



ROOFING AND DESIGN PROFESSIONAL WARRANTIES

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ABSTRACT

The financial and professional consequences of using unclear warranty language can be huge. Nonspecific warranties and contract provisions have the potential to expose the warrantor to far more liability than intended and may also give other parties greater recourse than expected. Pulling from 20 years' experience representing roofing manufacturers, building owners, design/build firms, engineers, and contractors, the speakers will demonstrate that warranty language is often an overlooked issue. Discussion will focus on how courts analyze ambiguous warranties to create unexpected liabilities and greater financial ramifications. The speakers will offer suggested language to use to hopefully avoid unintended consequences.

SPEAKER

BRIAN T. MUST — METZ LEWIS BRODMAN MUST O'KEEFE LLC



BRIAN MUST has spent the past 20 years representing manufacturers, building owners, design/build firms, engineers, and contractors in the commercial roofing industry. He has represented various roofing entities in claims or litigation involving hospitals and healthcare facilities, schools and universities, government buildings, and high-rise condominiums. His experience ranges from negotiating and resolving commercial roofing claims and lawsuits to trying cases before federal and state courts and commercial arbitrations.

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JOSHUA BAKER has represented roofing manufacturers and contractors in alleged roofing failure and contractor error disputes. He also has experience with overall claims management, including policy and procedure development and with writing effective warranties.

ROOFING AND DESIGN

PROFESSIONAL WARRANTIES

It's a typical Tuesday afternoon when your office phone rings. One of your largest clients is on the other end with a request that is music to your ears. The board has commissioned the construction of a new office building and has selected your firm to be the lead professional. All aspects of the building envelope, exterior, and roof are your responsibility. Plans and specifications are approved, contractors and suppliers are vetted, agreements are executed, and the construction of the building is successfully completed.

The building owner, thanks to your expertise and recommendation, installs a new roofing system and secures a 20-year, no-dollar-limit warranty from the roofing manufacturer. The installation of the system goes smoothly, and your firm approves the roof following a final inspection. The roof performs without incident for many years with only minor repairs that are covered under the warranty without issue.

Fast-forward 15 years, and the same client calls to report a major water leak that has infiltrated the building and caused substantial damage. The roofing manufacturer inspects the roof and determines that the leak is covered under the warranty. However, the cost to repair the roof is significant and potentially exceeds the remaining value of the roof. The roofing manufacturer, relying on its warranty language, which disclaims consequential damages, also refuses to repair any damage to the building's interior caused by the leak. The manufacturer offers to pay the remaining value of the roof and offers no compensation for the interior damage.

The building owner, faced with receiving only a fraction of the costs to repair the roof, is persistent and decides to bring a lawsuit against the roofing manufacturer seeking to recover all of damages, including the full cost to repair the roof and the costs associated with repairing the damage to the building's interior. While the roof warranty may have seemed like a minor detail during the multimillion-dollar construction of the new building, it suddenly turns into the heart of a lawsuit with large sums of money on the line.

The outcome of the lawsuit is largely dependent on two key factors: first, the written terms and legalese contained within the warranty itself; second, whether the terms and conditions of the warranty have been complied with and satisfied. Whether it is the designer who specifies the roof, the manufacturer who supplies the roof, the contractor who installs the roof, or the building owner who ultimately is obligated and controlled by the warranty, the warranty touches the hands of many people during the process.

This paper will discuss how courts in the United States have treated ambiguous and unclear warranty language in contract documents. It will also address the potential issues that can be created when vague warranties are used. Whether the job is new construction, the replacement of an existing roof, or a professional providing expert and litigation support services, the roof warranty is a critical factor and an area where building owners rely upon the guidance of professionals in order to avoid unintended consequences.

WHAT IS A WARRANTY?

The concept of a warranty was first developed in the early 19th century as a means for reputable sellers to stand behind the goods that they sold. Buyers and sellers of commercial goods used "implied" warranties as a way for sellers to back their products and act as an insurer of their own goods. The law covering the subject of warranties developed from these early principles governing the relationships between buyers and sellers of commercial goods and services.

Over time, implied warranties began to be transcribed and expressed in written contracts between two parties. The Uniform Commercial Code, first published in 1952 with the goal of harmonizing the law of sales and other commercial transactions, defines an express warranty as an affirmation of fact or a promise made by a seller to a buyer that relates to the goods and creates an express undertaking that the goods will conform to the affirmation or promise.

