

No. 44545-0

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CANTERBURY APARTMENT HOMES LLC,

Respondent,

v.

LOUISIANA PACIFIC CORPORATION,

Appellant,

RESPONDENT CANTERBURY APARTMENT HOMES LLC'S
BRIEF

GORDON THOMAS HONEYWELL LLP
Margaret Y. Archer, WSBA No. 21224
Warren J. Daheim, WSBA No. 03992
Attorneys for Respondent

Suite 2100
1201 Pacific Avenue
P.O. Box 1157
Tacoma, WA 98401-1157
(253) 620-6500
WSBA No. 21224

BY  DEPUTY
STATE OF WASHINGTON
2013 SEP -3 AM 9:03
COURT OF APPEALS
DIVISION II

[100073058]

ORIGINAL

TABLE OF CONTENTS

INTRODUCTION1

RESPONSE TO ASSIGNMENT OF ERROR AND LP’S
FAILURE TO PRESERVE ISSUES FOR APPEAL5

STATEMENT OF THE CASE.....7

 A. LP Sold Canterbury Defective Inner-Seal Siding That
 Required Full Replacement.....7

 B. Before Replacing The Defective Siding, Canterbury
 Made A Claim Under The LP 25-Year Limited
 Warranty.9

 C. The Nation-Wide Class Settlement.....12

 D. Once The Class Settlement Term And Court
 Supervision Of Class Claims Terminated, LP
 Unilaterally And Arbitrarily Changed Its Claims
 Protocol.....14

 E. The Federal Court Rejected LP’s Efforts To Limit
 Remedies Available To Canterbury Under The Limited
 Warranty.18

 F. LP Did Not Appeal The Federal Court’s Rulings, But
 Elected To Proceed In State Court.....20

ARGUMENT.....20

 A. LP Confuses And Improperly Conflates The Separate
 And Distinct Concepts Of Claims And Remedies.
 Distinction Of The Two Is Critical To Properly
 Evaluate This Appeal.....20

 B. The Court Properly Instructed The Jury That The
 Limited Remedy Stated In The Warranty Is Not
 Exclusive.....22

 1. Under the UCC, limited remedies are optional
 unless expressly agreed to be exclusive.....22

| | | |
|----|---|----|
| 2. | LP’s warranty has no unmistakable expression that the stated warranty remedies were agreed to be exclusive and the remedies are thus optional to Canterbury..... | 27 |
| 3. | The federal court did not limit Canterbury’s remedies under the express warranty, but ruled that issue is within the province of the state court. | 31 |
| 4. | Without interpretation or modification, the Class Settlement Agreement fully reinstated LP’s warranty, and with it all remedies available pursuant to its terms in light of Washington law..... | 34 |
| C. | The Trial Court Properly Instructed The Jury On Failure Of Essential Purpose And The Evidence Supports The Verdict. | 37 |
| 1. | The federal court did not rule in 1996 that a protocol not even invented until 2003 was an adequate remedy. | 39 |
| 2. | The substantial evidence was more than sufficient to support the court’s decision to instruct the jury on the failure of essential purpose issue. | 40 |
| 3. | The trial court’s ruling on exclusivity did not render the failure of essential purpose issue moot. | 42 |
| D. | The Trial Court Properly Instructed The Jury On The Measure Of Damages And The Substantial Evidence Supports The Verdict. | 44 |
| 1. | LP failed to preserve its jury instruction challenges..... | 44 |
| 2. | The damages awarded are supported by the law and the substantial evidence. | 47 |
| | CONCLUSION..... | 51 |

Appendices

- A. LP's Jury Instruction Exceptions (RP 878-880)
- B. Jury Instruction (CP 198)
- C. Jury Instruction (CP 199)
- D. Jury Instruction (CP 200)
- E. LP's Proposed Jury Instruction and Verdict Form (CP 151-172)
- F. LP Limited Warranty (Trial Exhibit 9)
- G. Trial Court's Ruling on Exclusive Remedy (RP 831-834)
- H. Trial Court's Ruling on Failure of Essential Purpose (RP 806-808)

