

No. 44545-0-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

CANTERBURY APARTMENT HOMES LLC,

Respondent,

v.

LOUISIANA PACIFIC CORPORATION,

Appellant.

APPELLANT'S REPLY BRIEF

Kathleen M. O'Sullivan, WSBA No. 27850
Abha Khanna, WSBA No. 42612
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
(206) 359-8000

Julia E. Markley, WSBA No. 36095
PERKINS COIE LLP
1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
(503) 727-2000

Attorneys for Appellant
Louisiana Pacific Corporation

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I. INTRODUCTION

Canterbury's response brief includes a parade of factual allegations intended to color the Court's view of LP's liability. While LP disputes Canterbury's characterization of the facts, it focuses its reply purely on the issues on appeal: the Superior Court's legal errors regarding remedy.

Canterbury asks this Court to adopt its myopic approach to determine the appropriate remedy, cordoning off all consideration of the Settlement Agreement and related Federal Court orders and focusing solely on the Limited Warranty itself. There, too, Canterbury would have the Court close its eyes to contrary provisions and read only certain sentences handpicked by Canterbury to support its interpretation.

Similarly, Canterbury asks the Court to disregard inconvenient terms and implications of the Settlement Agreement. Canterbury was well aware of the class action litigation when it purchased the siding at issue, though that fact is omitted from its response brief. But Canterbury now contends that it is free to pursue unlimited damages as if the class action Settlement Agreement never existed. By Canterbury's account, the Settlement Agreement's limitation to the "express terms" of the Limited Warranty was no limitation at all, and the jury was entitled to cast aside the warranty and award an unprecedented amount in damages.

Canterbury would prefer that the Court not trouble itself with nagging questions about the practicality of Canterbury's position. Why would consumers whose siding fails in the first five years of use be limited to the warranty remedy while those who enjoy up to 25 years of use are

free to pursue full replacement costs? What did LP bargain for in the settlement if not to put an end to future claims for unlimited damages based on defective siding?

But this Court cannot ignore the plain meaning of the Limited Warranty, the express language of the Settlement Agreement, and the clear command of both contracts that Canterbury be limited to the warranty remedy, a remedy deemed fair and adequate by the Federal Court. Accordingly, LP requests that this Court hold Canterbury to its promise in those agreements and remand for a new trial on the appropriate amount of damages due Canterbury under the Limited Warranty.

II. ARGUMENT

A. The Remedy Stated in the Limited Warranty Is the Sole and Exclusive Remedy Available to Canterbury.

The jury should have determined the amount of Canterbury's damages under the only remedy outlined in LP's 25-year Limited Warranty. Both the plain language of the warranty and the federal class action settlement limiting Canterbury to the warranty's "express terms" compel this result.

1. The Limited Warranty Is an Express Agreement of Exclusivity.

Canterbury's response brief makes clear that the only way to read the Limited Warranty in its favor is to ignore both the plain language of the warranty and the rules of contract interpretation.

As an initial matter, Canterbury appears to have backed away from the argument it advanced to the trial court that “magic words” are required to make a warranty remedy the “sole and exclusive” remedy. And for good reason. Washington law requires simply that the contract at issue contain an express agreement that a remedy is exclusive. *See Am. Nursery Prods., Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 227, 797 P.2d 477 (1990) (assessing whether the contract as a whole contains an “expression of an intent of exclusivity”); *Nw. Perfection Tire Co. v. Perfection Tire Corp.*, 125 Wash. 84, 92, 215 P. 360 (1923) (reviewing contract to find “any plainly expressed intent to compel the [buyer] to resort exclusively to the remedy of replacement”) (emphasis added).

Although Canterbury no longer relies on “magic words,” its interpretation of the Limited Warranty does require some sleight of hand; Canterbury’s preferred reading would have key passages disappear and new terms materialize out of thin air.

The “Limitations” section of the Limited Warranty provides:

- “If after inspection and verification of the problem, L-P determines that there is a failure covered by the above warranty, L-P will refund to the owner an amount of money equal to twice the retail cost of the original siding material.” Trial Ex. 9.
- “The cost of labor and materials other than siding [i.e., replacement costs] are not included.” *Id.* (emphasis added).
- “During the first 5 years, L-P’s obligation under the above warranty shall be limited to twice the retail cost of the siding material when originally installed on the structure.” *Id.* (emphasis added).

- “During the 6th through 25th year, as determined in the above manner [i.e., the manner described for years one through five], warranty payments shall be reduced equally each year such that after 25 years from the date of installation no warranty shall be applicable.” *Id.* (emphasis added).

Thus, for siding that fails after 16 years, the warranty remedy “shall be limited” to twice the retail cost of the siding, as it would be for failure in the first five years, and subject to an aging deduction. Replacement costs such as labor and materials are specifically excluded.

