WARRANTIES AND GUARANTEES IN THE EIFS INDUSTRY

What are your rights and obligations when it comes to warranties?

By Peter R Spanos, Esq.

Few areas of construction industry law are as complex and contain as many traps for the unwary as warranties and guarantees for materials and construction systems supplied for projects. As is the case with all construction component products, exterior insulation and finish systems fall under both express and implied legal warranties as well as various forms of written guarantees appearing in the contract documents among the owner, general contractor, subcontractor/applicator, distributor and manufacturer.

Owner, Architect and General Contractor

Before discussing the rights and duties of the subcontractor/applicator and the manufacturer, it may be helpful to review the pertinent responsibilities of the owner and architect in the area of specifying and contracting for a construction system, such as an EIFS product.

As the party contracting for the structure, the owner generally has certain responsibilities, including:

- To establish the performance and usage criteria for design and material selection;
- To provide realistic budget parameters consistent with these performance and usage criteria; and
- To properly use and maintain the structure and the component system after construction.

Working closely with the owner, the design professional (the architect or engineer) must assume liability for the implementation of the owner’s criteria for performance and usage. Generally, no express warranties or guarantees are given by or required of the design professional; similarly, rarely are any “performance-oriented” warranties (warranty or guarantee that the building or component system design will “work” if properly installed) required by the owner. Nevertheless, under the law, the architect or engineer is held implied to warrant that he has exercised reasonable skill and care.

The design professional must exercise reasonable skill and care commensurate with the prevailing standards of the profession in determining and specifying a combination of materials and systems that are adequate for the intended use and in designing the components of the building. If this standard is met, then the designer has satisfied his implied professional obligation.

There are several weaknesses inherent in the legal standard applicable to the design and material selection function of the architect or engineer. First, the prevailing legal standard provides a relatively low level of accountability—lack of negligence when judged by community standards—in contrast with the stricter liabilities for performance of building component systems applicable to manufacturers and the normal contractual guarantees given by subcontractors/applicators. In addition, design professionals are highly dependent on manufacturer-supplied information, so they may not do an adequate independent investigation of how the various component of the building interact.

Finally, architects and engineers commonly use contractual terms to shift all or a part of the “design” responsibility to the contractor, subcontractor or material supplier. For example, a “performance” specification or “performance” criteria added to a specified system shifts this area of judgment to the contractor and the subcontractor.

Under the contract with the owner, the general contractor normally is obligated to furnish and install all the materials specified in the contract documents in a good and workmanlike manner in accordance with the contract documents and consistent with the prevailing standard of the industry. This includes an affirmative duty to coordinate the work of all subcontractors so as to facilitate an overall efficient operation, and to provide suitable conditions of the protection and installation of systems while under construction. The guarantee of materials and labor required of the general contractor under his agreement with the owner is passed...
through to the subcontractor/applicator in their contract documents.

**Subcontractor/Applicator**

Like the general contractor, the subcontractor/applicator has guarantee responsibilities that flow from the contract documents. Typically, the subcontractor/applicator is contractually bound to furnish and install the specified materials in accordance with the contract documents. These include the plans and specifications and any additional documents that are incorporated into or made a part of the contract documents, such as manufacturer’s specifications and recommendations.

The subcontractor/applicator also has an implied duty of performance (created by law independently of the contract) to construct and install the component system (such as an EIFS installation) in a good and workmanlike manner consistent with the prevailing standards of the industry. It should be noted that this obligations does not require “perfect” installation and application.

**Material Suppliers and Manufacturers**

Suppliers deal primarily with prime or general contractors and subcontractors/applicators in a construction project, supplying materials and equipment for incorporation into the completed building. Generally, there is no standard contract between the material supplier and the contractor or subcontractor. The contract is more likely to be evidenced by purchase orders, invoices and correspondence.

The manufacturer also typically provides its own written warranty, which both creates certain express guarantee obligations and limits other warranty obligations otherwise imposed by law.

Typically, in a breach of contract action involving a warranty or defective system claim by an owner, each party may only bring a legal action against the party with whom they directly contracted. Thus, typically the owner may sue the general contractor, who sues the subcontractor/applicator, who may sue the material supplier or manufacturer who sold the system’s components. Sometimes the owner may sue the manufacturer directly on a written warranty or may sue as a third-party beneficiary of the suppliers contract or purchase order with the subcontractor/applicator.

Manufacturers and suppliers or distributors are subject to the obligations imposed by law under the Uniform Commercial Code, a statute government sales of goods adopted in various forms by all states except Louisiana. These include the UCC implied warranties and the UCC express warranties, which are these:

- **Implied warranty of merchantability** (implied warranty of fitness for ordinary purposes) (UCC Section 2-314). This is a warranty that the goods shall be merchantable in that they are fit for the ordinary purposes for which such goods are used and is implied in any contract for their sale.
Implied warranty of fitness for particular purpose (UCC Section 2-315) This is a warranty that the goods shall be fit for the particular purpose for which they are going to be used when the seller knows how the goods are going to be used.