TABLE OF AUTHORITIES

Cases

| | |
|--|------------|
| <i>American Nursery Products, Inc. v. Indian Wells Orchard</i> , 115 Wn.2d 217, 797 P.2d 477 (1990)..... | 25, 31, 42 |
| <i>Amrine v. Murray</i> , 28 Wn. App. 650, 626 P.2d 24 (1981) | 43 |
| <i>Barnard v. Compugraphic Corp.</i> , 35 Wn. App. 414, 667 P.2d 117 (1983) | 23 |
| <i>Bulzomi v. Dept. of Labor and Indus.</i> , 72 Wn. App. 522, 864 P.2d 996 (1994)..... | 6 |
| <i>Chatlos Systems, inc. v. Nat'l Cash Register Corp.</i> , 670 F.2d 1304 (C.A.N.J. 1982)..... | 50 |
| <i>Cox v. Lewiston Grain Growers, Inc.</i> , 86 Wn. App. 357, 936 P.2d 1191 (1997)..... | 38 |
| <i>David v. Microsoft Corp.</i> , 149 Wn.2d 521, 70 P.3d 126 (2003)..... | 44 |
| <i>Dennis v. Great American Insurance Company</i> , 8 Wn. App. 71, 503 P.2d 1114 (1972)..... | 29 |
| <i>Dopps v. Alderman</i> , 12 Wn.2d 268, 121 P.2d 388 (1942)..... | 37 |
| <i>Earl M. Jorgensen Co. v. Mark Constr., Inc.</i> , 56 Haw. 466, 540 P.2d 978 (1975)..... | 41 |
| <i>Ford Motor Co. v. Reid</i> , 250 Ark SCO 176, 465 SW2d 80 (1971).... | 21, 31 |
| <i>Hicks v. Kaufman and Broad Home Corporation</i> , 89 Cal. App.4 th 908 (2001)..... | 49 |
| <i>Hogland v. Raymark Industries, Inc.</i> , 50 Wn. App. 360, 749 P.2d 164 (1987)..... | 6 |
| <i>In re Chinese Manufactured Drywall Products Liability Litigation</i> , 706 F. Supp.2d 655 (E. D. La 2010) | 49 |

| | |
|--|------------|
| <i>Landis v. Williams Fannin Builders, Inc.</i> , 193 Ohio App.3d 318, 951 N.E.2d 1078 (2011) | 49 |
| <i>Latimer v. William Mueller & Son, Inc.</i> , 149 Mich. App 620, 386 N.W.2d 618 (1986)..... | 41 |
| <i>Leprino v. Intermountain Brick Company</i> , 759 P.2d 835, 6 UCC Rep. Serv.2d 377 (Colo. App. 1988)..... | 41 |
| <i>Lewis Refrigeration Company v. Sawyer Fruit, Vegetable and Cold Storage Co.</i> , 709 F. 2d 427 (6 th Cir. 1983) | 38, 40 |
| <i>Marr Enterprises, Inc. v. Lewis Refrigeration Co.</i> , 556 F.2d 951 (9 th Cir. 1977) | 41 |
| <i>Micro Environmental Int'l, Inc. v. Coopers & Lybrand, LLP</i> , 110 Wn. App. 412, 40 P.3d 1206 (2002)..... | 6 |
| <i>Miller v. Badgley</i> , 51 Wn. App. 285, 753 P.2d 530 (1988) | 23, 48 |
| <i>Neville Chemical Company v. Union Carbide Corporation</i> , 294 F. Supp 649 (W.D. Penn. 1968) | 41 |
| <i>Northwest Perfection Tire Co. v. PerfectionTire Corp.</i> , 125 Wash. 84, 215 Pac. 360 (1923) | 24, 25, 26 |
| <i>Norway v. Root</i> , 58 Wn.2d 96, 361 P.2d 162 (1961)..... | 30 |
| <i>Raum v. City of Bellevue</i> , 171 Wn.App. 124, 286 P.3d 695 (2012) ... | 44, 45 |
| <i>Schroeder v. Fageol Motors, Inc.</i> , 86 Wn.2d 256, 544 P.2d 20 (1975).... | 22 |
| <i>Swenford v. Dept. of Licensing</i> , 122 Wn.2d 670, 95 P.3d 364 (2004)..... | 47 |
| <i>Trueax v. Ernest Home Ctr., Inc.</i> , 124 Wn.2d 334, 878 P.2d 1208 (1994) 7 | |

Statutes

| | |
|--------------------------|----------------|
| RCW 62A.1-106(1)..... | 51 |
| RCW 62A.1-201(34)..... | 21 |
| RCW 62A.2-313(1)(a)..... | 21 |
| RCW 62A.2-314..... | 21 |
| RCW 62A.2-315..... | 21 |
| RCW 62A.2-316..... | 22 |
| RCW 62A.2-714(2)..... | 23, 45, 47 |
| RCW 62A.2-719..... | 22 |
| RCW 62A.2.719(1)..... | 31 |
| RCW 62A.2-719(1)(b)..... | 25, 26, 30, 31 |
| RCW 62A.2-719(2)..... | 2, 38, 40, 42 |

Rules

| | |
|---------------------|------|
| CR 51(f)..... | 6 |
| RAP 10.3..... | 5, 7 |
| RAP 10.3(a)(4)..... | 5 |
| RAP 10.3(g)..... | 5 |
| RAP 10.4..... | 5 |
| RAP 10.4(c)..... | 5 |

Other Authorities

| | |
|---|----|
| <i>Anderson on Damages Under the UCC § 10.6</i> | 48 |
| <i>Anderson on Damages Under the UCC § 12.7 (2003)</i> | 38 |
| <i>Anderson on Damages Under the UCC § 12.8 (2003)</i> | 38 |
| <i>White & R. Summers, Uniform Commercial Code § 12-9</i> | 26 |

INTRODUCTION

Canterbury Apartment Homes, LLC (“Canterbury”) commenced this lawsuit after the defective Louisiana Pacific Corporation (“LP”) Inner Seal Siding installed on its apartment buildings failed, necessitating replacement of all the siding at a total out-of-pocket cost of \$937,917. Canterbury made a claim under LP’s 25-year limited warranty. There was never a dispute that the LP product was defective. Rather, this dispute arose after LP tendered its offer of payment under the warranty.