Canterbury tries to pretend that the paragraph discussing warranty payments during the first 5 years has no bearing on the case, *see* Resp. Br. at 28, but its efforts to sidestep that provision are unavailing. First, Canterbury suggests that the warranty language “as determined in the above manner” refers *not* to the paragraph limiting the available remedy during the first five years of use but instead to a more distant paragraph above. At no point does Canterbury provide any rationale why a reader would ignore the closest referent in determining what the “above manner” is. Canterbury’s attempt to leap over the nearest applicable paragraph defies common sense and basic principles of contract interpretation. *Martin v. Aleinikoff*, 63 Wn.2d 842, 846, 389 P.2d 422 (1964) (“Where no contrary intention appears in a statute, relative and qualifying words and phrases, both grammatically and legally, refer to the last antecedent.”) (internal quotation marks and citation omitted); *Perez Trucking, Inc. v. Ryder Truck Rental, Inc.*, 76 Wn. App. 223, 229, 886 P.2d 196 (1994) (citing the “rule of the last antecedent” in interpreting insurance contract).

The phrase “above manner” expressly incorporates all of the prior warranty language, and in particular the closest preceding paragraph.

Second, Canterbury contends that the earlier paragraph’s reference to “twice the retail cost of the original siding material” reflects an entirely different calculation than “twice the retail cost of the siding material when originally installed,” as provided for defects discovered in the first five years. Canterbury’s argument, however, hinges upon a distinction without a difference. According to Canterbury, “[t]he base compensation for defective siding discovered in years 6 to 25 is tied to current retail price of the material installed, rather than the original purchase price as applied in the first 5 years.” Resp. Br. at 28. Canterbury offers no citation or explanation for this bald assertion, and a search for any support in the contract language turns up empty. Both phrases clearly refer to the “original” purchase price of the siding.¹ Canterbury’s interpretation requires adding the term “current” to the warranty language, contrary to a fundamental rule of contract interpretation. *See Jarstad v. Tacoma Outdoor Recreation, Inc.*, 10 Wn. App. 551, 555, 519 P.2d 278 (1974) (“Had such been the intention of the parties, the provision should have

¹ As shown at trial, LP’s application of the warranty remedy assumed that the two phrases are interchangeable in describing the only remedy expressly stated in the Limited Warranty. LP’s claims administrator testified that her department had determined “the highest dollar amount that the product had been sold for throughout the United States” to be “52 cents a square foot.” RP 452. This was the only figure used by LP in processing warranty claims. *Id.* at 453; *see also id.* at 452 (“We decided to give the benefit to the homeowner by stating 52 cents. It took the burden off of every individual homeowner filing claims to have to prove to us what they paid.”).

been added. We are not permitted to reform that agreement or add to its terms in the guise of interpretation.”). The Limited Warranty envisions the same base price no matter what year the breach occurred.

Canterbury’s tortured reading leads, remarkably, to eliminating the inconvenient paragraph from its analysis altogether. According to Canterbury, “[t]he remedy language applicable to defects discovered in years 6 to 25 is easier to evaluate when the language applicable only to claims in the first 5 years is omitted.” Resp. Br. at 28-29. Indeed, while Canterbury’s surgical extraction of relevant warranty language does make it easier for *Canterbury* to endorse its preferred interpretation, it does not comport with well-established rules of contract interpretation requiring courts to consider the contract in its entirety. *See, e.g., Mayer v. Pierce Cnty. Med. Bureau, Inc.*, 80 Wn. App. 416, 420, 909 P.2d 1323 (1995) (citing “basic principle[.]” that “the court ascertains the intent from reading the contract as a whole”). Particularly where one provision specifically references another, any interpretation that fails to consider the clear import of both provisions is misleading. When the paragraphs are interpreted together, the exclusive nature of the stated remedy applies to the full 25 years of the warranty. *See Am. Nursery Prods.*, 115 Wn.2d at 226 (reviewing “[t]he remedies in the contract, found in paragraphs 2.1, 5.2, and 9.3” to determine exclusivity).²

² Unlike the warranty language here, the remedies provided in the *American Nursery* contract contained no limiting language whatsoever, instead broadly conferring on the party declaring default “all rights provided under the Washington [UCC] and other applicable laws of the State.” 115 Wn. 2d at 220,

Canterbury similarly disregards another key provision in the “Disclaimer” section of the Limited Warranty: “Except for the express warranty and remedy set forth above, L-P disclaims all other warranties” Trial Ex. 9 (emphasis added). While Canterbury purports to educate LP on the difference between warranties and remedies, its select quote from the disclaimer language conveniently omits the word “remedy” altogether. Resp. Br. at 30. Canterbury offers no rebuttal to LP’s argument that this provision specifically addresses the single remedy provided in the Limited Warranty and disclaims all others. Canterbury’s tactic of avoiding troublesome contract language belies its assertion that the Limited Warranty contains no expression of intent of exclusivity.³

Ultimately, Canterbury concedes that the Limited Warranty contains limiting language to express exclusivity for defects discovered in the first five years. Resp. Br. at 29 n.2. It insists, however, that the provision does not clearly apply to years 6 to 25, noting that “[w]here there may be competing *reasonable* interpretations, pre-printed form contracts should be construed against the drafter.” *Id.* (emphasis added).

