A Tale of 2 Terms

YOU CAN ALMOST GUARANTEE IT: MANY CONTRACTORS GET CONFUSED BETWEEN WARRANTIES AND GUARANTEES. **By Karen P. Layng, Esq.**

Frequently, litigation or claims arising out of construction projects involve the interpretation of the parties' warranties or guarantees. However, much confusion exists – even among industry practitioners – about the key differences between the two terms.

Generally, a warranty addresses the standard of performance, while a guarantee is the obligation to return and fix defective work. A claim for breach of express warranty is based on the owner's contention that the contractor warranted a particular outcome, which was not achieved. In other words, a warranty clause addresses quality in general.

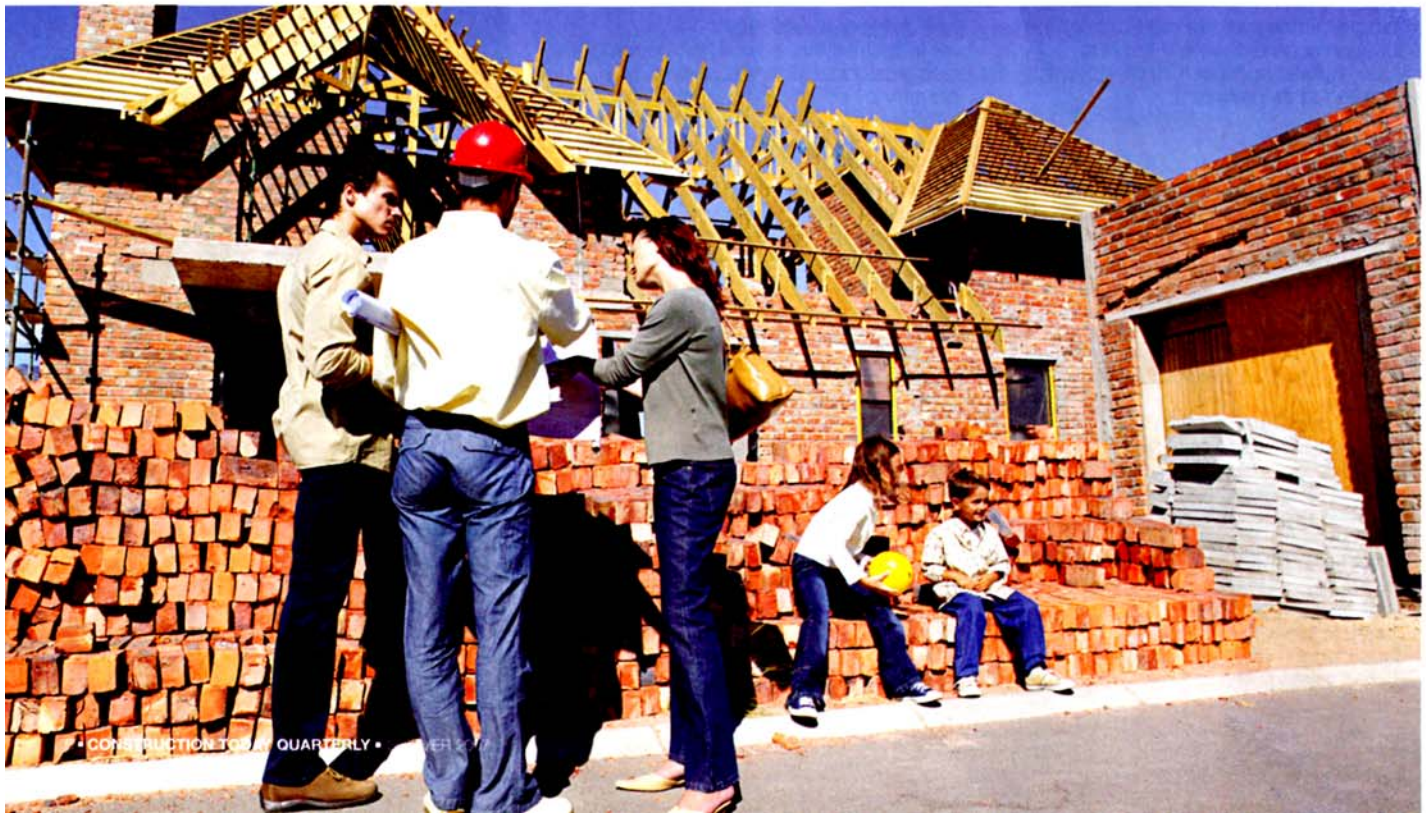
A guarantee clause, on the other hand, specifically addresses defects that are discovered after acceptance of the project. The American Institute of Architects' (AIA) standard A201-1997 owner-contractor contract includes both such warranty and guarantee provisions, and it is likely the new 2007 version will not significantly change these terms.