Though ardent in its defense of its warranty remedy, calling it not just adequate, but “robust” (LP Brief at 39), nowhere in its 49-page brief does LP disclose the amount it proposed to pay Canterbury. LP’s “robust remedy” for Canterbury’s \$937,000 problem was payment of \$8,383, less than 1% of the actual cost incurred to address the defective siding.

Washington’s Uniform Commercial Code (“UCC”) authorizes contractual limitations on the available statutory remedies for breach of warranty. Those limitations are only enforceable, however, if certain conditions are satisfied. Limited remedies will be deemed optional (rather than exclusive) unless the written warranty contains an unmistakable expression that the parties agreed the stated remedies are exclusive. RCW 62A.2-719(1(b)). Here, because LP failed to include an unmistakable expression that the limited remedy was agreed to be exclusive, the trial

court properly instructed the jury that the limited remedy stated in the warranty was not the sole and exclusive remedy available and that Canterbury could recover the UCC remedy.

Moreover, even if exclusive, if circumstances cause a limited remedy to fail of its essential purpose – fail to provide at least a minimum adequate remedy – the UCC permits a consumer to recover the statutory remedies. RCW 62A.2-719(2). Because substantial evidence was presented to demonstrate that the warranty limitation, as implemented by LP, deprived Canterbury of a minimum adequate remedy, the trial court also correctly instructed the jury that it could award the UCC statutory remedy if the jury found the warranty failed of its essential purpose.

Properly instructed by the trial court, the jury returned a verdict of \$775,314.17. Though \$162,000 less than the amount Canterbury actually spent to address the defective siding, LP calls the verdict a windfall.

LP seeks refuge in the 1996 class settlement, which through 2002, barred some 800,000 purchasers from bringing suit and required that claims for LP's defective product be addressed through a specified settlement program. However, the class program ended on January 1, 2003. Thereafter class members were expressly authorized to make claims for defective LP siding under the warranty. The class settlement neither interpreted nor modified LP's limited warranty; it simply

reinstated it. Yet twice LP asked the federal court with exclusive jurisdiction to enforce the class settlement to intervene. It also asked the state trial court to use the class settlement to limit Canterbury's remedies no less than four times. Each time LP's request was denied.

On its first federal court motion, LP asserted all state court claims were released in the settlement. U. S. District Court Judge Robert Jones ruled that the warranty claim was not released. He ruled that the class settlement did not bar Canterbury from prosecuting its asserted breach of warranty claim in state court – which claim expressly disclosed that Canterbury sought replacement costs in excess of \$900,000. (CP 254-55.)

In its second motion, LP asserted all the arguments that it makes here. LP argued, Washington law aside, the class settlement directs that the limited remedy stated in LP's warranty is exclusive and, by approving the class settlement, the federal court deemed the remedy adequate. LP claimed Canterbury was barred from seeking UCC remedies in state court. Judge Jones, the court with exclusive jurisdiction to interpret and enforce the class settlement, refused to intervene. Judge Jones ruled:

The Washington state trial court is in the best position to interpret the warranty in light of Washington law, and make rulings concerning Canterbury's remedies and damages. (Emphasis added.)

(CP 427.) LP did not appeal either decision.

Pierce County Superior Court Judge Edmond Murphy understood the federal court and acted in complete accord with Judge Jones unappealed ruling. Judge Murphy ruled (RP 981):

Judge Jones did rule in the November ruling just a few weeks before trial, that it was up to this Court to interpret the warranty in light of Washington law and to make rulings regarding the plaintiff's remedies and damages, which the Court has done.

I don't find that there was anything in either the settlement agreement or in what Judge Jones has ruled that prohibits this Court from doing that.

From the beginning, LP has tried to hide behind the class settlement even though (1) it expressly reinstated LP's warranty, (2) it excluded warranty claims from the release, and (3) LP's position was rejected by the federal court with exclusive jurisdiction. The class settlement did not interpret or modify the limited warranty and certainly did not correct its deficiencies under Washington law.

LP makes a handful of other arguments, all of which were rejected by the trial court or not raised until this appeal. Those arguments are based on incomplete and flawed statements of fact and law. One fact that LP cannot answer is that its implementation of the warranty produced an \$8,383 solution for a \$937,000 product failure. The jury correctly found that a 1% remedy was essentially no remedy at all, and certainly not a "minimal adequate remedy" as Washington law requires.

**RESPONSE TO ASSIGNMENT OF ERROR AND LP'S
FAILURE TO PRESERVE ISSUES FOR APPEAL**

If LP's 49-page challenge can be reduced to a single sentence, one can speculate that sentence might be: The trial court improperly instructed the jury on the remedies available under this breach of warranty claim and the corresponding measure of damages. Yet, one cannot glean the nature of LP's challenge from its single assignment of error. LP's issue number 3 at least references "jury instructions," but it fails to identify any specific instruction. LP has failed to comply with RAP 10.3.