Modern-day building and construction

projects are rife with multiple contract documents and express warranties, which may appear at first glance to be straightforward in their use, application, and purpose. However, courts throughout the United States have often struggled with interpreting warranties and applying them to a particular set of facts. This lack of uniformity has led several commentators to remark that the legal concept of a warranty is "a freak hybrid of the illicit intercourse of tort and contract."¹

But when reduced to its essential core, a warranty is a quality standard that a seller is required to maintain. Contractors and manufacturers generally provide an express warranty that ensures that their work will be free from defects and conform to the contract documents. Likewise, the warranties issued by most roofing manufacturers typically cover any defects that materially affect the roof's performance or cause roof leaks.

However, each roofing manufacturer's warranty is unique and embedded with various caveats and limitations that can have significant ramifications (both legally and financially) to a building owner. In 1999, the National Roofing Contractors Association (NRCA) published its *Low-Slope Roofing Materials Guide* and included an extensive chart that summarized the various types of roof membrane warranties offered by roofing manufacturers for built-up, modified-bitumen, and single-ply roofs. The chart is an excellent resource for comparing the different types of warranties being offered by roofing manufacturers across the industry. *Figure 1* represents a simplified summary of the types of standard warranties and their major differences, which are being extended in today's marketplace by roofing manufacturers.

The bottom line is that there are countless options when it comes to selecting a roof warranty, and each manufacturer offers various warranty levels, ranging from the platinum, to the gold, to the standard-issued warranty. The type, level, and uniqueness contained within each warranty can be both overwhelming and perplexing.

Company	Length of Warranty	Covered	Not Covered	No Dollar Limit	Proration
A	15 years	All roof water leaks in the roofing systems	Damage to structure, including consequential, incidental, or special damages	Yes	Yes
B	40 years	Any defects that materially affect roof performance or cause roof leaks	Damage to structure, including consequential, incidental, or special damages	Yes	Yes
C	10 years	Any defects that materially affect roof performance	Damage to the interior or exterior of the structure, including consequential incidental, or special damages	Yes	Yes
D	15 years	Any leak in the roofing system	Damages to building, including lost profits, consequential, incidental, and special damages	No	No
E	15 years	Any leak caused by a defect in the roofing system	Consequential or incidental damages	No	No
F	15 years	Any leak caused by a defect in the roofing system	Consequential, incidental, or special damages	No	No
G	10 years	Any defects that materially affect roof performance or cause roof leaks	Damage to structure, including consequential, incidental, or special damages	Yes	No

Figure 1 – Comparison of warranty language offered by various U.S. roofing manufacturers.

Best practices suggest that professionals should identify the different types of warranties being extended and understand the subtleties between each before making recommendations to owners. Additionally, the language contained in the warranty is often considered boilerplate by the manufacturers and will rarely be subject to change, thus necessitating a well-prepared professional to appropriately inform the owner about potential future issues before the warranty is specified.

While a roof warranty is intended to clearly delineate the respective obligations and liabilities of manufacturers and building owners in the event of a dispute or product failure, often the warranty may expose the warrantor to far more liability than was intended, and may also give the building owner much greater recourse than was expected. And the inverse can also be true, depending on the jurisdiction of the dispute.

PRORATED WARRANTIES

Most, if not all, sophisticated roofing manufacturers offer a prorated or a pro rata warranty as part of their standard terms and conditions. Under a pro rata warranty, if there is a roof defect or failure before the end of the warranty term, the manufacturer will repair the affected area of the roof at a

cost that is dependent on the age of the roof at the time of the complaint. Courts will routinely enforce prorated warranties in the event of litigation.²

Pro rata warranties benefit the roofing manufacturer to the detriment of the building owner because they reduce any money owed to the owner based on the age of the roof. The terms and the amount of the proration language should be an item up for negotiation before the roof warranty is issued, provided that the manufacturer is amenable to change. Best practices dictate that the owner be advised that the value of the warranty decreases as the roofing system ages over time when the manufacturer is unable or unwilling to modify its prorated warranty.

Prorated warranties are relatively inconsequential in the event of minor roof leaks or deficiencies. However, prorated warranties become a much larger issue as the roof reaches the end of the warranty term or the cost to repair exceeds the remaining value of the warranty. For example, assuming your client's roof cost \$1 million to install, and the contracted warranty value is

reduced by 5% each year, the value of the warranty is dramatically decreased over time. Additionally, if the cost of repairs comes close to or exceeds the warranty's value, the manufacturer will likely take the position that payment of the warranty value is its only legal obligation to the building owner. *Figure 2* illustrates the value of a roof warranty based on a 5% pro rata reduction for each year following the initial \$1 million installation cost. It also assumes that the cost to repair the impacted area of the roof increases as the roof gets older.