About Warranties

The A201-1997 agreement (subparagraph 3.5.1) contains three types of warranties: (1) the materials and equipment will be of good quality and will be new unless otherwise specified; (2) the work will be free from defects not inherent in the quality required or permitted; and (3) the work will conform to the requirements of the contract documents. Each of these warranties may apply to a general contractor or subcontractor's work.

The first warranty deals only with materials and equipment, not workmanship. When the project specifications do not mandate installation of a particular component, system or product, an owner may claim a breach of warranty if the system installed does not meet the owner's expected or anticipated standards.

Alternatively, even if the specifications require use of a particular brand of materials, the contractor/installer still warrants that the system meets performance criteria. If the materials fail to meet the performance specifications due to no fault of the con-



tractor, the contractor may still be held liable for breach of warranty arising from the inadequate performance. However, the precept that a contractor could be required by the owner to install a particular brand of materials and then be held responsible for its failure has met with judicial hostility.

An example is *Dumas vs. Angus Chemical Co.*, where a court absolved a contractor from liability for construction of a defective fire protection system that caused millions of dollars in property damage. In Dumas, the owner furnished the plans and specifications to a fire system installer, but never requested the installer to conduct a hazard analysis, nor informed the installer about the nature of the plant's chemical process.

After a series of explosions at the plant injured hundreds of people and caused more than $150 million in property damage to the plant and neighboring communities, a class action was brought against the parties involved, including the installer. Although the Dumas court dismissed the claims against the installer under the circumstances presented, the court stated that a contractor might be liable when it knows, or should know, that plans and specifications could be defective. As such, the prudent contractor should notify the owner and the architect upon the discovery of a design problem so that one of them can take steps to correct the defect.

The second warranty deals directly with defects in the materials that are not "inherent in the quality required or permitted." In this situation, the contractor is not liable to an owner who selects a particular brand of material, which, while not inherently flawed, is inappropriate or "unsuitable" for the intended application. If the materials are defective, however, regardless of the context in which they are to be used, the contractor can be held to have breached this second warranty.

The third warranty addresses the workmanship of the installation of the system itself. These warranties most frequently come into play if particular performance standards were designated either as to labor or material, and there has been a failure to comply with the standards. It is important to note that because the A201-1997 agreement does not designate any time limitation by which such warranty claims must be brought, the contractor should consider negotiating an accelerated or limited period by which such claims must be asserted.

Warranties are also addressed in the Uniform Commercial Code (UCC), which applies to the actual manufactured materials sold to an owner. The UCC has been adopted in its entirety by many states, but these claims must be reviewed under the governing law provisions of the construction contract. Ordinarily, a manufacturer or supplier of such goods will only be potentially exposed to express warranty claims. According to the UCC, an express warranty may be created by affirmation of a fact, a promise made, a description of the goods or by providing a sample of the goods that becomes a basis for the bargain.

Additionally, an express warranty need not be in writing; such warranties may be implied or may arise if the manufacturer knew that the material would be unsuitable. Nonetheless, if a contractor can establish that it followed the owner's detailed design specifications, it will not be held responsible for the failure to achieve a particular result in the absence of having expressly warranted otherwise.

About Guarantees

The AIA A201-1997 agreement (paragraph 12.2) addresses guarantees under the heading "Correction of Work." A guarantee clause concerns workmanship and provides that the contractor will be responsible for returning to fix any defects that arise, either during the course of the project or after substantial completion. Importantly, a guarantee is an obligation that is separate and distinct from that of the warranty.

A notable difference between a warranty and a guarantee is the fact that guarantees are typically limited to one year after substantial completion of the project or the contractor's work. The purpose of a guarantee is to provide specific language that an owner can point to if a contractor refuses to correct defective work.

Indeed, unfortunate situations often arise where the contractor claims the cause of a "defect" is a faulty design vs. the architect's claims that the work was done improperly. The agreement mandates that a contractor fix any defects so that the owner is not forced to litigate the issues to determine who was at fault, but can immediately demand a fix of the problems without first establishing an attribution of fault. The owner, however, is required to provide prompt written notice of any defect.

Also important is the fact that if the owner fails to properly notify the contractor of the defect within the one-year period for corrections (or any other period fixed in the parties' contract), the owner waives his right to require correction by the contractor. Therefore, some owners often consider adding language to their contracts to provide that each time a repair is made under the requirements of the contract documents, the one-year correction period commences as to that item requiring correction.

Construction contractors must understand the difference between warranties and guarantees and govern their conduct accordingly. These terms are frequently and often improperly interchanged and may subject a contractor or subcontractor to liability the company did not contemplate. ■

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