

Reading Between the Lines Contract Study

Warranties: Express vs. Implied

Study Outline

1. Warranty – what is it?
 - a. A representation made by one party that another can and will rely on.
2. Types of Warranties
 - a. Express vs. Implied – What is the difference?
 - i. Express – contractual obligation that the product or work performed will meet certain standards for a specified period of time.
 - ii. Implied – obligations imposed by law; promises not explicitly made by contract, but nonetheless enforced by courts.
 - b. Express Warranties
 - i. Created by contract – typically cover:
 1. Materials and equipment
 2. The “Work” as defined in the “Contract Documents”
 - ii. Example: AIA A401: **§ 4.6.1** The Subcontractor warrants to the Owner, Architect, and Contractor that materials and equipment furnished under this Subcontract will be of good quality and new unless the Subcontract Documents require or permit otherwise. The Subcontractor further warrants that the Work will conform to the requirements of the Subcontract Documents and will be free from defects, except for those inherent in the quality of the Work the Subcontract Documents require or permit. Work, materials, or equipment not conforming to these requirements may be considered defective. The Subcontractor’s warranty excludes remedy for 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.
 - c. Types of Implied Warranties
 - i. Implied warranty of habitability – residential construction
 - ii. Implied warranty of workmanlike performance
 - iii. *Spearin* Doctrine (previous study topic)
3. Uniform Commercial Code (UCC)
 - a. Applicability of the UCC – applies only to the sale of goods and not services
 - b. What about a mixed contract for both goods and services – predominant purpose test

Reading Between the Lines Contract Study

Warranties: Express vs. Implied

- c. Express Warranties – any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain
- d. Implied Warranties – created by operation of law
 - i. Merchantability – unless disclaimed, goods sold by a merchant must be “merchantable.”
 - 1. Merchantable – characterized by fitness for normal uses, good quality, and in accordance with any statements or promises made on the package or label
 - ii. Fitness for a particular purpose
 - 1. Arise when seller has reason to know of any particular purpose for which the goods are required and that the buyer is relying on seller’s skill or judgment to select or furnish suitable goods.
 - iii. Disclaimer of implied warranties
 - 1. C.R.S. 4-2-316 (2): [T]o exclude or modify the implied warranty of merchantability or any part of it, the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

4. How long do warranties last?

- a. As expressly stated in contract or specifications – (e.g. 20-year roof warranty)
- b. Statute of limitations
 - i. Breach of contract – 3 years (C.R.S. 13-80-101)
 - ii. Actions against contractors/subcontractors/CDARA – 2 years (C.R.S 13-80-104)
- c. Call-Back Warranty – AIA A201, Section 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 . . . , 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 notice from the Owner to do so, unless the Owner has previously given the Contractor a written acceptance of such condition.

5. Negotiating/Drafting Tips

- a. Warranty clauses a Contractor/Subcontractor typically wants:

Reading Between the Lines Contract Study

Warranties: Express vs. Implied

- i. Warranty for a limited and defined period of time
- ii. Warranty period that is not extended by remedial work
- iii. Notice and reasonable opportunity to repair or replace
- iv. No responsibility for design errors or omissions

b. Sample Provision to Include:

Warranty and Rejection of Work. Notwithstanding anything else to the contrary or any higher standard stated elsewhere, Subcontractor's work shall be executed in substantial compliance with the Subcontract Documents in a good and workmanlike manner and free of defect not inherent in the type of work. Contractor may reject Subcontract Work only for demonstrated non-compliance with the Subcontract Documents and only if the Architect/Engineer concurs that the Subcontract Work is defective. The foregoing warranty for defective materials and workmanship shall be for a period of one year from the date of substantial completion of Subcontractor's work unless otherwise specifically agreed in writing signed by Subcontractor. THIS WARRANTY IS IN LIEU OF ALL OTHER WARRANTIES WHETHER EXPRESS OR IMPLIED, AND ALL SUCH WARRANTIES ARE HEREBY EXPRESSLY DISCLAIMED, INCLUDING THE IMPLIED WARRANTIES OF FITNESS FOR A PARTICULAR PURPOSE AND MERCHANTABILITY.

c. Warranty clauses to avoid (if possible)

- i. Implied warranties
- ii. Warranty periods contained in project specifications or other documents
- iii. Warranty obligations that include warranty obligations for:
 1. Alterations to the Work performed by others
 2. Damage to Work caused by others
 3. Improper use of material or equipment
 4. Failure to properly operate or maintain the Work
 5. Normal wear and tear
- iv. Disclaimer of design adequacy – Example: Contractor makes no warranty, either express or implied, regarding the completeness, correctness, or adequacy of any information contained in the Subcontract Documents and Contractor expressly disclaims any such warranties.

6. Sample Subcontract Review Exercise:

Reading Between the Lines Contract Study

Warranties: Express vs. Implied

Section 20: Guarantees and Warranties

- A. Subcontractor warrants to the Owner, Architect, and Contractor that materials and equipment furnished under this Agreement will be of good quality and new unless otherwise required or permitted by the Subcontract Documents, that the Work will be performed in a good and workmanlike manner, and the Work and materials furnished under the Subcontract Documents will be suitable for its intended purpose and shall conform with the requirements of the Subcontract Documents. Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective.
- B. Subcontractor additionally guarantees its workmanship and materials for a period of one (1) year from the date of final acceptance of the Project as a whole by the Owner and Architect, or for such longer periods as may be provided in the Subcontract Documents or as established as a matter of law and Subcontractor shall remove, replace and/or repair at its own expense, as directed by the Owner or Contractor, any faulty, defective, improper or non-conforming Work, materials, or equipment discovered within such period.
- C. Contractor shall notify Subcontractor of any failure which Contractor observes or has been notified of in the guaranteed Work. Subcontractor shall be provided reasonable opportunity to correct the defects in the guaranteed Work. However, should the Subcontractor fail to rectify any failure within a reasonable length of time, as determined by the Contractor in its sole and exclusive discretion, Contractor may correct the defect in the guaranteed Work without voiding any terms of the guarantee and Subcontractor shall pay all costs incurred by Contractor.
- D. Subcontractor shall extend the guarantee to cover repair of defective Work for a period equal to that of the original guarantee after repairs have been completed and accepted by the Owner.
- E. These warranties shall be in addition to and not in limitation of any other warranty or remedy assumed by Subcontractor, its sub-subcontractors, suppliers, and materialmen as a matter of law.
- F. Subcontractor agrees that its warranty obligations shall be co-extensive with any warranty obligations related to the Work that either the Contractor or Owner owe to any third parties relative to the Project as a matter of law.