RAP 10.3(a)(4) requires the appellant to include in its brief a "separate concise statement of each error a party contends was made by the trial court." RAP 10.3(g) requires one challenging jury instructions to make "a separate assignment of error for each instruction which a party contends was improperly given or refused ... with reference to each instruction or proposed instruction number." RAP 10.3(g) directs: "The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto." Finally, RAP 10.4(c) provides that, if an appellant presents an issue that requires study of a proposed or actual jury instruction, the party should type the material portions of the text verbatim or include them by copy in the text or in an appendix. LP has not complied with these rules.

LP's generically stated assignment of error has made it difficult to clearly identify all issues that require response. The issues provide more detail, but still fail to meet the purpose and requirements of the rule. More significant, however, is that LP's non-compliance, particularly with regard to the jury instruction challenges, has aided LP in camouflaging LP's failure to properly preserve the instruction challenges now apparently lodged in this appeal. This failure to preserve jury instruction objections is fatal to the challenges newly raised on this appeal.

CR 51(f) requires a party objecting to an instruction to state distinctly the matter to which he objects, the grounds and specify the number, paragraph or particular part of the instruction to be given or refused and to which is objected. Failure to comply precludes review of the issue on appeal." *Bulzomi v. Dept. Labor & Indus.*, 72 Wn. App. 522, 529, 864 P.2d 996 (1994). The objector must provide the court with a correct statement of the law. *Micro Env. Int'l, Inc. v. Coopers & Lybrand, LLP*, 110 Wn. App. 412, 427, 40 P.3d 1206 (2002).

If a party is dissatisfied with an instruction, it is that party's duty to propose an appropriate instruction and, if the court fails to give that instruction, take exception to that failure. If a party does not propose an appropriate instruction, it cannot complain about the court's failure to give it.

Hogland v. Raymark Indust., Inc., 50 Wn. App. 360, 368, 749 P.2d 164

(1987). Objections are only preserved if properly made at trial and statements made in a motion for new trial are too late. *Id.* at 529. Tardy objections do not facilitate the purpose of the requirement, which is “to enable the trial court to correct any mistakes in the instructions in time to prevent the unnecessary expense of a second trial.” *Trueax v. Ernst Home Ctr., Inc.*, 124 Wn.2d 334, 339, 878 P.2d 1208 (1994).

Compliance with RAP 10.3 and 10.4 would have exposed that LP did not properly preserve the challenges it now makes to the jury instructions. LP failed to include in its exceptions all the challenges presented here. LP completely failed to fulfill its duty to propose alternate instructions to resolve asserted objections. Canterbury will highlight and address LP’s specific omissions where appropriate in the argument. However, to aid the court in determining if issues were properly preserved, Canterbury provides: (i) LP’s presentation of exceptions in its entirety (RP 878-79) at Appendix A; (ii) the challenged Jury Instructions 9, 10 and 11 at Appendices B, C and D, respectively; and (iii) all of LP’s proposed jury instructions (and special verdict form) at Appendix E.

STATEMENT OF THE CASE

A. LP Sold Canterbury Defective Inner-Seal Siding That Required Full Replacement.

Canterbury owns a 180 unit, well-maintained luxury apartment complex that was constructed in 1995 with siding manufactured by LP.

(RP 320-23, 337-38, 113-14.) The product was sold with a 25-year written warranty. (RP 335-36, Trial Exhibit (“Ex.”) 9, also attached as Appendix F.) Provided the siding was properly installed and maintained, LP warranted “against manufacturing defects under normal conditions of use and exposure” for a period of 25 years. (Ex. 9.)

The siding was defective. The defect was latent and it was not until 2008 that Canterbury discovered fungal deterioration and delamination on a portion of the siding. (RP 339-41.) The delamination progressed. The owner of Canterbury observed failing siding on all its buildings and between 80 and 100 mushrooms growing on the defective siding. (RP 381, Ex. 216.) In 2011, experts, with the benefit of an inspection conducted by three inspectors over a period of four days, determined that the damage was pervasive throughout all of the buildings. (RP 104-06, 131.) The damage included cracking, splitting, splintering, warping, buckling, bulging, delamination, and decay. (RP 115-18; Exs. 21-28, 39-41, 57-65.) One expert testified to the jury “it was pretty much everywhere.” (RP 131.) Another expert, a chemist, later performed a separate analysis and determined that no less than 70% of the LP siding on each building wall was permanently defective. (RP 282, 277.)

Repair would require total replacement of the siding. Full replacement was the only feasible option, not only because more than 70%

of the siding was permanently damaged, but also because the overlapping siding (“lap siding”) is installed from the bottom up. (RP 199-201, 379-81.) Defective siding thus cannot be replaced without removing all siding installed above the area of damage. (*Id.*)

Moreover, the approximately 30% of the LP siding that had not yet achieved a state of “permanent damage” nonetheless had small cracks and fissures. (RP 251, 282.) The experts testified, without contradiction, that the size of the crack does not matter. Even a small crack indicates the board has failed, since any crack provides an entry way for water. (RP 120.) A mere trace crack will ultimately lead to board swelling and cracking, and the failure will progress to a worsening condition. (RP 120, 251, 268, 271.) Even if repairing only 70% of the permanently damaged lap siding was feasible, it would be imprudent, to say the least, not to replace the boards with trace cracks. (RP 379-81.)

