limitation will be effective.

\textbf{C. Express Warranty Limitations}

One way to limit and/or disclaim an express warranty is to limit the remedy for any breach by the subcontractor. Often contained in many subcontracts, and allowed by UCC Section 2-316(4), is the option to repair or replace the allegedly defective goods. It should be noted, however, that a limited remedy is presumed to be optional unless its exclusivity is expressly agreed to by the parties.\textsuperscript{14} For this reason, drafters of subcontracts must be sure that the limited remedy clause clearly provides for that remedy’s exclusivity.

Section 2-719 of the UCC further provides that a remedy limitation will be enforced unless the remedy fails of its essential purpose or is unconscionable.\textsuperscript{15} Courts have developed
factors to be applied in making a “fails of its essential purpose” determination. These factors include: (1) the facts and circumstances surrounding the contract; (2) the nature of the basic obligations of the parties; (3) the nature of the goods involved; (4) the uniqueness or experimental nature of the items; (5) the general availability of the items; and (6) the good faith and reasonableness of the provision. As applied to a limited remedy, such as repair or replacement of defective goods, such remedy would likely fail the essential purpose test if the seller refused to repair or replace the goods or the repair or replacement of the defective goods would not rectify the problem. For instance, in Milgard Tempering, Inc. v. Selas Corp. of America, a limited repair or replace warranty on a glass tempering furnace was found to have failed of its essential purpose when the seller failed to make the necessary repairs for over two and a half years.

The limited remedy of repair or replace is often coupled with a waiver of consequential damages and a limitation of liability. Such exclusion of consequential damages as a remedy for a breach of warranty is permitted by the UCC unless it is found to be unconscionable. In determining whether a waiver of consequential damages is unconscionable, courts analyze whether the transaction was “procedurally” unconscionable and whether the exclusion is “substantively” unconscionable. Factors for making this determination include: (1) the nature of the injuries suffered by the plaintiff; (2) whether the plaintiff is a substantial business concern; (3) disparity in the parties’ bargaining power; (4) the parties’ relative sophistication; (5) whether there was an element of surprise; and (6) the conspicuousness of the clause. In A & M Produce Co. v. FMC Corp., the court held that warranty disclaimer in a contract for the sale of crop weight-sizing equipment was unconscionable where the manufacturer/seller did over $40 million in sales in that industry per year, whereas the local farmer/purchaser had approximately fifty
employees at most, and where the farmer was not given an option to negotiate the manufacturer’s form contract.\textsuperscript{22}

There is a split of decisions and a generally open question as to whether, when a limited remedy is coupled with a waiver of consequential damages and/or a limitation of liability, and the limited remedy fails the essential purpose determination, the consequential damages provision remains enforceable. In \textit{Eastman Chem. Co. v. Niro, Inc.},\textsuperscript{23} the court held that the consequential damages waiver remains enforceable notwithstanding the fact that the limitation of remedy had failed of its essential purpose.\textsuperscript{24} But in \textit{Murray v. Holiday Rambler, Inc.},\textsuperscript{25} the court took the opposite position, holding that the failure of the limited warranty of its essential purpose invalidated the consequential damage waiver.\textsuperscript{26} Accordingly, the purchaser was permitted to recover consequential damages “as though the limitation had never existed.”\textsuperscript{27}

D. Services

A subcontractor’s express warranty of workmanship guarantees a particular standard of performance. Contrast this with a performance specification which guarantees a particular result will be achieved. While most owners would like or expect perfection from their contractors and subcontractors, such level of unattainable perfection is not required to substantially perform under a construction contract. Again, looking at AIA Document A401-2017, Section 4.6.1, the subcontractor warrants that the work will conform to the requirements of the contract documents and will be free from defects, “except for those inherent in the quality of the work the contract documents require or permit” and excluding “damage or defect caused by abuse, alterations to the work not executed by the subcontractor, improper or insufficient maintenance, improper operation, or normal wear and tear under normal usage.”
When the question arises as to whether the owner or contractor are entitled to strict compliance with plans and specifications, the issue cannot be resolved without discussion of the economic waste doctrine. Under the economic waste doctrine, it must be evaluated whether the cost to correct the work in order to ensure strict compliance with the plans and specifications exceeds the diminution in value of the project as a result of the failure to strictly comply with such contract documents. While there is a split of authority on this issue, many courts hold that if the cost to correct greatly exceeds the diminution in value, then the cost to correct will not be the proper measure of damages. In *Kelley*, for instance, diminution in value was found to be the appropriate measure of damages when the cost to repair the plaintiff’s defectively installed (cracking) driveway would have been around $130,000, but evidence was presented that the defective condition of the driveway would not affect the market value of the property. But *Landis v. William Fannin Builders, Inc.* demonstrates that there are exceptions to the rule. There, a builder installed siding of a different color than that selected by the buyers, resulting in an unsightly, patchwork appearance. Although the diminution in value of the home resulting from the mismatched siding was only $8,500, the buyers were entitled to recover the full amount necessary to replace the siding—$66,906.24. The court reasoned that since the buyers contracted for a custom home with a specific look, the cost to achieve that look was the only reasonable measure of damages.

