LEGAL ADVISER

# Express & Implied Warranties

by Quenda Behler Story

Warranties, which are promises made to your customer about your work, are of two types: express and implied. An express warranty is deliberate and intentional, and is made orally or in writing. There is rarely any doubt that you made a promise because you typically say or write something like, "This roof will not leak for fifteen years." That's an express warranty.

An implied warranty, however, grows out of the work you did — it's "implied" from the circumstances. You may not even have been aware that you were making a promise — it doesn't matter, you made it anyway. For example, if you installed an overhead garage door, even though you may have been careful to make no express warranties whatsoever about how long it would last or how well it would work, you still made two implied warranties: workmanship, and usability or fitness of purpose. These implied warranties are not called exactly the same thing in every state, but the concepts are the same.

***Workmanship.*** The implied warranty of workmanship is not a guarantee of *good* workmanship — it's a guarantee of *not bad* workmanship. With regard to the garage door, for example, it means not that you did a terrific job, but that the installation is good enough — your average construction foreman would not make you do it over again. In other words, your work is up to the minimum standards of the trade.

***Usability or fitness of purpose.*** Whether you intended it or not, you have also guaranteed the customer that the garage door could be used as intended. It will, for example, open and close, although it may not be plumb and it may not fit the opening perfectly. If the door will not open or close, even if it is an otherwise top-notch installation, the door is not usable for its purpose. Your warranty obligations would then require you to get back to the job site and fix it on your own nickel. The nature of the problem doesn't affect your implied warranty for usability — you're obliged to make the door work even if the problem was minor and the customer could have easily fixed it himself.

## Length of Warranty

Do you still have to worry about customer complaints after you've retired and are living in Florida? Express warranties are typically part of the contract and so are governed by contract law, which usually has a three-year statute of limitations. But for implied warranties, the answer depends on what state the warranted work was performed in.

In Michigan, where I live and work, the law says that implied warranty claims against contractors for damages to property or persons must be made within six years, or within one year after the time the customer should have discovered the damage, whichever comes first. In other words, the law gives the customer some time to find the defect. Once that defect is found, or should have been found, the clock starts running faster.

Let's say you only put half as many nails in the asphalt shingles as you

were supposed to. Unless the shingles start blowing off the roof, it's unlikely that a customer would discover the nail shortage within the six years allowed to bring a claim against you. At the end of the six years, the customer has no claim against you anymore, even if the customer subsequently discovers the lack of proper nailing.

If, however, the customer did somehow discover within the six-year period that the shingles were not properly nailed, the time to bring a claim shortens to one year from the date of that discovery.

Now suppose that the water supply lines are cross-connected, so that the cold faucet produces hot water, and the hot faucet cold water. This is a defect the that the property owner should notice immediately, so that property owner never has more than a year in which to bring a claim against the contractor.

None of this means that the property owner has to go to court and get a judgment all within a year. It just means that he or she has a year in which to start the lawsuit — which can then drag on for years.

***Changing the rules.*** Terms or disclaimers included in your contract will usually control over state law. For example, if your contract said that all express or implied warranties were for one year, that would override a longer period under the state law.

If you don't want to give any warranties at all, you can do that but, as a general rule, you have to do so in writing and you have to do so specifically. A disclaimer like: *The contractor makes no express or implied warranties* may not be specific enough. That's because even a disclaimer that eliminates implied warranties is usually interpreted as meaning that the thing in question must not be totally useless.

In some circumstances, however, you may find yourself worrying that something you build *will* be totally useless. In that case, you need a more specific disclaimer.

For example, suppose you're the foundation contractor and you think there's not enough cement in the concrete mix. But when you mention it to the owner and the architect, they both tell you, "That's not your job, just follow the specs." If you're concerned that the foundation will be totally useless — that it will not carry the load — now is the time to say so in writing. Add a disclaimer like this to your contract: "The contractor makes no warranties about the fitness of purpose or the usability of this foundation." That's specific enough to get someone's attention.

---

***Quenda Behler Story*** *has practiced and taught law for 25 years. She and her husband are partners in a remodeling company in Okemos, Mich.*