

When a Promise Becomes a Warranty

by Quenda Behler Story

Express warranties are written or verbal promises the builder makes about the outcome of his work. For example, the contractor might promise that a roof will last 15 years, that a home office will be wired for modern technology, or that a lawn will shed rainwater after it's sodded.

As the courts put it: An express warranty is a statement made by a seller — that's you, the builder — whereby the seller promises something *specific* about the goods or services being sold. Typically, this type of promise has to do with how well the thing you build functions.

televisions, that is an express warranty.

Maybe you're thinking that these are actually contract problems. Well, sometimes they are. But it's also possible for something to be a contract problem and a warranty problem at the same time. For example, maybe the contract for the media room contained language stating that there would be no glare. So if there were glare, the customer could sue you for breach of contract *or* for breach of warranty.

Is that difference important? You betcha. In a breach of contract lawsuit, the customer can win money

sold for only \$400,000? No, because even if it was an express warranty, the customers didn't rely on what you said. They had already signed the papers and given you the go-ahead before you started talking about possible resale value.

Getting Into Trouble

Suppose the express warranty you made was not in writing? Express warranties are often written into the contract, but, depending on your state law, they may not have to be in writing. In most states, just because you never put your promise into writing doesn't mean you can safely forget about it. If you assured your customers that all the stone tiles you were installing in the foyer were perfectly safe and would never be slippery, and they are slippery, that's a breach of an express warranty.

Of course, your customers will have to prove somehow that you said that, and they will also have to prove that they relied on what you said when they chose the tile. But if they have the proof, the fact that your express warranty was not in writing will not get you off the hook. In court, it sometimes comes down to who is the most convincing witness, you or your customer.

Clearly, it's possible to make express warranties without meaning to do so. As another example, the words in your advertising could create an express warranty. If your ad says that you will replace the entire window if it ever leaks, that's an express warranty. You might be able to fix the window with caulk, but legally, you'd be required to replace it.

You can give your customers an express warranty by handing them one of those manufacturer-supplied brochures that has an express

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Legal Requirements

Okay, but you talk to your customers a lot. At what point does a conversation stop being just talk and become a promise your customer can take to court? Well, customers can take you to court anytime they want, but two things have to happen for them to *win* a suit for breach of warranty. First, the court has to be able to figure out what it was you promised. And second, it has to determine that the client relied on that promise.

For example, it doesn't mean much if you tell your customers how wonderful their new media room will be or that it will be the envy of all the neighbors. Such statements are just talk, not specific enough to constitute an express warranty. But if you tell your customers that the windows in the new media room will never cause screen glare on their computers and

only for certain kinds of economic loss — what it cost to fix what you didn't do right, or what the diminished value of the job project is. But in a breach of warranty lawsuit, the customer could collect for noneconomic loss, which would include things like pain and suffering. There's almost no limit to the kinds of loss a plaintiff can recover for in a breach of warranty lawsuit.

Fortunately, there is the second part to this. Your customers cannot successfully sue you for breach of warranty *unless* they actually relied on what you said. It doesn't matter what you said if your customers didn't rely on it.

For example, what if, after all the papers were signed, you told your customers that they'd be able to resell their house for half a million dollars? Would you be in trouble if the house

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warranty in it. If they base a buying decision on the brochure, they, in effect, have a warranty from the manufacturer and a warranty from you.

It's also possible for someone else, such as your lead carpenter or your subcontractor, to give the customer an express warranty that is legally binding on you. Depending on the situation, the people you hire may be considered your agents.


Staying Out of Trouble

What can you do to protect yourself? Write into your contract that the only express warranties you're making are the ones in your contract documentation or warranties you made using specific change order procedures.

Then enforce that change order procedure. Include some specific language in your contracts, clearly stating that the customer is limited to the manufacturer's express warranties about the materials.

You could also write into the contract that if your client has a problem with the work of a sub, he can only sue the sub, but in most states, the courts will not recognize that type of clause. It is possible in some states to further protect yourself by writing into your contract that anyone suing you for breach of warranty can collect only certain kinds of damages, but again this is iffy.

Be very careful about the promises you make to your customers, and be careful about conversations your employees may have with your customers.

Will doing all this make you bullet-proof? No, that's not possible. But it will definitely shift the odds to your side. 

Quenda Behler Story has practiced and taught law for over 25 years and is the author of The Contractor's Plain-English Legal Guide (www.craftsman-books.com).