E. **Performance Guarantees and Specifications**

Performance guarantees and specifications act to guaranty a particular result or define the intended result of the subcontractor’s work. It is a warranty by the subcontractor that a certain portion of the work will be performed as specified and sets forth the standard the subcontractor is to achieve. Often, disputes arise over whether a particular specification is a “performance” or
“design” specification. “Performance specifications” and “design specifications” are simply labels. They do not “independently create, limit, or remove a contractor’s obligations.”

It is the obligation imposed by the specification that determines the extent to which it is “performance” or “design,” not the other way around.

The difference between performance and design specifications can be described as follows:

Design specifications dictate the ‘how’ governing a contractor’s tasks, in contrast to performance specifications, which concern the ‘what’ that is to be done… The relevant inquiring [as to the distinction between these specifications] concerns quality and quantity of the obligations that the specifications impose. Hence, detailed measurements, tolerances, materials, i.e., elaborate instructions on how to perform the contract qualify as design specifications. In other words, where the specifications are described in precise detail and permit the contractor no discretion, they are design specifications. In contrast, where the specifications set forth simply an objective or standard and leave the means of attaining that end to the contractor, they are performance specifications.

The difference between a design specification and a performance specification is important under what is known as the Spearin doctrine based upon the United States Supreme Court case U.S. v. Spearin, 248 U.S. 132 (1918). Under the Spearin doctrine, a contractor (and subcontractor) is not liable for defects in plans and specifications furnished by the owner if it constructs the project pursuant to plans and specifications. This is because the owner impliedly warrants the plans and specifications it furnishes to the contractor/subcontractor. The Supreme Court in Spearin stated:

“If the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications. This responsibility of the owner is not overcome by the usual clauses requiring builders to visit the site, to check the plans, and to inform themselves of the requirements of the work….”

II. **Implied Warranties**

Benjamin Franklin once famously penned that nothing is certain “except death and taxes.” For most subcontractors, two scenarios that are virtually guaranteed in any project are
low margins coupled with substantial risk. As a result, subcontractors can face financial ruin when presented with a claim by an owner or general contractor after their work has concluded, on a liability not even contemplated when the subcontract was signed.

Post-construction liability can arise in the form of express warranties or implied warranties, and implied warranties may be based on statute or through common law. While implied construction warranties are generally similar from state to state, many courts treat them somewhat interchangeably or fail to distinguish among them, resulting in a lack of uniformity and/or among confusion among implied warranty case law.

A. Warranty of Good Workmanship / “Workman-Like Manner”

Even with express warranties written into the contract regarding the quality of work, the law in some states provides that an owner can rely on warranties not spelled out, such as the implied warranty to perform its work in a diligent and reasonably skillful, workmanlike manner. This implied warranty comes into play in situations where the contractual warranty has expired or the owner failed to give notice during the requisite period. Alternatively, this implied warranty may fill a gap when the parties fail to have a written contract or to expressly address warranty issues in their contract.36

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, although the terminology varies.37 The guidelines of this warranty are more akin to a standard of care issue, as opposed to warranting perfect results. In other words, the test for breach of the implied warranty of proper workmanship is “reasonableness, not perfection; the standard being, ordinarily, the quality of work that would be done by a worker of average skill and intelligence.”38 Other courts have framed the test 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.”

A contractor or subcontractor who breaches the implied warranty to perform in a workmanlike manner is liable for damages to repair the constructed improvement to the condition contemplated by the parties at the time of the contract.

The implied warranty doctrine does not typically extend to materials; rather, 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. When an owner specifies a particular material, the owner’s implied warranty of the specifications supersedes the contractor’s implied warranty of good workmanship. 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 warranty for latent defects in its paint.

B. Warranty of Habitability / Fitness for a Particular Purpose

Most every state recognizes an implied warranty on the part of a builder/vendor of a new residence that the structure will be suitable for habitation. In general, this warranty applies only to residential construction, not to commercial property. However, one Arizona court has applied the warranty to condominium structures. Various courts have held the implied warranty of habitability to cover a large range of defects, including a defective septic system, roof leaks, a foul odor, and uneven settlement. 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.

