

Reader Response

Warranty: A Liability or an Asset

By Floyd Dimmick Sr., Crown Polymers, LLC

The February 2007 Problem Solving Forum question asked about the most common warranty provisions for flooring in terms of types, time period, and allowable defects. While the specifics addressed in February are important, I think a broader discussion of warranties for flooring systems would be useful, and have thus submitted the following response.

Are warranties becoming more fashionable today? Are polymer overlay and coating floor contractors using less experienced sales staffs and leading with “warranty” as a closing tool? On the other hand, are flooring companies not spending the time to evaluate if their company considers a warranty a management risk or asset?

Important questions—and how they are answered will determine part of the culture of a company. The contractor who does not address them typically has not spent the time to determine the overall company culture. The consumer typically rates polymer floor contractors as a “Me-too-Company” or as a “Problem-Solution-Company.”

Which category best fits your company profile, the low bidder or the problem solver? Because of the new economic climate, the question that begs for an answer is, “Which company has the best opportunity to survive and increase their profits?”

Is it clear that the warranty provides the obvious benefits being offered by the flooring contractor? Alternatively, is it a supporting document that builds value and credibility? Most professional marketing and sales persons believe the warranty is not the most important factor in closing the sale.

When a consumer makes a major purchase such as a new polymer floor overlay, the seller makes an important promise to stand behind the product or system. It’s called a warranty.

In business-to-business and consumer-to-business transactions, a warranty is (in legal language) an obligation that the floor system is as factually stated or legally implied by the

seller. In addition, the warranty is an obligation that the recommended product or system provides for a specific remedy to repair and provide the solution for current damage or for the floors new usage. If such repair or replacement fails to meet the warranty, a breach of warranty occurs when the promise is broken, i.e., a product or system is defective or does not comply with what should be expected by a reasonable buyer.

Warranties come in two general forms: an express warranty or an implied warranty. An express warranty is one created by a spoken, written, or otherwise expressed statement of fact concerning the goods. On the other hand, an implied warranty is a guarantee concerning the goods that arises by operation of law. In other words, nonspecific guarantee or statement of fact concerning a good is necessary to create an implied warranty.

Express Warranty

An express warranty typically contains a guarantee from the seller of a product or system that specifies the extent to which the quality or performance of the product is assured and states the conditions under which the product or system can be replaced or repaired. As the seller of the goods, the contractor is normally the party making the warranty. However, on large projects, the polymer manufacturer and contractor often make a “joint” warranty that is governed by an approved specification.

An express warranty often appears in the form of a written warranty document, and in essence, guarantees that the floor (or other product) is of a certain quality and that it is free from defects in materials and workmanship. Most, if not all, express warranties will limit the amount of time for which the guarantee is made. Some warranties allow for full replacement or repair of the guaranteed floor during the warranty period, while others offer a prorated warranty that will cover only a portion of the replacement or repair costs, depending on the age of the floor.

Most written polymer floor overlay warranties are titled “Limited Warranty” because their application is limited to certain circumstances. Some warranties will list the situations in which the warranty will apply, while others will list the situations in which the warranty will not apply. Most polymer floor overlay warranties are manufacturer specific and usually are very specific about what is covered by the warranty and when it is covered (e.g., adhesion to the substrate under specific conditions of use and maintenance).

As noted above, an express warranty can be created by a spoken or written statement of fact concerning a product. However, an express warranty may also be created by the use of a model or sample of the product being sold. For example, if you were visited by a polymer floor salesman, and during his sales presentation, he showed you a sample of the type of flooring that he was selling you, he would likely have made an express warranty to you that the product delivered to you would conform to the sample he showed you. Advertisements that describe a product often create an express warranty running in favor of the purchaser. Since any statement of fact concerning a product will likely give rise to an express warranty, many sellers of floors often place “disclaimers” in their advertisements in an attempt to shield themselves from warranty liability.

Despite the relative ease with which an express warranty can be created, a seller is allowed to assert statements of opinion concerning the floor without creating an express warranty; such statements are known as “puffery.” The justification for allowing sellers to make statements of puffery is that a reasonable buyer would not accept as fact a statement of opinion, and thus, the puffery would not form the basis of the bargain. To illustrate by way of example, a statement that “This floor system is the best floor overlay” would probably be considered puffery. On the other hand, a statement such as “This floor system will never need to be waxed” could be



Floyd Dimmick, Sr. is co-founder and technical director of Crown Polymers, LLC, an international polymer manufacturer of concrete repair products and floor systems. Active in the design and application of polymer products for more than 40 years, he has developed new polymer technologies that are patented in the

U.S. and Canada. He teaches polymer classes for contractors and has published numerous papers. He is currently active on committees for ACI, ASTM, SSPC, NACE and other organizations. He may be reached at info@crownpolymers.com.

Problem Solving Forum

considered a statement of fact concerning the product, and thus, give rise to an express warranty.

Implied Warranties

An implied warranty is one that arises by operation of law. Simply put, implied warranties are creatures of state law; they do not exist unless and until the law of the state where the sale is consummated says they do. However, the existence of an implied warranty does not depend on whether the seller has made a representation concerning the product. Note that all states currently have some form of implied warranty to protect consumers.

