

A Promise Is a Promise: WATCH YOUR WARRANTIES!

By Catherine E. Willson

A warranty is a promise of performance written into a contract. It relates to either the quality or the workmanship of a product. Manufacturers' warranties usually relate to the quality of the product only. Manufacturers do not normally warrant installation unless they use preapproved installers. Contractors often warrant both the quality of the product and the workmanship on installation. Sometimes when a problem arises, these lines get blurred.

The warranty may be written into the contract with the customer. Alternatively, it could be provided to the customer as a separate document used as a marketing feature or as a transferrable obligation that can be given to the next purchaser of a property. Warranties add value to a contract. The better the warranty, the more likely that the contractor will receive work.

A warranty should be carefully drafted to ensure that it only promises what the giver is willing to provide in terms of fixing a problem with a product or installation. In other words, only promise what you are willing to perform. This is trickier than it sounds. It is useful to have a warranty document reviewed by a lawyer.

Consider the following:

1. **Promise only deliverables.** A manufacturer should not warrant installation unless it has controls in

2. **Restrict the warranty to the cost of repair/replacement of material.** For example, a contractor should not, as part of its warranty, pay damages to the customer for lost profit, business losses, delay costs, or damages to third parties. If the warranty is for a waterproofing product, is the warrantor also assuming responsibility for water damage suffered because of faulty product or installation? What about responsibility for mold, mildew, fungi, or air quality problems? In other words, consider what costs and damages can arise from

the faulty product or installation, and decide whether or not you will assume those costs. If not, be explicit about these restrictions in the warranty.

3. **Require proper maintenance and compliance with care instructions.** Don't pay for a customer's failure to maintain the product.
4. **Clarify what is being guaranteed.** For example, a manufacturer may not guarantee colorfastness or appearance, mechanical damage by others, disintegration of substrate, etc.



5. **Only warrant your work.** Do not accept responsibility if someone tampers with the product/installation.
6. **Specifically exclude all other warranties.** The Sale of Goods Act in Ontario creates two implied warranties: a warranty of fitness for a particular purpose and a warranty of merchantability. Exclude these in favor of your own written warranty that can be considerably more restrictive.
7. **Consider whether the warranty should be transferable from a customer to a new building owner.** Does the warranty end with the customer, or can it be transferred over a period of years?
8. **Consider the application of time limits.** Is your warranty for one year or more? What is the deadline for court action by a customer on the warranty? This should all be spelled out in the warranty, and the time limits can be short.




In addition to these limitations on scope, a company should also consider certain condition precedents that must be met before it is willing to carry out work pursuant to its warranty. Consider the following:

1. **Require the customer to provide written notice of a problem to the warranty provider within a certain amount of days of discovering the problem.** Give the warranty provider the right to examine the site or inspect the failure prior to fulfilling its warranty. Such an examination may actually demonstrate that the failure is not covered under the warranty and is the fault of someone else.
2. **Require that full payment be received on the contract before the warranty is enforceable.** If a contractor hasn't been paid, it certainly doesn't want to fulfill its warranty, and this should be spelled out in the warranty.

Contractors and manufacturers sometimes do not put enough thought into the promises they make about their products, and consultants should study the warranties that affect their customers. I hope this

article serves to make you think about warranties and the commitments truly being made. In the words of Dr. Seuss's Horton the Elephant, "I meant what I said, and I said what I meant!"

This information deals with complex matters and may not apply to particular facts and circumstances. The information reflects laws and practices that are subject to change. For these reasons, this information should not be relied on as a substitute for specialized professional advice in connection with any particular matter. 



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These are just some of the limitations that a company should consider when drafting a warranty for its product or work.

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