226. Canterbury contends that the Supreme Court did not “rely on this provision for its ruling with regard to the exclusivity of the stated remedies.” Resp. Br. at 31. But the Court cited this broadly-worded provision, along with all other paragraphs addressing remedies, to determine that there was no expression of intent of exclusivity. *Am. Nursery Prods.*, 115 Wn. 2d at 226.

³ Canterbury suggests that the warranty itself indicates that the remedy is optional by including the language: “This warranty gives you specific legal rights and you may also have other rights which vary from state to state.” Resp. Br. at 29-30. But not only does this provision refer to *rights*, not remedies, it is mandated by the Federal Trade Commission in all consumer warranties. *See* 16 C.F.R. § 701.3(a)(9). At the same time, the FTC permits warrantors to limit available relief for a breach of warranty. *Id.* § 701.3(a)(8).

But Canterbury fails to acknowledge LP's contention that Canterbury's interpretation is simply not reasonable.⁴ Not only does Canterbury's preferred interpretation defy the most natural reading of the contract language and multiple rules of construction, but also it would lead to an absurd result, where customers who enjoy as much as 25 years of useful life of their siding would receive far *more* in damages than customers who experience defects in the first five years. *See Byrne v. Ackerlund*, 108 Wn.2d 445, 453-54, 739 P.2d 1138 (1987) ("Where one construction would make a contract unreasonable, and another, equally consistent with its language, would make it reasonable, the latter more rational construction must prevail."). Such a result is both unreasonable on its face and refuted by the warranty language, which specifies that consumers who experience defects after the first five years are subject to an aging deduction and therefore entitled to *less* money than those whose siding fails sooner. Trial Ex. 9.

Despite Canterbury's persistent attempts to create ambiguity where there is none, the Limited Warranty in this case is clear. *Mayer*, 80 Wn. App. at 420 ("[A] court will not read an ambiguity into a contract that is otherwise clear and unambiguous."). The express terms specify a single

⁴ "[T]here is no need to resort to the rule that ambiguity be resolved against the drafter," where the parties' intent can be determined from "viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties." *Roberts, Jackson & Assocs. v. Pier 66 Corp.*, 41 Wn. App. 64, 69, 702 P.2d 137 (1985) (internal quotation marks and citation omitted).

remedy, provide that owners “shall be limited” to that remedy, and disclaim all others.

2. The Settlement Agreement and Federal Court Orders Further Limit Canterbury’s Remedy to the Remedy Stated in the Limited Warranty.

Canterbury would have this Court believe that the class action Settlement Agreement and related federal court orders have no bearing on this case. Not so. Both limited Canterbury to the “express terms” of the Limited Warranty. CP 264, 249.

Notably, Canterbury does not dispute that the Settlement Agreement is a subsequent contract between the parties, and that where parties enter into two contracts on the same subject, “the contracts must be interpreted together, and the second agreement prevails if there are any inconsistencies.” *Durand v. HIMC Corp.*, 151 Wn. App. 818, 830, 214 P.3d 189 (2009). Thus even if the Limited Warranty were ambiguous on the exclusivity of the stated remedy (it is not), the parties’ subsequent Settlement Agreement would inform and clarify the issue. Canterbury argues instead that the Settlement Agreement did nothing to interpret or modify the Limited Warranty; it simply “reinstated” it as if the class action settlement had never happened.

Canterbury is all too quick, however, to brush aside a Settlement Agreement spanning 17 years, paying out hundreds of millions of dollars, and specifying a narrow basis for subsequent claims. Canterbury’s contention that the Settlement Agreement does not so much as “discuss

the terms” of the Limited Warranty, Resp. Br. at 37, is belied by the specific language limiting class members’ claims to the “express terms of the L-P 25-year Limited Warranty issued with the product.” CP 264. Bound by the four corners of the contract, class members are not at liberty to look outside the Limited Warranty for relief for defective siding. Canterbury’s interpretation would read the phrase “express terms” right out of the Settlement Agreement, rendering it meaningless surplusage in violation of “a cardinal rule governing the construction of contracts,” *Olson v. Snake River Valley R.R. Co.*, 22 Wash. 139, 145, 60 P. 156 (1900); *Ball v. Stokely Foods*, 37 Wn.2d 79, 83, 221 P.2d 832 (1950). The Settlement Agreement did not simply reinstate the Limited Warranty; it limited claimants to the warranty’s “express terms.”