Accordingly, in September 2011, with substantial advance notice to LP (Exs. 10, 13, 15), Canterbury, replaced all of the siding, incurring actual repair costs in the amount of \$937,917. (RP 375-78, Exs. 16-20.) The siding contractor, who has extensive experience with siding, including LP siding, confirmed to the jury that replacement of all the siding was necessary. (RP 199-201.) “It was bad, bad siding,” he noted. (RP 198.)

B. Before Replacing The Defective Siding, Canterbury Made A

Claim Under The LP 25-Year Limited Warranty.

Well before Canterbury took the necessary action of replacing the severely damaged siding, it submitted a claim under the 25-year warranty. (RP 351-556, 366-67, Exs. 10-14.) Canterbury advised LP of the expert analysis, offering the report and with substantial photographic documentation of the damage. (Ex. 10.) LP never requested the expert report, but Canterbury nonetheless voluntarily provided LP the photographic evidence. (Ex. 11, RP 355-56.) Though the claim was submitted in May 2011, LP did not send an inspector until August 2011, after Canterbury repeatedly communicated its frustration with the delay and the need to make repairs before the winter weather. (RP 372, Exs. 11, 13, 15.) The single LP inspector conducted a two day inspection. (RP 595.) The inspector was expressly directed to strictly adhere to an LP protocol. (RP 588-89, 596.) This protocol, which will be discussed in detail later, was designed to underestimate the amount of damaged siding.

With the imminent weather change, Canterbury could wait no longer and it commenced to replace the siding. (RP 775-76.) LP no longer sold Inner-Seal siding after 1996, so the product was not available for replacement. Canterbury replaced the damaged LP Inner-Seal siding with Hardie Plank siding. (RP 374-75, 204, 525-26.)

On October 12, 2011, LP finally sent Canterbury a “settlement

letter,” which was LP’s only response to Canterbury’s warranty claim. (Ex. 214.) LP offered a warranty payment of only \$8,383, less than 1% of the actual cost of the required repair. Based solely upon the LP’ self-serving protocol, which was neither part of the warranty nor disclosed to customers, the LP inspector opined that only 11% of the Canterbury Apartments’ siding was damaged. (*Id.*) Founded on this gross understatement of damaged siding and the price at which the product was sold prior to discontinuance in 1996, LP valued the total damage at only \$18,152. LP reduced that valuation by more than half based on claimed depreciation of what should have been permanent siding. (*Id.*)

Not surprising, Canterbury made a written objection to the findings by letter dated October 26, 2011. (RP 373, Ex. 216.) Canterbury’s owner requested LP to provide the standards used for its analysis, noting that he personally observed visible damage on approximately 80% of the siding. (*Id.*) Canterbury also retained a second expert evaluation, which confirmed that the permanent damage was vast (more than 70%), and that total replacement was the only viable repair. (RP 282.)

LP requested no further opportunity to inspect. In fact, it did not respond at all to Canterbury’s objection. (RP 373.) Hearing no response, Canterbury filed this state court action claiming (1) breach of LP’s 25 year written warranty; (2) breach of warranty by advertising; (3) violation of

Consumer Protection Act by misrepresentation, and (4) violation of Consumer Protection Act by arbitrary handling of Canterbury's warranty claim. (CP 1-12.) Pursuant to a federal court order (discussed below), the latter three claims were dismissed. (CP 21-50.) Only Canterbury's claim for breach of LP's 25 year warranty remained to be litigated.

C. The Nation-Wide Class Settlement

The LP Inner-Seal siding and warranty at issue here were also the subject of a 1996 class settlement approved by U.S. District Court Judge Robert Jones. (CP 256-384.) The class settlement was negotiated after LP sold the defective Inner-Seal siding between the early-1980s to the mid-1990s to hundreds of thousands of developers and households across the country. LP's siding was cracking and absorbing water leading to decay, warping, buckling and delamination. (*See* CP 325, 361.) Not surprising, a great deal of litigation followed, including the class settlement brought before the U.S. District Court in Oregon wherein LP sought to cut off its liability to some 800,000 persons. (*See* CP 259.)

The Settlement Agreement provided a process through which claimants with defective siding installed prior to January 26, 1996 could submit claims and receive compensation for defective siding. The remedy was not limited to a refund for the defective siding. Class members received repair costs, including labor for installation, reduced by an aging

deduction. (RP 532, CP 264.) As part of the settlement, LP also waived all defenses against class claims, including improper installation or maintenance. This waiver was considered a significant element of the consideration LP provided in the settlement. (CP 366, ¶ 9; CP 391.) In return, class members released in the original agreement all claims against LP, including claims for breach of warranty. (CP 328.)