C. General Contractor Insolvency a Direct Route to Subcontractors

Why do subcontractors need to be concerned about this implied warranty? Consider the recent decision of by the *Sienna Court Condominium Association v. Champion Aluminum*
Corporation. In that case, an appellate court in Illinois addressed whether a property owner could bring a latent defect claim directly against one or more subcontractors. As early as 1983, Illinois had case law permitting a homeowner to proceed against a subcontractor, directly, where the general contractor was insolvent and the defect was caused by the subcontractor(s).

However, the Sienna case involved an issue where even though the general contractor was insolvent, there was recourse available to the homeowners through a warranty fund and/or insurance by the general contractor. The court reiterated what it believed to be a bright-line rule that the solvency of the general contractor controls whether a claim may be brought directly against a subcontractor or not. Insolvency, the court found, means that the general contractor’s liabilities exceed the value of its assets; and the general contractor has stopped paying its debts in the ordinary course of business. Once it has been determined that the general contractor is insolvent, under this definition, the court found it irrelevant whether the homeowner had received some funds from the GC’s warranty fund or might receive some funds from the GC’s insurance; and allowed the claims to be brought against the involved subcontractors. The court held that the implied warranty is a claim for construction defects and may not be imposed against material suppliers who do not engage in actual construction activities.

Additionally, two Michigan cases decisions have expressly limited the applicability of the implied warranty of habitability to claims involving new residences sold by a “builder-vendor.” In Smith v Foerster-Bolser Construction, Inc, the court held that where the purchaser hired a contractor to build a home on land owned by the purchaser, the purchaser could protect herself by including express warranties in the contract and the court would not imply a warranty of habitability. The court also noted that the purchaser could use ordinary negligence principles to recover for defective work. Similarly, in Kisiel v Holz, the court held that a purchaser could not
sue a subcontractor for breach of an implied warranty of habitability because the warranty only
applied to a “builder-vendor.”55

D. Understanding Privity Issues in Implied Warranty of Habitability56

Typically, enforcement of an implied warranty requires privity of contract. Because implied warranty claims sound in contract, the general rule is that only parties and privies may enforce them. However, this rule proved to be inequitable in some “new home construction” cases where courts were faced with concerns that builders might escape the implied warranty by hiding behind the first purchaser. Arizona has recently had occasion to address the ambits of the implied warranty arising out of new home construction.

Homeowners associations (HOAs) typically plead breach of implied warranty causes of action, a theory intended to protect innocent buyers.57 A breach of warranty claim can be based on express warranty provisions in the contract between an HOA and the GC, builder, or developer, or it can be based on implied law, or both. Many states are split on whether implied warranty claims can be brought against GCs or subcontractors that were not in privity with the original home purchaser.58

In some jurisdictions, privity is not necessary to enforce an implied warranty claim; these jurisdictions include Idaho, Arizona, Illinois, New Jersey, Mississippi, Texas, Oklahoma, South Carolina, Indiana, Wyoming, Arkansas, and most recently, New Hampshire.59 Privity is necessary in jurisdictions including New York, Georgia, Minnesota, South Dakota, Connecticut, Colorado, Florida, and Missouri. However, states differ on the implied warranty causes of actions that they allow.60 In Connecticut, no privity is needed and homeowners may recover from subcontractors on an implied warranty theory.61

**Arizona Treatment of Habitability Warranty**
Arizona jurisprudence on this warranty is particularly interesting and continues to evolve. First, in *Columbia Western Corp. v. Vela*, the Arizona Court of Appeals expanded implied warranty liability to cover builder-vendors with overarching responsibility for “new home construction.” The Court viewed such an implied warranty as necessary to protect new-home buyers because: (1) modern building construction is complex; (2) the builder holds himself out as an expert in building houses for individual new-home buyers; and (3) ordinary homebuyers are not sophisticated enough to discover latent defects in a new home.

The Arizona Supreme Court went one step further in *Richards v. Powercraft Homes, Inc.* holding that implied warranty of workmanship and habitability claims can be made by subsequent purchasers against builders or developers, and these are particularly favored in circumstances of latent defects. However, *Richards* failed to address whether implied warranty claims can be brought against contractors and subcontractors that are not in privity with the original home purchasers. The Court later took this exception one step further in *Lofts at Fillmore Condominium Assoc. v. Reliance Commercial Construction, Inc.* In *Lofts*, the Court allowed purchasers to enforce the implied warranty against non-vendor builders, regardless of privity. Both cases reasoned that the purpose for the implied warranty – to protect innocent buyers and hold builders responsible for their work – would be defeated unless an exception to the privity requirement applied under the circumstances.