Canterbury argues that LP’s ability to assert previously waived defenses is “solely a function of a full reinstatement of the limited warranty” as “there is no language in the Amended Agreement expressly authorizing the otherwise waived defenses.” Resp. Br. at 37 n.5. But Canterbury neglects to mention that, like the warranty remedy, LP’s affirmative defenses are found in the “express terms” of the Limited Warranty. Trial Ex. 9.⁵ The Settlement Agreement carved out a narrow

⁵ Indeed, the express terms of the Limited Warranty include no less than three references to LP’s available defenses. Trial Ex. 9 (warranting the product “when installed and finished according to the published installation and finishing instructions and when properly maintained”); *id.* (under “Limitations” provision: “The siding must be stored, handled, installed, finished and maintained in accordance with L-P’s published instructions. Failure to follow such instructions will void this warranty.”); *id.* (under “Important Notice” in bold and underlined text: “**Failure to install, finish and maintain in accordance with L-P’s**”

exception to “Settled Claims” based on the “express terms” of the Limited Warranty, including defenses and remedies provided therein.

Canterbury accuses LP of failing to distinguish between “claims” and “remedies.” Resp. Br. at 21. It is Canterbury, however, that fails to acknowledge the difference between a general claim for breach of warranty and a claim bound by the “express terms” of the Limited Warranty. And Canterbury’s semantics ignores the fact that courts routinely use the term “claim” to describe not only a specific cause of action but also a request for a specific remedy.⁶ The Settlement Agreement itself refers to the remedies available to class members as “claims.” CP 264 (“A ‘Settled Claim’ does not include *any claim for consequential damages* to other structural components caused by the failure or repair of Exterior Inner Seal™ Siding *or to claims made against L-P* after the expiration of the term of the Settlement Agreement *under the express terms of the L-P 25-year Limited Warranty* issued with the product.”) (emphases added). Canterbury can hardly dispute that a “claim for

published instructions may cause damage to the siding and will void this warranty.”). Canterbury’s preferred remedy, meanwhile, is not mentioned once.

⁶ See, e.g., Black’s Law Dictionary (9th ed. 2009) (including a definition of “claim” to mean “any right to payment or to an equitable remedy”); *Marr Enters., Inc. v. Lewis Refrigeration Co.*, 556 F.2d 951, 953 (9th Cir. 1977) (“[T]he trial judge dismissed all claims of Marr against Lewis except that for repayment of the purchase price, because the court found that contractual disclaimers of liability and limitations of remedy were valid and enforceable.”); *Portland Elec. & Plumbing Co. v. City of Vancouver*, 29 Wn. App. 292, 294-95, 627 P.2d 1350 (1981) (“There is a distinction between a claim for monies due, or an action for the price, and a claim for damages for breach of contract.”). Indeed, even the official comments to Washington’s UCC provisions refer to “claim[s] for damages.” See RCW 62A.2-607.

consequential damages” is limited to a specific remedy and not a separate cause of action. Where the Amended Settlement Agreement refers to the remedy of consequential damages as a “claim,” the rest of the sentence should be read in accord with that provision. *See Ball*, 37 Wn.2d at 87-88 (“Under the doctrine of ‘*noscitur a sociis*,’ the meaning of words may be indicated or controlled by those with which they are associated.”).

Moreover, the Federal Court put to rest any purported confusion between claims and remedies when it ruled conclusively: “[P]laintiff’s *remedy*, if any, *is* the 25-year warranty.” CP 254 (emphasis added). Canterbury offers no response on this point.

The Federal Court orders in this case are replete with references to the limitations provided by the warranty’s “express terms.” First, paying precise attention to “the wording of the amendment to the settlement agreement concerning the 25-year warranty,” CP 250, the Federal Court repeated the Settlement Agreement’s narrow provision for written warranty claims: “As relevant here, the amendment revised the definition of ‘Settled Claim’ to exclude ‘claims made against L-P after the expiration of the term of the Settlement Agreement under the express terms of the L-P 25-year Limited Warranty issued with the product.’” CP 249.

Second, the Federal Court pointed to the Notice of Approval of Settlement sent to class members, which cautioned that ““most warranties issued for L-P Inner Seal Siding had a depreciation schedule so that by the year 2003 *your recovery under the warranty will have depreciated.*”” CP 250 (emphasis added). There would be no reason to reference the certainty

of a depreciation schedule if the remedy in the warranty were not the only remedy available to class members after the settlement term.⁷

Third, upon LP's motion to enforce the Federal Court's prior order, the Federal Court emphasized Canterbury's "limitation to warranty damages." CP 427. Understanding LP's motion as a request "to interpret the warranty and determine Canterbury's damages as a matter of law," the Federal Court refused to examine the factual question regarding the "amount Canterbury may seek as damages," CP 427, whether it be \$74,361, *id.*, \$50,000, *see* Resp. Br. at 33 n.4, or any other amount. That determination, which is largely contingent "upon the amount of affected siding material," Trial Ex. 9, was left to the state trial court. The Federal Court reinforced, however, its previous ruling that "[P]laintiff's remedy, if any, is the 25-year warranty," and reiterated that Canterbury is "limit[ed] to warranty damages." CP 427. To adopt Canterbury's position, one would have to interpret this "limitation" as authorizing full replacement costs as "ordinary" damages under the UCC, which is no limitation at all.