Because proration can ultimately reduce an owner's recovery should a dispute arise, the pro rata language contained in a warranty should be examined and negotiated, if possible, before the warranty is issued (*Figure 3*). Building owners should also understand

	Value of Warranty	Cost of Repair
Year 1	\$1,000,000	\$50,000
Year 5	\$800,000	\$150,000
Year 10	\$550,000	\$350,000
Year 15	\$300,000	\$500,000
Year 20	\$50,000	\$700,000

Figure 2 – Value of 20-year warranty based on 5% pro rata reduction for each year that the roof remains in place.

that the value of the warranty decreases as the roof ages. Nevertheless, even if the owner is successful in securing a non-prorated warranty, courts across the United States are split on the issue of whether a roofing manufacturer is entitled to a prorated reduction of damages as a matter of law when lawsuits are filed based on roof defects or failures.

Some Courts Rule That Building Owners Are Entitled to Full Damages When a Warranty Is Not Prorated.

Courts will enforce a written warranty when it states that a manufacturer's liability is limited or reduced on a prorated or pro rata basis, depending on the age of the roof. While rarely, if ever possible, a building owner should attempt to eliminate or soften any prorated language in a manufacturer's warranty. Non-prorated warranties provide owners with their strongest argument against manufacturers, should a roof defect or failure necessitate a costly repair or total replacement before the warranty expires. Non-prorated warranties also provide owners with legal grounds to claim that a manufacturer is responsible for all costs of repair or replacement.

Some courts follow the rule that building owners are entitled to full repair or replacement costs when a warranty is not prorated.³ These courts adhere to the legal principle that the usual measure of damages is the cost to restore the defective structure back to its originally warranted condition.

A case from Delaware is particularly instructive on this line of judicial reasoning.⁴ In 1975, a 14-story high-rise building consisting of 177 condominium units was built on the shores of the Atlantic Ocean. The building also had commercial offices, retail space, and recreational facilities. In 1986, the building owner filed a lawsuit arguing that the defective design and construction of the roof led to water infiltration and structural damage to the building's interior. The owner's expert estimated that the total cost of repairing or replacing the defective components ranged between \$13 and \$15 million.



Figure 3 – Warranty language is often overlooked during the initial phases of planning and can have serious future ramifications in the event of a claim.

The roofing company had provided a 20-year non-prorated warranty. It argued to the trial judge that the owner's damages should be offset or reduced because the roof performed without issue for the first 11 years of its useful life. The manufacturer also argued that full repair or replacement damages would be unfair and create a windfall to the owner because such an award would result in providing the owner with a new roof that would perform beyond its originally warranted timeframe.

The trial judge sided with the building owner and ruled that the owner could present evidence of the total cost to repair or replace the defective components. While the court acknowledged that this ruling may create a windfall to the owner, any added value was outweighed by the potential of giving the roofing company too much of a benefit. The court ultimately ruled that allowing evidence of the total costs to repair or replace the roof was the only way to make the building owner financially whole.

Other Courts Rule That Building Owners' Damages Are Offset or Reduced Even if a Warranty Is Not Prorated.

Not all courts and states are as generous, though, when it comes to awarding damages to building owners on non-prorated warranties. When a warranty is silent on proration, roofing manufacturers will often argue that the legal defenses of "betterment" and "useful life" should be adopted to offset

an owner's damages.

Betterment exists when an owner uses a replacement product that is of greater quality than originally specified. Where a repair or replacement constitutes a betterment of the original construction, some courts hold that the manufacturer is not liable for the additional cost.⁵ The theory behind the betterment defense is that the manufacturer should not be penalized when an owner elects to use a replacement product that is of greater quality than that originally called for in the parties' agreement. Advancements in roofing technology can also lead manufacturers to

take the position that the replacement component is a betterment over the originally warranted roof.

Similar to betterment, some courts allow manufacturers to limit their liability based on the useful life defense. Useful life refers to the anticipated lifespan during which a new roof can reasonably be expected to perform its intended function subject only to routine maintenance and ordinary repairs for wear and tear. Manufacturers often rely on useful life evidence to reduce the owner's claimed damages by convincing a judge that credit should be given for the period of time that the warranted roof was functional.⁶

Proponents of allowing useful life evidence believe that equity and fairness require owners' damages to be offset based on the benefit they received from the already-expired useful life of the structure. This also prohibits a building owner from receiving a windfall. Many courts agree with this rationale, and will only award partial damages to building owners. These damages are prorated to reflect the existing roof's performance prior to the alleged defect or leak.⁷ Courts inclined to rule in this fashion can cause building owners to suffer serious financial losses, especially when repair costs are significant and the remaining term of the warranty is limited. When building owners are not properly advised or do not fully understand their possible risk in this area, a court ruling to this effect can create a public relations nightmare for any professional.