Express warranties made by affirmation, promised, description and sample (UCC Section 2313). This is a statement, representation or description regarding the goods made by the seller and made a part of the basis of the bargain, including samples, product literature, sales brochure and similar documents generated by the manufacturer.

UCC implied and express warranties can be limited in several ways, both in terms of the scope of the warranty and the remedies available for its breach. The applicable UCC sections are these:

- Exclusion of modification of Uniform Commercial Code warranties (UCC Section 2316). This is a specific provision negating all warranties such as “The foregoing shall constitute the sole ad exclusive liability of Manufacturer in connection with the purchase of use of the EIFS system. This warranty is in lieu of all other written or oral, express or implied warranties and Manufacturer hereby expressly disclaims against any such warranties of merchantability or fitness for purpose.”

- Contractual modification or limitation of remedy (UCC Section 2-719). A written specific remedy can be made exclusive if agreed upon; consequential and other damages maybe limited or excluded entirely unless this is “unconscionable.” If circumstances cause an exclusive or limited remedy to fail of its essential purpose, however, the remedies provided in the Uniform Commercial Code may be revived under UCC Section 2-719(2).

In addition to the warranty obligations created by and governed by the UCC, the manufacturer has an affirmative duty by law to make such tests and inspections during and after the process of manufacture as are commensurate with the risk of damage or injury involved in the intended use of the product.

The manufacturer also has a duty to avoid negligence in the manufacturing and design of the component system, that is, a duty to design and manufacture a product that is reasonably fit and safe for the purpose for which it is intended. The standard of care of the manufacturer is one of reasonable care; the manufacturer is under no duty to produce a “foolproof” product.

The clearest basis of a warranty or guaranty obligation on the part of a manufacturer is expressed in the manufacturer’s written warranty document. For example, a typical warranty may state, “Manufacturer warrants to the building owner that its products made and sold as ‘EIFS system’ when applied in accordance with its application instructions and specifications shall be free of defects resulting from defective materials for a period of five years.”

In the EIFS industry warranties vary from manufacturer to manufacturer. The limitations and exclusions also vary from manufacturer to manufacturer.

A typical contractual modification or limitation of liability in the EIFS industry may state: “Nothing in this warranty shall render Manufacturer liable for any damage to the substrate, to the structure itself, to the contents of the structure or for any consequential or incidental damage whether in contract or in tort, including negligence. Owner waives any claims against manufacturer for such direct, indirect or consequential damages.”

The contractual obligations of the subcontractor/applicator may include furnishing the manufacturer’s warranty, guarantee or bond or service contract, so the contractor must be certain that all manufacturer’s requirements are satisfied. The subcontractor/applicator should avoid contractual language that allows owners to postpone a decision as to whether a manufacturers bond, guarantee or service contract will be required because of potential impossibility of performance by the contractor.
subcontractor/applicator needs to know at the outset exactly what he or she is required to furnish.

It is prudent to submit all data relevant to the component system construction to the manufacturer at the bid preparation state, and either obtain a commitment from the manufacturer to issue a guarantee or find out what revisions are needed before the guarantee will be issued. It is also prudent to check provisions in any applicable manufacturer’s applicator agreement or approved contractor agreement regarding the applicator’s obligations in conjunction with the manufacturer’s guarantee. For example, the manufacturer’s warranty may state, “EIFS system must be applied by a company whose applicators have been trained and are currently registered by Manufacturer in order for this warranty to be effective and binding.”

Warranties should be evaluated in terms of many factors, including these:

- Length of coverage.
- Penal sum limitation (Is there a specified maximum dollar limitation regardless of the actual damages sustained?).
- Scope of coverage (just materials, materials and workmanship, repair costs, etc.).
- Exclusive or additional remedy (Is the guarantee or warranty made the only recourse available to a claimant, eliminating other legal avenues of recourse such as the UCC remedies?).
- Cost of coverage.
- Limitation on types of recoverable damages.
- Assignability.
- Renewability.
- Commitment of the manufacturer and resources available to honor the guarantee.
- Financial soundness of the manufacturer.

In summary, the warranties and guarantees involved in the EIFS industry are not confined to the written documents, although those documents greatly control and influence the respective rights and obligations of the parties.

NOTE: This article is intended as general educational information, and not as legal advice applicable to particular circumstances. The reader should consult with competent and experienced legal counsel concerning the applications of any of the matters discussed to his own situation.

About the Author
Peter R. Spanos is a partner in the Atlanta law firm of Hendrick Spanos & Phillips. He is also general counsel for the Association of the Wall and Ceiling Industries—International, Falls Church, Va., and has represented many of their members.

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