The Superior Court's rulings directly conflict with the Federal Court orders and Settlement Agreement on the same issue. While the Federal Court ruled that Canterbury's "remedy, if any, *is* the 25-year warranty," CP 254, the Superior Court stated that the "limited warranty *is not . . . the only option that is available to the plaintiff[]*," RP 62. While

⁷ Both the Notice of Approval and the Federal Court order quoting it also refer to the remedy of consequential damages as a "claim." CP 250 ("All claims other than warranty claims (excluding those for consequential damages . . .) will be released if you stay in the Class."); CP 420 (same).

the Settlement Agreement limited Canterbury to the “*express terms* of the L-P 25-year Limited Warranty,” CP 249, the Superior Court instructed the jury that “[t]he limited remedy stated in the warranty is not the sole and exclusive remedy available” to Canterbury, CP 198. The Superior Court’s failure to apply the limitations express in the warranty, the Settlement Agreement, and the Federal Court orders warrants a new trial.

Canterbury’s 51-page effort to explain away the significance of the class action settlement contains no response whatsoever to LP’s argument about the purpose behind the settlement. *See* Appellant’s Br. at 25-29. This is likely because Canterbury’s argument fails as a matter of both principle and practicality. The purpose of class action settlements is to provide a substantial and finite pool of funds to class members in exchange for the certainty that the company settling the litigation will not face endless litigation and indefinite damages based on the same defective product in the future. Here, LP agreed to pay hundreds of millions of dollars to class members in exchange for the class members’ agreement to release their underlying claims, with the narrow exception of claims “under the express terms” of the Limited Warranty for defects discovered after the settlement period. Canterbury’s position – and the Superior Court’s jury instruction – allows this narrow exception potentially to swallow the entire settlement, permitting a virtually unbounded damages award far in excess of any amount awarded to other class members.

The Superior Court’s ruling threatens the certainty, predictability, and finality of the class action settlement. Indeed, if the Settlement

Agreement did not preclude remedies beyond the “express terms” of the Limited Warranty, then the promises offered to LP in consideration of its settlement payment were illusory, as LP would remain liable to class members for the full replacement cost of defective siding. *See Cascade Auto Glass, Inc. v. Progressive Cas. Ins. Co.*, 135 Wn. App. 760, 770, 145 P.3d 1253 (2006) (“A contract is illusory when its provisions make performance optional or discretionary.”). As a class member, Canterbury cannot so unravel the Settlement Agreement by which it is bound.

B. The Jury Should Not Have Been Permitted to Decide Whether the Warranty Remedy Failed of Its Essential Purpose.

Canterbury’s response brief does little to bolster the Superior Court’s improper jury instruction regarding failure of essential purpose.

First, there is no question that the Federal Court has already found the warranty remedy to be “fair, reasonable, and adequate and in the best interests of the Class.” CP 259 § 5. Canterbury’s suggestion that this ruling was limited to the “settlement remedy” provided to claimants, Resp. Br. at 39, is incorrect. Not only was the Federal Court’s determination based on the Class as a whole, of which Canterbury is a member, but the Federal Court specifically raised concerns about class members who discover defects after the settlement term, and the Settlement Agreement was amended accordingly to provide those class members with relief “under the express terms of the L-P 25-year Limited Warranty.” CP 249. As a class member, Canterbury specifically released all other claims that “could reasonably have been or in the future might reasonably be

asserted,” including claims for damages under the UCC and claims that the remedies in the settlement were unfair or inadequate. The jury should not have been allowed to reconsider the adequacy of a warranty remedy that had already received the Federal Court’s stamp of approval.

Canterbury counters that even if the Federal Court approved the remedy as written in the Limited Warranty, it could not have approved LP’s “unilateral[] implement[ation]” of that remedy. Resp. Br. at 40. Contrary to Canterbury’s characterization of the warranty protocol as “rigid” and “nonsensical,” *id.* at 15, LP developed its protocol with objective standards based on the class action protocol, *see* Exs. 222, 223 (both warranty and class protocol criteria for thickness swell is .540”), which are critical to LP’s consistent and fair application of its warranty program, RP 471, 478-79. Not only does the Settlement Agreement require class protocol to be followed only for the settlement term, CP 330, 335-38, it also prohibits Canterbury from using class protocol as the basis for a subsequent suit, CP 330-31 (no action taken under Settlement Agreement may constitute evidence of any wrongdoing or liability of any kind on the part of LP).