Under the Settlement Agreement's own terms, the compensation program would terminate on January 1, 2003. (CP 330.) Thus, as originally drafted, class members who discovered defective siding after January 1, 2003 would have released all claims, but nonetheless go uncompensated. After Judge Jones expressed concerns (CP 249), the class parties agreed to amend the settlement agreement to reinstate the 25-year LP warranty for claims arising after January 1, 2003. (CP 263-307.) The reinstatement was implemented by simply amending the class settlement definition of "Settled Claims" 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 this product." (See CP 264 ¶ 1.3.) The Amendment further provided: "At the termination of the Settlement Agreement, L-P's 25-year Limited Warranty shall be in effect the balance of its term when measured from the date of original installation of the claimant's siding." (CP 268, ¶ 6.)

With the 2003 reinstatement of the limited warranty, LP's previously waived defenses were also reinstated, including the defenses of improper installment and improper maintenance. Indeed, LP asserted such affirmative defenses in this case. (CP 17-18.)

D. Once The Class Settlement Term And Court Supervision Of Class Claims Terminated, LP Unilaterally And Arbitrarily Changed Its Claims Protocol.

Through January 1, 2003, implementation of the settlement was under federal court supervision. LP and the consumer plaintiffs negotiated a protocol by which claims would be administered. Upon submission of a claim, an inspector, mutually approved by LP and the class representatives, would inspect the claimant's property using an agreed-to protocol. The settlement protocol included the following:

- The inspector would find damage if fungal degradation was present, wax spots were present, there was missing or delaminated overlay or a board was buckling. (CP 278, 285, Ex. 223 at p. 2, 15.)
- The inspector would also find damage if a board presented one or more of: (1) thickness (swell) exceeding .540 inches; (2) moisture content exceeding 25%; and (3) an "edge checker" or probe (¼ inch wide and .012" thick) could be inserted ⅛ inch deep into a board crack. (CP 275, 285, Ex. 223 at p. 2, 15, RP 528-29.)
- The inspector would conclude that the entire board was damaged if any portion of the board was damaged. (CP 299, Ex. 223 at p. 17.)

- If damage to the lap siding on any wall exceeded 60%, the claimant would receive compensation for the entire wall. (RP 546, CP 265, Ex. 223 at p. 18.)

Finally, if dissatisfied with the compensation, a class member could appeal to an arbitrator. (CP 269-70.) At arbitration, the class claimant was not strictly bound by the release. The class member could assert any legal theory and LP could assert previously waived defenses. (CP 270.)

When the class program ended and the LP warranty was reinstated, LP dramatically changed its protocol. It should be noted that the warranty itself does not impose any specific protocol for determining compensable damage. It only provides that it warrants against defects such as delamination, cracking, peeling, chipping or flaking of the overlay surface. (Ex. 9.) In any event, free of court supervision, LP unilaterally imposed a rigid protocol and nonsensical for determining compensable damage under the warranty. It was less generous than that used for the class claims.

For example, under the re-instated warranty, LP no longer compensates for the presence of fungal decay. To be compensable now, the inspector must be able to punch a hole through or deform the board with thumb pressure. (Ex. 222 at p. 4, RP 640-41.) The mere presence of wax spots will likewise no longer result in compensation. Now, wax spots must appear on more than 20% of the exposed board. (Ex. 222 at p. 5.) LP replaced the probes previously used for edge checking. The

replacement probes are twice as wide (from ¼ inch to ½ inch), twice as thick (from .012 to .024 inches) and inspectors are directed to only find damage if this larger probe could be inserted four times as far into a board crack (from ⅛ inch to ½ inch deep). (RP 534-36, 642.) If the inspector finds “damage,” he is instructed to only measure the “reveal,” the exposed portion of the board, for purposes of calculating the area of damaged siding. Though part of the board, LP directs its inspectors to exclude the hidden or “lapped” portion of the board from his calculation. (RP 644.)

The new protocol was developed by LP’s legal team, the claim administrator and the inspection company, with no input from an architect or consumer representative. (RP 533-34.) When LP claim administrator was asked to provide a reason for the change, she responded: “I honestly don’t know.” (RP 537.) When asked if he understood why a new protocol was imposed, LP’s inspector responded: “The class action was over.” (RP 642.) The inspector clarified, however. He doesn’t ask questions, but follows the manual that LP provides. (RP 643.)

LP applies its new protocol rigidly. (RP 539-40.) LP’s inspector testified that he is not authorized to deviate from LP’s manual. (RP 596.) If a claimant retains a qualified professional that produces an expert report with contrary findings, LP will not even consider the report. (RP 538.) If a homeowner disagrees, LP’s response is to send another inspector with

instructions to follow the identical LP protocol. (RP 537.) There is no other mechanism to challenge LP's unilateral damage assessment.

That LP's post-settlement claim protocol will identify less damaged siding (and decrease compensation) is obvious. Canterbury nonetheless retained a chemist to evaluate LP's protocol. Not surprising, the larger probe, by itself, identified 50% less failure. (RP 762-63.) LP's trial expert reached a similar conclusion. (RP 738-40.) This failure to identify damaged boards is compounded by LP's thickness test. Recall that it is not enough to insert the probe ½ inch into a cracked board. The LP protocol also requires that the same board have a thickness measurement of .540 inches before it will qualify as damaged. (RP 597, 643, 534-36.) Canterbury's chemist found that, even "terribly damaged boards" that failed the probe test and were in a clear state of deterioration would nonetheless yield a "passing rating" under the thickness requirement of the LP protocol. (RP 768-72.) This was likely if weather conditions were dry before the test. Ultimately, he concluded that the LP's protocol is "unreliable" for identifying damaged boards. (RP 772.)