More recently, the Arizona Court of Appeals has held that a lack of contractual privity precludes homeowners from asserting claims against subcontractors for breach of implied warranty of workmanship and habitability. In *Yanni v. Tucker Plumbing, Inc.*, a group of plaintiff-homeowners discovered allegedly defective plumbing components in their homes.
Instead of suing the general contractor in charge of the homes’ construction, the homeowners sued the plumbing subcontractors directly.

The homeowners argued that the *Richards/Lofts* exception completely abrogated the rule requiring privity in implied warranty cases. Thus, according to the homeowners, they could sue the defendant-subcontractors directly, regardless of privity. The subcontractors, however, successfully argued that *Richards/Lofts* did not completely abandon the privity requirement for all implied warranty claims. They prevailed on summary judgment, arguing that the *Richards/Lofts* exception applied only in a very narrow context. The subcontractors further argued that the implied warranty for “new home construction” runs only to the general contractor with overarching responsibility for the entire project—not to each individual subcontractor who may have hammered a nail or installed a pipe.

Because the subcontractors were not in charge of the entire project, having worked only on the plumbing, they could not have warranted any particular home as a whole, only their specific work. This specific warranty also ran only to the general contractor, who warranted the entire home. Although the *Richards/Lofts* exception would have applied to a claim against the general contractor, it did not apply to the homeowners’ claim against the subcontractors. The Court of Appeals agreed with the subcontractors, affirming summary judgment. The Arizona Supreme Court denied the homeowners’ petition for review. Thus, privity of contract is still the rule for breach-of-implied-warranty claims against subcontractors, regardless of whether the work involves new home construction. Homeowners with implied warranty claims must sue the general contractor in charge of “new home construction” if they are to find any recourse.

At least one court has held that the warranty of habitability applies even to amateur builder/vendors, not merely construction companies. However, mere performance of limited
rehabilitation work may not give rise to an implied warranty of habitability. Many jurisdictions extend the warranty of habitability to subsequent purchasers of a residence, but some jurisdictions do not recognize an implied warranty of habitability running in favor of subsequent purchasers. Issues of the extent and duration of implied warranties of habitability are unresolved and subject to debate in many jurisdictions.

**Illinois Treatment of Habitability Warranty**

In addition to the 2017 *Sienna* decision discussed above, Illinois case law is particularly noteworthy in any examination of the implied warranty exposure facing subcontractors. In 2012, an Illinois appellate court made clear that the implied warranty of habitability extends beyond developers to claims against general contractors who are not in privity of contract with the homeowner. Additionally, the decision confirmed that subcontractors have exposure to direct claims from homeowners under the IWOH if the general contractor is insolvent. This decision underscored that general contractors and subcontractors in Illinois face significant risk of direct IWOH claims for latent construction defect claims.

While the developer/seller is often protected from this liability through disclaimers in the sales contract (which are enforceable under Illinois law), the general contractor and its subcontractors often do not have this protection because they are not explicitly included in the disclaimers contained in the sales documents. Consider the facts *Pratt Condominium*.

The developer hired Platt Construction Group, Inc. (“Platt”) as its general contractor. Platt subcontracted the masonry work to EZ Masonry, Inc. (“EZ Masonry”). The developer’s sales contracts contained a one-year Homeowner’s Limited Warranty that included a disclaimer of the IWOH:

(c) WAIVER-DISCLAIMER. THE SELLER HEREBY DISCLAIMS AND THE PURCHASER HEREBY WAIVES THE IMPLIED WARRANTY OF HABITABILITY DESCRIBED UB PARAGRAPH
10(B) ABOVE AND THEY ACKNOWLEDGE, UNDERSTAND AND AGREE THAT IT IS NOT PART OF THE CONTRACT. Effective [sic.] and Consequences of this Waiver-Disclaimer. Purchaser acknowledges and understands that if a dispute arises with Seller and the dispute results in a lawsuit, Purchaser will not be able to rely on the Implied Warranty of Habitability described above, as a basis for suing the Seller or as a basis of a defense if Seller sues the Purchaser.

Shortly after closing, owners discovered water leaks in units and common areas. The condominium association filed suit, but by that time the developer was insolvent. Pratt moved to dismiss the claims against it on the ground that IWOH applies only to “builder-vendors,” i.e. builders who construct residential buildings and sell units in the buildings.

The trial court agreed and dismissed the IWOH claim, but the appellate court reversed, holding that the IWOH applies to builders of residential homes regardless of whether they are involved in the sale of the homes (the “Pratt I opinion”). After remand, the association filed an amended pleading against the developer, Platt and EZ Masonry for breach of the IWOH. Platt moved to dismiss, arguing that the individual unit owners waived the IWOH in their real estate contracts. Platt argued that because the unit owners waived the warranty as to the developer, they also waived it as to Platt and EZ Masonry. The trial court agreed and dismissed the IWOH claims against Platt and EZ Masonry. EZ Masonry also moved to dismiss on the ground that it could not be sued unless the general contractor (Platt) was insolvent. The trial court denied the motion.