In any event, Canterbury’s primary dispute with LP’s protocol is that it failed to accurately reflect the amount of damaged siding. *See* Resp. Br. at 42 (“LP’s rigid protocol would direct a conclusion that only 11% of the LP siding was defective, but investigation by two independent experts would reveal damage in excess of 70%.”). There is no reason why the jury could not have agreed with Canterbury regarding the amount of affected

siding and still applied the warranty remedy. In other words, the warranty remedy does not fail of its essential purpose solely because LP may have applied it in such a way as to undercompensate Canterbury if the amount of warranty damages can be correctly determined by the jury.⁸

In its opening brief, LP noted that typically a refund of the purchase price prevents a limited remedy from failing of its essential purpose. *See* Appellant's Br. at 38-39. The non-Washington authorities Canterbury cites in response do not suggest otherwise. First, Canterbury cites case law for the proposition that a refund remedy fails of its essential purpose where the defect in the warranted product is latent. *See* Resp. Br. at 41. But unlike the circumstances in those cases, here the Limited Warranty specifically contemplated that manufacturing defects may not appear immediately but may instead surface "[d]uring the 6th through 25th year." Trial Ex. 9. *See Leprino v. Intermountain Brick Co.*, 759 P.2d 835, 837 (Colo. App. 1988) ("When the parties agreed to limit the buyer's remedy to refund of the purchase price, they contemplated a situation in which the defective bricks would be returned to Intermountain prior to installation and the purchase price would be returned to the plaintiffs."); *Neville Chem. Co. v. Union Carbide Corp.*, 294 F. Supp. 649, 655 (W.D. Pa. 1968) (finding that warranty remedy was "obviously designed to cover

⁸ Although Canterbury failed to produce any evidence of the original purchase price, it is not difficult to calculate the range of options available under the warranty remedy. Assuming 100% of Canterbury's siding was affected, Canterbury would be entitled to \$94,032 under the warranty (52 cents multiplied by 195,774 square feet, times two, minus the aging deduction). RP 192 (total siding of 195,774 square feet); Tr. Ex. 227A (aging deduction of .538164).

a situation where the defect is discoverable upon receipt of shipment, reasonable inspection and prompt discovery of defects”). Where class member Canterbury agreed to the Limited Warranty remedy as written—and the Federal Court approved that remedy as adequate—Canterbury cannot now complain that those terms are unfair. *See* 1 James T. White, Robert S. Summers, & Robert A. Hillman, *Uniform Commercial Code* § 13:20, at 1132 (6th ed. 2012) (UCC provision concerning failure of essential purpose is concerned with “the application of an agreement to novel circumstances not contemplated by the parties”).

Second, Canterbury argues that a remedy may fail of its essential purpose where the seller’s action or inaction with respect to that remedy “causes the remedy to fail.” Resp. Br. at 41. But unlike the plaintiffs in the cases Canterbury cites, Canterbury does not complain that LP’s application of the warranty remedy caused Canterbury to incur the damages it seeks to recover. *See Leprino*, 759 P.2d at 837 (“Intermountain had made the limited remedy ineffective because an entire shipment of worthless bricks was installed as a direct consequence of its inaction.”); *Earl M. Jorgensen Co. v. Mark Constr., Inc.*, 540 P.2d 978, 986-87 (Haw. 1975) (discussing consequential damages resulting from failure to provide limited remedy in a reasonably prompt and nonnegligent manner); *Lewis Refrigeration Co. v. Sawyer Fruit, Vegetable & Cold Storage Co.*, 709 F.2d 427, 432 (6th Cir. 1983) (plaintiff asserts that limited remedy of rescission “would have caused [plaintiff] to lose revenues and breach important commitments”); *Marr Enters.*, 556 F.2d at 955 (“Typically,

[these] cases . . . are those in which the plaintiff's remedy was limited solely to repair or replacement of defective parts and the seller failed to replace or repair in a reasonably prompt and non-negligent manner.”). Here, Canterbury chose to remove and replace all of the siding *before* LP submitted its offer of payment under the warranty. Resp. Br. at 10-11.

Finally, despite Canterbury's best efforts to justify the “alternative theories” reflected in the jury instructions, it cannot cover for the Superior Court's error in failing to clarify the issue before the jury.⁹ Canterbury's self-evident statement that a party is permitted to advance alternative theories sidesteps the issue of inconsistent jury instructions presented without any clarification or context. Jury Instruction 9 provided conclusively and as a matter of law that “[t]he limited remedy stated in the warranty is not the sole and exclusive remedy available under the warranty.” CP 198. Jury Instruction 11, meanwhile, permitted the jury to find that the warranty remedy failed of its essential purpose, CP 200, even though this issue is moot where a warranty remedy is deemed non-exclusive. These were not alternative theories presented to the jury; they were conflicting instructions. Together they allowed the jury to improperly use the failure of essential purpose analysis to bolster its election of a remedy other than the warranty remedy, and made it impossible to

⁹ Canterbury states that LP did not articulate its objection on this basis before the trial court. Resp. Br. at 43. But LP specifically advised the Superior Court of its exception to Jury Instruction 11 as conflicting with Instruction 9: “It is inapplicable here where the Court has instructed the jury that it can go beyond the remedy stated in the warranty to the damage formula in the UCC.” RP 879.

determine on which of Canterbury's alternative theories the verdict is based. *See Hall v. Corp. of Catholic Archbishop of Seattle*, 80 Wn.2d 797, 804, 498 P.2d 844 (1972) (“[W]e have held consistently that it is prejudicial error to give irreconcilable instructions upon a material issue in the case. Where instructions are inconsistent or contradictory on a given material point, their use is prejudicial because it is impossible to know what effect they may have on the verdict.”).