LP retained its own trial expert. LP's tasked this expert with reviewing LP's protocol against the inspector's report to determine if the LP inspector followed the protocol. (RP 727-28.) When asked if the protocol made sense, LP's expert responded: "I wasn't asked to form an

opinion about whether anything made sense in this case.” (RP 729. *See also*, RP 726.) Notably, LP’s expert acknowledged, that when retained by consumers on another case to determine the extent of damaged LP siding, he did not use a probe or any other rigid protocol. Rather, he chose the same methodology as Canterbury’s expert, and determined damage through visual tests. (RP 747-51.)

E. The Federal Court Rejected LP’s Efforts To Limit Remedies Available To Canterbury Under The Limited Warranty.

After Canterbury filed suit, LP filed a motion to enforce the Settlement Agreement against Canterbury. (CP 524-39.) LP requested a court determination that Canterbury was a class member, as well as an order compelling Canterbury to dismiss all of its state court claims, even its claim under the reinstated warranty. (CP 525.)

Judge Jones ruled on LP’s motion on July 26, 2012. (CP 247-55.) He held that Canterbury was a class member and, as such, released three of its four state court claims. (CP 254-55, 248.) Judge Jones thus ordered Canterbury to dismiss its breach of warranty by misrepresentation claim, as well as its two CPA Claims, which it did. (CP 255, 21-50.)

However, Judge Jones denied LP’s motion with regard to Canterbury’s breach of warranty claim. The federal court held that Canterbury did not release, but fully retained its breach of warranty claim.

Through the parties' briefing, the court was fully informed of the scope of Canterbury's breach of warranty claim, including its claim that the warranty remedies are not exclusive and that Canterbury is thus entitled to recover its full replacement costs of approximately \$900,000. (CP 532, 535-36, 574-75.) Fully informed, Judge Jones held that Canterbury could pursue its claim for breach of the reinstated warranty in state court, and the state court could apply Washington law to resolve the issues presented in that claim. (CP 250-51.) LP did not appeal Judge Jones' decision.

Instead, two months later, LP made another attempt to litigate this case in the federal court through a "motion to enforce the court's July 26, 2012 Order." (CP 608-26.) LP again asserted Judge Jones previously ruled that the scope of remedies available under the LP warranty was to be determined by the class settlement agreement, rather than the warranty's words and applicable state law. (CP 615-23.) LP requested the federal court "to decide the scope of remedies available to Plaintiff on its 25-year Limited Warranty claim." (CP 609.) More specifically, LP requested the federal court to rule "that the sole and exclusive remedy for Plaintiff is the remedy stated in LP's 25-year Limited Warranty of twice the retail cost of the original siding less the aging deduction." (*Id.*)

Judge Jones denied LP's motion on November 1, 2012. (CP 426-28.) He agreed that LP's motion "in reality appear[ed] to be a back door

attempt to obtain summary judgment . . . without the requisite notice and without complete presentation of relevant facts through sworn testimony.” (CP 427.) Ultimately, Judge Jones decided that the issues presented flowed from warranty interpretation rather class settlement interpretation, since he held: “The Washington state trial court is in the best position to interpret the warranty in light of Washington law, and make rulings concerning Canterbury’s remedies and damages.” (*Id.*)

F. LP Did Not Appeal The Federal Court’s Rulings, But Elected To Proceed In State Court.

Once again, LP chose not to appeal Judge Jones’ decision.

In this context, and with the benefit of two unappealed orders from the federal court with exclusive jurisdiction to interpret and enforce the Settlement Agreement, Judge Murphy made his decisions in this case.

ARGUMENT

A. LP Confuses And Improperly Conflates The Separate And Distinct Concepts Of Claims And Remedies. Distinction Of The Two Is Critical To Properly Evaluate This Appeal.

Canterbury presented a single claim to the trial court and jury. It is a breach of warranty claim – a claim under the terms of the LP 25-year limited warranty. There was no dispute that LP sold Canterbury siding that was defective and not as warranted (though there was disagreement as to the extent of and method to determine damage). The dispute revolved entirely around the remedies available to Canterbury under the warranty,

as written, as implemented by LP and in light of Washington law.

Though the release in the Settlement Agreement released claims, not remedies, LP nonetheless asserts that it dictates the damages that Canterbury may recover for its breach of warranty claim. LP also asserts that disclaimers of warranties (e.g. implied warranty) in the written warranty provide an unambiguous expression that the available warranty remedies are agreed to be exclusive. To evaluate LP's arguments, it is thus important to distinguish the concept of disclaimer or release of a warranty from the concept of limitation or exclusion of remedies available for breach of warranty. Though LP tends to conflate and confuse these two concepts, they are not the same nor are they interchangeable.