The First District reversed. Based on Pratt I, the Court reiterated that the IWOH applies to builders who are not vendors, because of the underlying policy to protect homeowners and apportion responsibility for latent defects that homeowners cannot immediately discover. Thus, the claim against Platt could proceed even though Platt was a builder and not a seller. The court further held that Platt could not meet the high standard required to prove a knowing waiver of the
IWOH because the disclaimer at issue only referenced the seller and purchaser; it did not explicitly include the general contractor or its subcontractors.

The court found “nothing whatsoever in the contract to indicate that the individual unit owners agreed to disclaim the warranty as to Platt or EZ Masonry, or that they were even aware of the possible consequences of disclaiming the warranty as to these two parties.” The First District then held that the association could not sue EZ Masonry without first establishing that Platt was insolvent. Rejecting the association’s attempt to rely on Pratt I, the court cautioned that it had not considered the applicability of the IWOH to subcontractors in that opinion. Rather, Pratt I addressed only the implied warranty’s application to builders who are not also vendors. The court held that the association must demonstrate that Platt was insolvent in order to assert a direct IWOH claim against EZ Masonry.

E. **Implied Warranties “Lurking” in Vendor Literature**

Another source of implied warranties for subcontractors may arise in the marketing materials, brochures, and literature distributed by a manufacturer or vendor in the pursuit of selling construction materials or equipment. 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 held that the warranty in the literature may be implied into the contract between the owner and the contractor.

This theory is based primarily on the notion that an owner’s approval of the product or 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 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. 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. 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.” It also 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.”

It is important to recognize that under this jurisprudence, 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. Similarly, when a contractor submits a request to use an alternative material from that specified, the contractor/subcontractor 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.
III. Periods of Limitation: But Is She Really, Truly Dead?

A claim for breach of warranty must be filed within the time allowed by the applicable statutes of limitation or repose. Most jurisdictions allow parties to shorten or extend that period by agreement. The agreement must be particular and leave no question as to the intent of the parties to alter the period of limitations for breach of warranty claims. A poorly drafted or ambiguous term may well be construed as a separate promise by a contractor to return and address defective workmanship, in addition to other warranty obligations. The owner and contractor equally benefit from clarity in understanding their respective rights and obligations when it comes to warranty requirements.

A. Statutes of Limitation and Repose

In most jurisdictions, the statute of limitations for a breach of express warranty claim is determined by the statute of limitations for breach of contract. The time of accrual of the statute of limitations will vary depending on the state. For example, some states’ statutes of limitations accrue at substantial completion, while others accrue upon discovery of the disputed defect. Obviously, this is an important distinction, and one the practitioner must note at the outset of a claim analysis. A breach of implied warranty claim is generally regarded as a claim sounding in negligence, and is therefore subject to state statutes of limitations for negligence causes of action. In most jurisdictions, this means that implied warranty claims must be brought within three years of the time that the claim was discovered or reasonably should have been discovered.

For breach of warranty claims involving the sale of goods, the UCC provides a four year statute of limitations. The UCC allows parties to reduce the period to no less than one year, but the period may not be extended. Therefore, UCC warranties, express or implied, commence upon the tender of the goods, without regard to whether the tender was of conforming or conforming goods. This is a drastic limitation because the breach is deemed to occur at the
tender of delivery and not when the defect is discovered. This concept excludes claims for latent defects in goods, which may well present long after four years from date of delivery. There is however an exception built into the UCC when the warranty “explicitly” extends to future performance, for example a roof warranty that extends 10 or 20 years.

Regardless of the time of discovery of the breach of warranty, a statute of repose may well prevent an untimely claim. For example, in North Carolina, a claimant cannot bring an action arising out of a defective or unsafe condition of an improvement to real property after six years from the disputed act or omission or substantial completion. Unlike a statute of limitations, a statute of repose is inflexible, regardless of the date of discovery.

B. **Contractual Warranty Periods**

The language negotiated by the parties is paramount and will, in most instances, dictate the extent of their warranty obligations. A review of the warranty requirements in the American Institute of Architects (AIA) A201 “General Conditions of the Contract for Construction” is instructive.