Boiled down, Canterbury's argument with respect to failure of essential purpose is that where warranty payments would not cover all of Canterbury's claimed damages, Canterbury should be freed from its contractual limitations. Canterbury would thus “turn the [UCC] provision on its head since it would always prevent implementation of any limitation that might prevent recovery of particular relief sought.” *Hill v. BASF Wyandotte Corp.*, 696 F.2d 287, 292 (4th Cir. 1982). In the face of the Federal Court determination foreclosing the issue, misleading jury instructions, and an utter lack of substantial evidence to support Canterbury's conclusory assertion, the Superior Court's instruction on failure of essential purpose was in error.

C. Alternatively, the Superior Court Erred with Respect to the Jury's Instruction on and Award of Damages.

The bulk of Canterbury's argument regarding the damages award revolves around LP's purported failure to preserve the issues discussed in its Opening Brief. But Canterbury's attempt to avoid appellate review of obvious errors is unavailing.

Canterbury first contends that LP failed to comply with the rules of appellate procedure. But the letter and spirit of the rules say otherwise. LP's claimed error with respect to the damages calculation is set forth in its third issue pertaining to assignment of error, separate and distinct from the errors alleged for the jury instructions regarding exclusivity of the warranty remedy and failure of essential purpose. Appellant's Br. at 3. And, contrary to Canterbury's representation, the verbatim text of Jury Instruction 10, outlining the measure of damages, is included not once, but twice in LP's Opening Brief, *see id.* at 12, 43, in compliance with RAP 10.4(c). Moreover, the rules favor "the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands." RAP 1.2(a).

Canterbury's contention that LP failed to articulate at trial its exception that Jury Instruction 10 compelled a certain verdict is disingenuous. In purporting to set forth "[t]he totality of LP's jury exceptions" in the appendix to its brief, Resp. Br. at 44, Canterbury neglects to mention the colloquy that took place one day prior specifically referencing the instruction on damages. *See* RP 850-71. In fact, while Canterbury asked that the court reporter be excused for this discussion, LP "prefer[red] that she stay on for purposes of making a record." RP 850. During that colloquy, LP asked that Canterbury's proposed instruction on damages be revised to state, "for your determination of damages you *may* use the following measure of damages. Make it permissive. The remedy

under the warranty is still an optional remedy.” *Id.* at 858 (emphasis added); *see also id.* at 865; *id.* at 866-67 (“Without that, it gives undue emphasis to the difference in values damages calculation.”).

“The pertinent inquiry on review is whether the exception was sufficient to apprise the trial judge of the nature and substance of the objection.” *Crossen v. Skagit Cnty.*, 100 Wn.2d 355, 358-59, 669 P.2d 1244 (1983) (finding no forfeiture where “it was apparent, given the extended discussions concerning jury instructions, that the trial judge understood the basis of counsel’s objection”). Here, the trial judge clearly understood LP’s objection that the instructions failed to convey that the warranty remedy remains a “permissible measure[] of damages,” RP 866, and specifically ruled against LP on that issue, *id.* at 867; *see also id.* at 879 (“We had quite a lot of discussion on the record yesterday afternoon about each of those subject matters. I think the Court has made its position clear. I think the parties have made their positions clear as well.”). Canterbury’s suggestion that LP advanced this argument for the first time on appeal is simply unfounded.

In a last gasp to prevent the Court from reviewing LP’s claim of error, Canterbury faults LP for not offering an alternative instruction on the issue. Resp. Br. at 44-45. But LP had no reason to bargain against itself by offering a jury instruction contrary to its theory that the only remedy available to Canterbury is stated in the warranty. *See Crittenden v. Fiberboard Corp.*, 58 Wn. App. 649, 656, 794 P.2d 554 (1990) (no obligation to propose alternative instruction when objecting to an

instruction that erroneously circumscribes jury's consideration of certain evidence). The fact that LP would not be offering a contrary jury instruction was the precise reason LP chose to have the above colloquy on the record. RP 850-51. Contrary to Canterbury's suggestion, LP had no obligation to provide alternative instructions that endorsed Canterbury's theory of the case and directly refuted its own.

It is no wonder Canterbury tries to avoid review of the merits, as its argument on the merits falls flat. Although at trial Canterbury maintained that the warranty remedy was not an option for the jury, *see id.* at 859, it now contends that the instructions accurately reflect that the warranty remedy was permissible. Canterbury emphasizes that Instruction 10 informed the jury that "costs of repair and/or replacement may be evidence" of the difference in value measurement, Resp. Br. at 45, but it ignores the language requiring the jury to use the UCC measure of damages rather than the warranty remedy: "[Y]ou are to use the following measure of damages in the amounts proved by Plaintiff." CP 199. Contrary to Canterbury's contention, the Court's clarification to counsel outside the presence of the jury hardly cures the problem; nor do LP's arguments to the jury compensate for this plain, judicial error. Resp. Br. at 46-47. Instruction 10 erroneously compelled a damages award in excess of the remedy provided under the Limited Warranty.