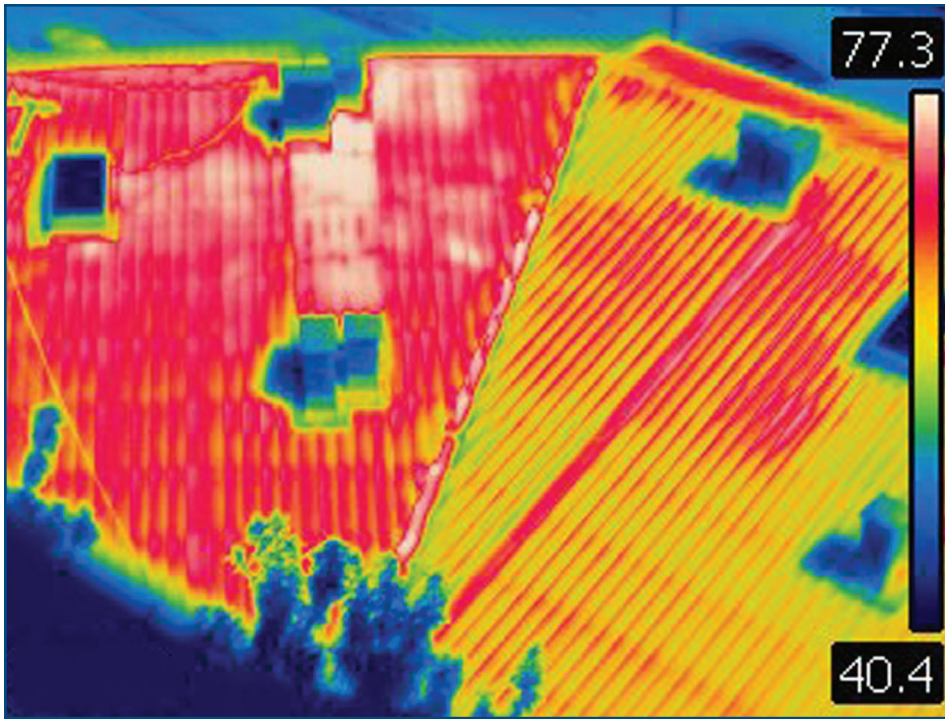


Figure 4 – Roofing manufacturers commonly secure waivers of consequential or indirect damages, which can exclude costs incurred to fix a building’s interior.

DIRECT AND CONSEQUENTIAL DAMAGES

Industry norm is that roof warranties disclaim any coverage for consequential damages. Consequential damage waivers are also often quickly absorbed as boilerplate. Most manufacturers utilize that exclusionary language in discussions with owners to limit claims made under the warranty (Figure 4). However, the mere disclaimer of consequential damages does not always preclude those damages from being awarded in a lawsuit.

Courts have struggled for many years to distinguish between direct and consequential damages. Direct damages are defined as those that follow immediately upon the act done. They arise naturally and ordinarily from the breach of the contract. For example, when a manufacturer installs defective flashing, the cost to repair the flashing is a direct damage in the eyes of the law and the responsibility of the manufacturer. But what if the defective flashing causes water to run into the interior of the building or behind the walls? Is this a direct damage or a consequential damage?

The legal definition of consequential damage is injury or harm that does not ensue directly and immediately from the act of the party, but only from some of the consequences or results of the act. For a building owner to recover consequential

damages from the breaching party, the damages must be reasonably foreseeable at the time of contract formation.

It is certainly reasonable to expect that a leaky roof could cause damage to a building’s interior. However, some courts (perhaps even a majority) have ruled that damage to a building’s interior is a consequential damage and is not covered under a warranty that includes a waiver of consequential damages. For example, in a roofing case in the state of Indiana, the court found that the cost to repair a leak constituted a direct damage, but the cost to remediate mold caused by the leak constituted a consequential damage and, therefore, was not recoverable by the owner.⁸ Other courts have followed suit and similarly ruled that water damage caused by a leak constitutes consequential and not direct damage.⁹

There are other courts, however, that have found that water damages caused by a leak are direct and not consequential damages. A court in Minnesota found that water stains on the ceiling and damage to tangible property inside a commercial storage facility were a direct result of a leak. Therefore, the damages were categorized as direct and not consequential and were not excluded under the terms of the warranty.¹⁰

The line between direct and consequential damages can be quite blurry and not as clear as one would think. Some manufactur-

ers are aware of this fact and how courts have interpreted damage waivers contained within their standard warranties. Should building owners be unable to negotiate out damage waivers or other exculpatory clauses, a vague and unclear warranty on any damage issues can be a way for owners to secure more coverage under the warranty than intended by the manufacturer.