The A201 contains the following warranty language, commonly referred to as the “quality standard:”

§ 3.5 WARRANTY
The Contractor warrants to the Owner and Architect that materials and equipment furnished under the Contract will be of good quality and new unless the Contract Documents require or permit otherwise. The Contractor further warrants that the Work will conform to the requirements of the Contract Documents and will be free from defects, except for those inherent in the quality of the Work the Contract Documents require or permit. Work, materials, or equipment not conforming to these requirements may be considered defective. The Contractor’s warranty excludes remedy for damage or defect caused by abuse, alterations to the Work not executed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage. If required by the Architect, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

The contractor therefore warrants (1) that materials and equipment used by the contractor will be new and of good quality unless otherwise required; (2) the work will be free from defects
other than those inherent in the work as specified; and (3) the work will conform to the requirements of the contract documents. This is a relatively unremarkable, vanilla promise on the part of the contractor. Owners will often try to strengthen this warranty term in the A201, by referencing specific or specialty materials, finishes or other requirements unique to the project. Notably, there is no time limitation.

The A201 also contains a one year “call-back period,” as follows:

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

This language is generally construed as a separate promise by the contractor to return and address defects when properly notified by the owner, for a one-year period following substantial completion.

A contractor wishing to eliminate any and all warranty obligations beyond a designated, contractual period must clearly state as much in the written contract with the owner. The written term must explicitly state that the intent of the parties is to limit all warranty obligations, express or implied, except for that which is specifically contained in the subject clause, and that all other obligations are excluded. Any language that falls short of this standard, may well fail to accomplish the type and extent of limitation intended or expected by the contractor.

C. When the Contractual Warranty is an Exclusive Remedy

As stated above, a contractual warranty operates as an exclusive remedy only when a court or finder of fact is able to conclude that on its face it is clear the parties intended for this result. Otherwise, the warranty provision will not be interpreted as a limitation of claims.

In Cree Coaches, Inc. v. Panel Suppliers, Inc., the owner filed a complaint against the contractor after the collapse of a building under the weight of snow. The project was completed
in 1960. In January 1967, the building collapsed because of snow build up. The owner alleged negligence in workmanship and design, breach of the contract of express and implied warranties, and strict liability. Michigan had a three year statute of limitations for negligence claims and a six year statute of limitation for breach of contract claims.

The contract contained the following warranty provisions:

**Article 9** - Contractor shall re-execute any work that fails to conform to the requirements of the contract and that appears during the progress of the work, and shall remedy any defects due to faulty materials or workmanship which appear within a period of one year from date of completion of the contract.

**Article 12** - In making and acceptance of the final payment shall constitute a waiver of all claims by the Owner, other than those arising from unsettled liens or from faulty work in appearing thereafter, as provided for in Article 9, and of all claims by the contractor to accept any previous made and still unsettled.

The trial court granted summary judgment on the grounds that these terms constituted a disclaimer of liability. The appellate court affirmed, holding that the clear and unambiguous import of the language was that the parties intended to limit the liability of the defendant for faulty work appearing within one year from the date of the completion of the contract.

In *Independent Consolidated School District No. 24, Blue Earth County v. Carlstrom*, the warranty provision at issue limited the contractor’s liability for faulty workmanship or materials to defects appearing within one year after substantial completion of the contract. More than five years after the building was complete, the floors began to settle and the school filed a complaint. The contractor argued the one-year warranty barred the claim. The owner argued the one-year warranty was not an exclusive remedy. The court found the contract was negotiated at arm’s length with no resulting undue advantage, and held the parties to their bargain. The court explained:

It is recognized that parties to a building or construction contract may stipulate as to the remedies which shall be available in the event of breach, and the remedies thus agreed upon may be held exclusive where the intent is made clear. The
question of whether or not the remedy is exclusive turns upon the intention of the parties as revealed by the language of the contract as a whole; the specific provisions relating to the remedy; and all the facts of a particular case. The remedy provided in a contract is exclusive of other possible remedies only where the language in the contract clearly indicates an intent to make it exclusive.80

Thus, while the claim was otherwise timely, the court found the parties intended to shorten the time in which such a claim might be made. Notably, the court distinguished between the contractual one year limitation period and separate causes of action based on breach of contract which would provide for application of a six year state statute of limitations period.81 The school board contended that these contractual provisions were against public policy. The court held there was no violation of public policy.

D. And When it is Not

As noted, courts are largely unwilling to read limitations period into warranty provisions absent clarity on that question.82 Because many (most?) contractual warranties fall short of that standard, many (most?) contractors operate under a false sense of security that their warranty obligations are so limited. In fact, these obligations can extend for several years out, depending on the nature of the defect and how and when the defect is discovered.

State statutes of limitations for breach of contract typically run much longer than the one year contractual warranty period. Problems arise when defects in construction work first appear after the contractual warranty period has expired. When plaintiffs have brought suits to recover damages, courts have refused to read the warranty as a limitations period. They have instead interpreted a warranty as an additional promise made by the contractor to return to the site and remedy defects that are discovered within the agreed period, or as a contractor’s right to cure defects. Courts have held the longer statutory limitations period to apply.