Moreover, Canterbury offers little to justify its reliance on replacement costs in lieu of satisfying its burden to establish the difference in value under the UCC. *See* RCW 62A.2-714(2). Even assuming the

value of the siding as delivered was zero (a near-impossibility given that it served its purpose for 16 years), Canterbury offered no evidence to establish that the value of the siding as warranted exceeded the purchase price of 52 cents per square foot.

Not only does Canterbury fail to cite any Washington authority to support an award of total replacement as an appropriate remedy, none of the out-of-jurisdiction cases it cites is on point. Two of them include no mention of the UCC whatsoever, let alone the damages calculation provided in Section 2-714. *In re Chinese Manufactured Drywall Prods. Liab. Litig.*, 706 F. Supp. 2d 655 (E.D. La. 2010) (under Virginia law, upholding award of repair costs for defective drywall that rendered plaintiffs' homes uninhabitable); *Landis v. William Fannin Builders, Inc.*, 951 N.E.2d 1078 (Ohio App. 2011) (under Ohio common law, holding that replacement costs were "reasonable" because contract was for a custom home and plaintiffs contracted for specific type of stain that was not used). *Hicks v. Kaufman & Broad Home Corp.*, 107 Cal. Rptr.2d 761 (2001), is even farther afield; holding only that a class may be certified when it includes members who have not demonstrated existing property damage, this case does not discuss the proper measure of damages under the UCC or any other law. Canterbury highlights *Chatlos Systems, Inc. v. National Cash Register Corp.*, 670 F.2d 1304 (3d Cir. 1982), as an example where "the UCC remedy of the difference in value . . . can yield a damages award well in excess of the purchase price." Resp. Br. at 50. Notably, *Chatlos* adheres to the difference in value formula provided by

Section 2-714 of the UCC; it does not even contemplate full replacement costs as a remedy. Unlike Canterbury, the plaintiff in that case presented evidence that the actual value of the goods delivered was far less than the contract price and that the value of goods needed to meet the plaintiff's requirements was far more. Here, Canterbury's decision to take a shortcut around its burden of proving difference in value by offering only evidence of full replacement costs cannot justify an award many multiples of the original price. Canterbury's inability to cite any analogous cases from any jurisdiction awarding full replacement costs under Section 2-714 of the UCC indicates that the verdict below is unprecedented.

Finally, Canterbury argues that the jury's \$775,214 damages award is hardly a windfall, citing its owner's self-serving testimony that he expected the siding to last indefinitely. By Canterbury's logic, the warranty's 25-year limitation is meaningless, and Canterbury would be entitled to reap the same damages award at year 26 as it would at year 16. Canterbury fails to recognize that, relative to its fellow class members who filed claims during the settlement term, and relative to customers who experienced siding defects in the first five years of use, Canterbury's damages award is exorbitant and cannot stand.

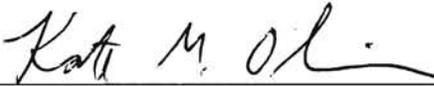
III. CONCLUSION

LP respectfully asks the Court to reverse the Superior Court's denial of its renewed motion for judgment as a matter of law and its motion for a new trial, and to remand for a new trial.

DATED: September 30, 2013

Respectfully submitted,

PERKINS COIE LLP

By: 

Kathleen M. O'Sullivan, WSBA No. 27850
Abha Khanna, WSBA No. 42612
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
(206) 359-8000

Julia E. Markley, WSBA No. 36095
1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
(503) 727-2000

Attorneys for Appellant
Louisiana Pacific Corporation

CERTIFICATE OF SERVICE

On September 30, 2013, I caused to be served upon the below named counsel of record, at the address stated below, via the method of service indicated, a true and correct copy of the foregoing document.

Warren J. Daheim, WSBA No. 3992
Margaret Archer, WSBA No. 21224
Gordon Thomas Honeywell LLP
Wells Fargo Plaza
1201 Pacific Avenue, Suite 2100
Tacoma, WA 98402
wdaheim@gth-law.com
marcher@gth-law.com
Telephone: 253.620.6500
Facsimile: 253.620.6565
Attorneys for Respondent Canterbury
Apartment Homes LLC

Via hand delivery
 Via U.S. Mail, 1st Class,
Postage Prepaid
 Via Overnight Delivery
 Via Facsimile
 Via Email

**I certify under penalty of perjury under
the laws of the State of Washington that
the foregoing is true and correct.**

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BY _____
DEPUTY

EXECUTED at Seattle, Washington, on September 30, 2013.



Linda Nelson