COMMON WARRANTY-RELATED ISSUES

In the authors’ experience, there are other common warranty-related issues that often arise during disputes over the scope of a warranty and the legal obligations of a roofing manufacturer. Some of these issues can be addressed before the warranty is issued, while others are simply areas of concern that any professional should be cognizant of prior to the construction process.

Use of Unspecified Materials and Improper Design

Roof warranties often do not cover any defects caused by improper design of the building itself, the use of unspecified products, or the use of products supplied by someone other than the manufacturer. They also do not cover defects caused by the use of products that are not approved. Manufacturers often use this language to disclaim any liability for defects caused by improper building design or the use of nonapproved materials. And courts can be receptive to this argument. For example, a roofing manufacturer was found to be not liable for defects and resulting damage caused by an owner’s use of unspecified fasteners that resulted in membrane punctures to the roof.¹¹ Because the owner used products that were not specified, the court found that the warranty terms were not followed, and the manufacturer was absolved of all liability as a result.

Failure to Report Leaks

Roof warranties require owners to report and provide notice to manufacturers of any leaks in the roofing system. A South Carolina court ruled that the roofing manufacturer of a commercial building was not liable for breach of warranty when the building owner failed to provide notice of a leak as required under the warranty.¹² While this may seem like a harsh result, the notice obligations are important because they allow for the parties to get on the roof quickly and deter-

mine the actual source of the leak. Notice in compliance with the warranty also aids in the early detection of any leak and can mitigate further damage to the roof if the issue is repaired immediately instead of being allowed to fester. Professionals should stress to owners the importance of complying with the notice provisions in the warranty once a leak is discovered.

Failure to Maintain Roof

Most warranties will exclude coverage for leaks caused by an owner's abuse or neglect of the roofing system. They will also disclaim coverage for leaks that result from an owner's failure to properly maintain the roof. Some courts have found that an owner's failure to maintain the roof in accordance with the warranty terms constitute grounds for a roofing manufacturer to escape liability.¹³

The interplay between the warranty and an owner's failure to maintain the roof is dependent on the factual circumstances. Likewise, when failure-to-maintain issues arise, the question of whether the failure is material and whether the failure is the actual cause of the leaks is an area that is ripe for expert testimony.

Installation According to Specifications

Roofing warranties also do not cover any defects caused by an owner's failure to follow specifications during installation or defects caused by workmanship from failure to follow the manufacturer's specifications. This is a common provision that the manufacturer's lawyer will rely upon when litigation ensues over a defective roof.

Courts are also welcoming to this position. The owner of a health and wellness facility in Ohio sued its manufacturer for breach of warranty after the manufacturer refused to pay for the repair or replacement of the roof system after it began to fail in several places.¹⁴ The owner admitted that the roof system was not installed in accordance with the manufacturer's plans and specifications.

The owner argued, however, that the manufacturer had waived any argument regarding the faulty installation by issuing the warranty after it had inspected the roof and made other warranted repairs to the system. The court rejected the owner's contention and found that the manufacturer was not responsible in any way, given the owner's failure to install the system in


accordance with the manufacturer's plans and specifications.

Failure of Essential Purpose

When faced with a limited warranty or a warranty that excludes the recovery of all damages except direct damages, an owner can possibly avoid the impact of the warranty by demonstrating that the remedy afforded to the owner fails in its essential purpose. An exclusive or limited remedy fails of its essential purpose where the warrantor is unable to correct the defect or otherwise provide the exclusive or limited remedy within a reasonable time after the defect is discovered.¹⁵

The essential purpose argument is fact-dependent but will be enforced when the manufacturer cannot replace a defective component within a reasonable period of time or cannot supply a replacement component that matches or is comparable to the original. Some courts even allow building owners to recover all costs, including incidental and consequential damages—even when waived in the contract, when the manufacturer's warranty fails of its essential purpose.¹⁶

WARRANTY TERMS AND CONDITIONS ARE CRITICAL

The warranty issued to a building owner by a roofing manufacturer can seem like an insignificant event during the life of a major construction project. The language, terms, and conditions of the warranty, however, are areas that can cause major complications down the line. When faced with multiple bids to construct a roofing system, the warranties being offered by each manufacturer should play a role in the decision-making process. Warranty language should be fully understood by the customer, and professionals should take the time necessary to make building owners aware of the potential intended and unintended consequences and risks that surround a warranted roofing system. 

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