The effect of the limited application of the contractual warranty is great. In most instances the state statutes of limitations far exceed any contractual warranty period. The result
is that the contractor and its surety could face claims a decade later by a dissatisfied owner alleging faulty construction. When the contractual warranty does not protect the contractor or the surety, the parties must examine traditional state law statute of limitations provisions to determine whether the owner’s claims are timely.\textsuperscript{83}

Generally, contractor’s contracts contain no language that unequivocally states that a contractual remedy period is an exclusive warranty for all claims under the contract or is a contractual limitation on when suit can be brought. The courts have been unwilling to construe the language in such a way as to bar actions against the contractor without express language limiting the remedy. As a result, the contractor and surety are not protected by the contractual warranty. Of course, it is important to note that any such claims sought must be brought within the applicable state statute of limitations.

In \textit{Business Men’s Assurance Co. of America v. Graham}, 984 S.W.2d 501 (Mo. 1999), the Supreme Court of Missouri was asked to resolve the question at what point certain construction defects were “ascertainable” in order to resolve whether the claim by the owner was timely under the state statute of limitations. The claim concerned the BMA tower in Kansas City, which was a renowned structure, built with a concrete and steel exterior frame supported by a column-free interior. The exterior frame of the building was a grid clad with four-foot square marble panels. The project was completed in 1963. Twenty-two years after completion, in 1985, marble panels began to fall, and suit was filed a year later. A jury found that the mechanism for attaching the panels to the concrete behind them was defective. The Court found that because the owner did not discover the latent defect until after 1981, the lawsuit was timely.

In \textit{McDevitt and Street Co. v. K-C Air Conditioning Service, Inc.},\textsuperscript{84} the Court of Appeals of Georgia reviewed claims by contractor against its subcontractor arising from the defective
installation of a waste water system in a hotel project. The project was completed in 1985. In
1988, the contractor received complaints of leaks that were occurring in the plumbing risers in
the hotel. It was determined that segments of the pipe were improperly bonded. The subject
warranty term read as follows:

> [A]ll Work will be of good quality, free from faults and defects and in conformance
with the Contract Documents. All Work not conforming to these requirements . . .
may be considered defective . . . . This warranty is not limited by the provisions of
paragraph 13.2.85

Paragraph 13.2.2 related to “correction of work” and required that:

> [I]f within “one year after acceptance by the Owner . . . or within such longer period
of time as may be prescribed by law . . . any of the Work is found to be defective
or not in accordance with the contract documents, the contractor shall correct it
promptly after receipt of written notice to do so” unless Owner has “given a written
acceptance of such condition. This obligation shall survive termination of the
contract.”86

The court concluded that the subcontract provision regarding the one year of guarantee
was an added guarantee which acted to extend rather than limit liability for faulty workmanship.
The provision did not act as an exclusive remedy and did not impair the contractor’s rights to
assert a breach of contract claim within the applicable statute of limitations.

In All Seasons Water Users Association, Inc. v. Northern Improvement Co.,87 the
Supreme Court of North Dakota addressed claims involving several hundred miles of pipe that
had been buried as a part of a water pipeline project. The contractor maintained that any
responsibilities to repair allegedly defective work were limited to a one year period. However,
the court distinguished between the duty to perform a warranty with the contracted duty to
construct a pipeline in accordance with the contractual specifications. “A warranty or guarantee
is basically an agreement to repair or replace the faulty work regardless of the reason for the
defect, so long as it is not due to abuse or neglect by the owner.”88 The contractor had a duty
which all contracts envision - a duty to perform. “A failure to [perform] subjects the contractor
to liability for damage due to the failure, so long as the action is not barred by the applicable statute of limitation or there is no clear and unequivocal language in the contract which limits such liability."\textsuperscript{89} The court held that the warranty language in the contract did not contain clear and unequivocal language memorializing an intention of the parties to limit claims.\textsuperscript{90}

In the \textit{Board of Regents v. Wilson},\textsuperscript{91} the Appellate Court of Illinois noted that the parties could, by express agreement, provide for an exclusive remedy but failed to do so. The court held that for one year the contractor had a duty to rectify defects due to faulty workmanship and materials, but that the terms in no way limited the owner from claiming damages as a result of faulty work or material after the one year period. Indeed, the court looked at the terms addressing “final payment” as conclusive of the parties’ intent that warranty claims would remain available. That provision provided:

\begin{quote}
The making and acceptance of the final payment shall constitute a waiver of all claims by the Owner other than those appearing from . . . faulty work appearing after final payment or from failure to comply with drawings and specifications.\textsuperscript{92}
\end{quote}