The most common type of implied warranty, the implied warranty of merchantability, guarantees that the product will do what it is supposed to do. For example, the implied warranty of merchantability might guarantee that a floor overlay will protect the concrete substrate from certain chemical spills without damage to the polymer overlay surface.

Another type of implied warranty is the implied warranty of fitness for a particular purpose. This implied warranty applies when you buy a floor overlay based on the seller's advice that the overlay is suitable for a particular use. As a general proposition, in order for the implied warranty of fitness for a particular purpose to arise, a seller must ordinarily sell the type of good for which a buyer is asserting a warranty. For example, if a car dealer who had never engaged in the business of selling polymer floor overlays came into the possession of a polymer floor overlay and sold it to you, despite any assurance to you by the car dealer that the floor overlay was suitable for your purpose, it could be very difficult to establish that the implied warranty of fitness for a particular purpose was in effect because the car dealer is not ordinarily engaged in the business of selling polymer floor overlays.

Use of a Disclaimer To Prevent Warranty Liability

One way for a seller to prevent warranty liability is by using a disclaimer. Note that the law varies substantially from state to state concerning a seller's ability to disclaim warranties. Therefore, to obtain the most accurate information possible concerning the seller's ability to disclaim, a prudent seller would be well advised to hire counsel in the states where the seller is selling and/or installing floors. Despite the differences from state to state, as a general rule it is much easier to disclaim implied warranties. In fact, the Uniform

Commercial Code, which has been adopted in some form in most, if not all, states, contains very specific instructions on how to effectively disclaim implied warranties. Disclaiming implied warranties can be as simple as indicating that the product is sold "as is," "with all faults," or otherwise indicate in writing that no warranty is given. However, several states, including Kansas, Maine, Maryland, Massachusetts, Mississippi, Vermont, West Virginia, and the District of Columbia, do not permit "as is" sales.

Typically, disclaimer language in a contract must be conspicuous. Conspicuous is generally defined to mean that the disclaimer must stand out (bold, all caps, large font, etc.).

However, an express warranty, oral or written, can be negated or limited only if its disclaimers are reasonable (Uniform Commercial Code, Section 2-316 (1)). Many states are fairly unwilling to allow sellers to disclaim express warranties. After all, an express warranty essentially guarantees an item that goes to the very basis of the bargain, and courts often note that sellers should not be able to make representations concerning the floor to induce the sale, and then disclaim the very same representation in the sales contract.

While it is not impossible to disclaim an express warranty, it is certainly more difficult to accomplish than to disclaim an implied warranty. Nevertheless, sellers have a very significant interest in disclaiming express warranties because salespersons often create express warranties during their sales presentations that their employers have neither approved nor contemplated. Because the salesperson's representations will likely bind the seller based on the agent/principal relationship between the seller and salesperson, the seller could find it self contractually obligated to stand behind a product for as long as the salesperson represented that the product will last. One method that sellers have employed, with some success, to prevent salesperson created warranties that are above and beyond the warranty normally granted is to include in the sales contract a "merger clause." In essence, a merger clause says that the agreement in writing constitutes the entire agreement of the parties, and no prior representations, oral, written, or otherwise, are relied on by the parties or are a part of the agreement. While the effectiveness of this strategy will vary widely from state to state, some states have allowed sellers who have used a merger clause to avoid the application of a salesperson-created express warranty. Another method employed by sellers to limit

warranty liability exposure is to include contractual language that limits the remedies available to the purchaser for a breach of warranty. An example of such a provision might limit the remedies available to either recovering the replacement value of the defective good, or requiring the seller to replace only defective parts. However, a seller's ability to limit prospective liability is not without limits; such a term can be found to be unconscionable and rendered unenforceable by a court. For example, if a defective product causes a personal injury, a contractual provision that precludes recovery for the personal injury can be deemed *prima facie* unconscionable (Uniform Commercial Code, §2-719 (3)).

Closing Thoughts

All flooring and coating contractors, including polymer manufacturers, are affected by express or implied warranty issues. There are "Management Risks" considerations for all companies. Only the owners or top management of a company can establish the company's culture on very complex issues concerning warranties.

For companies that choose to include a warranty as part of their brand culture, such a choice represents a strong and enduring asset—a value driver that can boost the company's success. Hardly any company will neglect the importance of using a warranty as supportive documents in customer relationships to create value and credibility. However, such benefits are not without cost, and a cost-benefit analysis should be performed before instituting a warranty program.

Author's Disclaimer

This article addresses some basic points of state law that you need to know to understand the requirements and prohibitions of the Magnuson-Moss Act. However, because state law varies, you may need to contact a private attorney or the offices of the attorneys in the states where you do business to get specific state law information. The article is intended as a tool for you to use in developing your marketing culture and as data for consultation with your attorney, not as a substitute for your attorney's advice.

Reprinted with permission from JPCL.

**Call for the location of
your nearest Crown Polymers
representative.**



Crown Polymers, LLC.
11111 Kiley Drive
Huntley, Illinois 60142

All registered trademarks are of Crown Polymers, LLC unless otherwise noted.
© Crown Polymers, LLC, 2006-2007 Printed in the USA

info@crownpolymers.com
www.crownpolymers.com

847.659.0300 Phone
847.659.0310 Facsimile
888.732.1270 Toll Free