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September 2008

## Legal Issues



### Liability May Be Limited

By Alison R. Mullins



What are contractual limitations of liability for warranties of merchantability? You see them all the time. They are everywhere: on the backs of event tickets, in the box of new cell phones, and in the purchase contracts of cars. What do they mean? Why do they matter to you as a mason?

Limitations of liability for warranties of merchantability limit the remedies available to purchasers when a product fails to perform its ordinary purpose. Commonly, an attempt is made to limit liability to either replacement or repair of the product. Courts across the country are repeatedly ruling on the question of whether these contractual limitations of liability are valid and binding.

As masons, your scope of work on most projects includes installing products. You need to be concerned about your liabilities for the products you are installing. In some circumstances, your warranty to the client may be broader than the warranty upstream to the manufacturer of the product you installed. Contractually, you need to provide yourself sufficient protections.

#### Language limiting liability

Language contractually limiting the liability must be conspicuous. One way to make the language conspicuous is to draft the clause limiting liability two font sizes larger than the rest of the contract language and putting it in bold print. The idea is that the purchaser must be aware of the disclaimer before the sale of the goods in a matter of fairness.

#### Basis of the bargain rule

The basis of the bargain rule means that the purchaser is aware of the disclaimer or limitation of liability, or lack thereof, in making the decision to enter into the purchase. The rule's purpose is to prevent purchasers from agreeing to unknown and unfair disclaimers. The law surrounding the test of what constitutes the "basis of the bargain" is unsettled; however, there is a consensus that there needs to be at least simple reliance by the purchaser on statements of the seller.

#### Course of dealings

Despite not being a direct part of the negotiations prior to delivery, a limitation of liability regarding warranty language can be found to be part of the basis of the bargain. In their analysis, courts may look to the prior dealings between the parties to see if there was an established course of conduct that made clear to the purchaser that the seller made a practice of disclaiming implied warranties. In order for a court to find there was an established course of dealings, it must be based on

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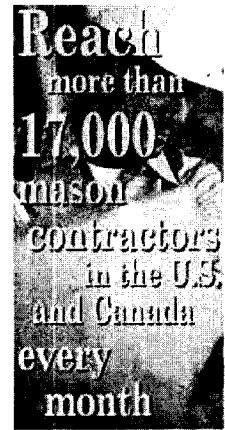
evidence that there were (1) numerous similar transactions, (2) between the parties, and (3) that are recent.

### Lines of fairness

Another factor used in determining the validity of a limitation of liability is an extremely unfair limitation. For example, a clause limiting liability of consequential damages for personal injury in a case of consumer goods is, on its face, unconscionable. On the other hand, a limitation of damages for commercial loss is not shockingly unfair or unreasonable.

### Conclusion

Including limitations of liability for warranties of merchantability in your contracts may prevent you from being caught in the middle of a manufacturer's limited warranty and your client's claims. Keep in mind, in order to be valid limitations of liability on warranties of merchantability, the clause must be conspicuous and cannot be unconscionable under the circumstances. Also, the course of performance or dealing with the other party to the contract is a factor that may be considered. Therefore, it is not only important what you put in writing, but also your actions that will play a role in determining the validity of a contractual limitation of liability.



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*This article is not intended to provide specific legal advice, but instead as general commentary regarding legal matters. You should consult with an attorney regarding your legal issues, as the advice you may receive will depend upon your facts and the laws of your jurisdiction.*

This article first appeared in *Masonry Magazine*, [www.masonrymagazine.com](http://www.masonrymagazine.com).

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Web site by: **Lionheart Publishing, Inc.**

506 Roswell Street, Suite 220, Marietta, GA 30060

Phone: 770-431-0867 | Fax: 770-432-6969

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