There are several other examples of courts refusing to enforce contractual limits of liability absent clear language. For example, in \textit{Carrols Equities Corp. v. Villnave},\textsuperscript{93} the New York Supreme Court, Appellate Division, held the one year guarantee provision applied solely to the contractor’s duty to correct defects through supplemental performance and, absent specific indication in the contract, it could not be construed as an exclusive remedy. In \textit{Baker-Crow Construction Co. v. Hanes Electric, Inc.},\textsuperscript{94} the Court of Appeals of Oklahoma concluded the twelve month warranty period was not an exclusive remedy. As a result, plaintiff was permitted to pursue his common law remedies under the other provisions of the contract.\textsuperscript{95} In \textit{Newton Housing Authority v. Cumberland Construction Co.},\textsuperscript{96} the Appeals Court of Massachusetts held that the language stated was insufficient, and that “[n]either the foregoing nor any provision in the Contract Documents, nor any special guaranty time limit shall be held to limit the
Contractor’s liability for defects to less than the legal limit of liability in accordance with the law of the place of the building.” And, in Burton-Dixie Corp. v. Timothy McCarthy Construction Co., the U.S. Court of Appeals for the Fifth Circuit held that the one year period was an added guarantee rather than a limit to contractor’s liability for faulty construction, and the warranty was therefore not an exclusive remedy.  

E. Conclusion and Practice Tips

When faced with an issue that concerns a contractual warranty, the practitioner is well advised to first obtain and review all of the contract documents, in order understand the nature of the warranty obligations therein. Warranty rights may be found in the contract, general or supplementary conditions, surety bond, and sometimes even embedded within the technical specifications. It is absolutely necessary to review all of the documents in order to determine the exact nature of any contractual warranty.

The analysis ought to then move onto the impact of the contractual warranty. A majority of courts have concluded, in general terms, that a warranty or guarantee period embodies an additional promise by the contractor, absent clear intent to the contrary, that should defective work be discovered within the contractual warranty period, the contractor will repair the same at no cost to the owner.

As a result, the contractor (and the surety) are or may be exposed to extended liability until the state statute of limitations or statute of repose has run. The risk to the contractor is substantial. Large-scale construction defect claims often lay hidden in the weeds for years before the true extent of the damage manifests. When the risk does occur, years have passed making investigatory and analysis functions more difficult and sometimes impossible, if
witnesses have died, companies have folded, or landscapes have changed. Front-end due
diligence and contract preparedness will go a long way towards mitigating against this risk.

2. U.C.C. § 2-313 cmt. 4.
   writ refused NRE (June 14, 1978).
7. Id. at 1131.
8. U.C.C. § 2-313(1).
10. Id. at 570–71.
11. Id. at 571.
12. U.C.C. § 2-316(1).
13. Id.
17. 902 F.2d 703 (9th Cir. 1990).
18. Id. at 707–08.
19. U.C.C. § 2-719(3).
22. Id. at 125–26.
24. Id. at 722.
25. 265 N.W.2d 513 (Wis. 1978).
26. Id. at 526.
27. Id.
29. Id. at 541–42.
30. 951 N.E.2d 1078, 1090 (Ohio App. 10th Dist. 2011).
31. Id. at 1089–90.
32. Id. at 1090.
34. Id.
35. Travelers Cas. And Surety Co. of America, 74 Fed.Cl. at 89; See also Martin K. Eby, 436 F.Supp.2d at 1308, n.47 (“Design specifications explicitly state how the contract is to be performed and permit no deviations.
   Performance specifications, on the other hand, specify the results to be obtained, and leave it to the contractor to
determine how to achieve those results.”) (internal quotations and citation omitted).
   Warranties, August 2013


Pracht v. Rollins, 779 P.2d 57 (Mont. 1989) (amateur builder was a pharmacist by profession).


*Id.* at 63.


See also MGL and RI.

186 N.W.2d 335 (Mich. 1971).

*Id.* at 336.

151 N.W.2d 784 (Minn. 1967).

*Id.*

*Id.* at 787.

*Id.*

*See e.g.*, President of Georgetown College v. Madden, 660 F.2d 91, 95 (4th Cir.1981).


*Id.* at 90 (quoting AIA Contract A201, 1976 Edition as amended by Supplementary Conditions).

*Id.*

399 N.W.2d 278 (N.D. 1987).

*Id.* at 285.

*Id.*

*Id.*


*Id.* at 218.


*Id.*


*Id.* at 478.

436 F.2d 405 (5th Cir. 1971).

*Id.* at 410-11.

*Madden*, 660 F.2d at 95.