Warranties may be express or implied. An express warranty is an affirmation of fact or promise made by the seller to the buyer relating to the goods and becoming the basis of the bargain. RCW 62A.2-313(1)(a).¹ A "remedy," in contrast, is "any remedial right to which an aggrieved party is entitled with or without resort to tribunal." RCW 62A.1-201(34). It is the form of relief given for any particular claim. Put another way, warranties create seller obligations. "Remedies are not 'obligations' they are rights arising from the failure to perform obligations." *Ford Motor*

¹ Implied warranties are warranties that are not written or expressed by the seller, but are created by law, such as the implied warranty of merchantability or fitness for a particular purpose. See RCW 62A.2-314, .315.

Co. v. Reid, 250 Ark SCO 176, 184, 465 S.W.2d 80, 85 (1971). A warranty disclaimer is thus different from a remedy exclusion.

A disclaimer clause is a device used to exclude or limit the seller's warranties; it attempts to control the seller's liability by reducing the number of situations in which the seller can breach. An exclusionary clause, on the other hand, restricts the remedies available to one or both parties once a breach is established. (Citation omitted.)

Schroeder v. Fageol Motors, Inc., 86 Wn.2d 256, 258, 544 P.2d 20 (1975).

The rules pertaining to disclaimer of warranties and exclusion of remedies are different. *Compare* RCW 62A.2-316 to RCW 62A.2-719.

As Judge Jones' decided, Canterbury did not seek to recover for any released claim. Its sole claim was for breach of LP's limited warranty against siding defects. The trial court properly decided that Canterbury's remedies for breach of that warranty included those authorized by Washington's UCC. LP's challenges to those rulings fail to recognize the important distinction between claims and remedies.

B. The Court Properly Instructed The Jury That The Limited Remedy Stated In The Warranty Is Not Exclusive.

The trial court instructed the jury: "The limited remedy stated in the warranty is not the sole and exclusive remedy under the warranty." (CP 198.) The warranty language and law support the instruction.

1. Under the UCC, limited remedies are optional unless expressly agreed to be exclusive.

In Washington, the ordinary remedy for breach of warranty is provided by statute and is set forth at RCW 62A.2-714(2):

The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate cause in a different amount.

Washington courts generally recognize the cost of repair to bring the goods to their warranted condition as a valid measure of the difference in value and will award such as buyer's damages. *See Barnard v. Compugraphic Corp.*, 35 Wn. App. 414, 667 P.2d 117 (1983); *Miller v. Badgley*, 51 Wn. App. 285, 295, 753 P.2d 530 (1988).

The UCC authorizes contractual limitation of the statutory remedy. However, the seller must satisfy certain conditions to effectively limit available remedies. Contractual remedies are considered additional and optional to statutory remedies unless the parties expressly agree that the contractual remedies are exclusive. RCW 62A.2-719 (1) provides:

Subject to the provision of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,

- (a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods and parts;

and

(b) resort to a remedy as provided is **optional unless the remedy is expressly agree to be exclusive, in which case it s the sole remedy.** (Emphasis added).

Subsection (1)(b) above is explained at Official Comment 2 to the UCC:

Subsection (1)(b) creates a presumption that clauses prescribing remedies are cumulative rather than exclusive. If the parties intend the term to describe the sole remedy under the contract, this must be clearly expressed. (Emphasis added.)

Thus, as a public policy matter, a seller cannot override the ordinary UCC remedy unless it (1) provides a different remedy, and (2) expressly states that the remedy provided is the sole and exclusive remedy. In the absence of an unmistakable expression that identified remedies were expressly agreed to be exclusive, the contract remedies will be interpreted to be in addition to the UCC ordinary remedy. They are optional.

This was the rule of law in Washington even before it adopted the UCC. In *Northwest Perfection Tire Co. v. Perfection Tire Corp.*, 125 Wash. 84, 215 Pac. 360 (1923), Washington's Supreme Court addressed a claim in which the seller asserted that the available remedies were limited by the contract. In *Northwest Perfection Tire*, the seller agreed to furnish tires for sale and distribution, but a large quantity of the tires was defective. The contract provided: "The Company also guaranties all tires, tubes and casings to be in good condition and to make good all defects

therein due to defective manufacture.” The seller asserted that this provision limited the purchaser to the remedy of replacement. *Id.* at 91-92.

The Court said the law is “well-settled” and rejected the argument:

We are unable to see in this language any plainly expressed intent to compel [the purchaser] to resort exclusively to the remedy of replacement; but see therein only the intent to give it permission to do so. This seems to be a somewhat common provision in tire distributing contracts;... and when such occasionally defective tires appear, the dealer would quite probably prefer having them replaced by perfect tires to his customers... But that does not mean that he is obliged to resort to that remedy unless the contract by unmistakable terms so provides. (Emphasis added.)

Id. at 92. Notably, when Washington adopted RCW 61A.2-719(1)(b) in 1965, the Official Washington Comments informed that the provision was intended to confirm the law as stated in *Northwest Perfection Tire*:

Part (b) is new but makes no change in the present rule of construction. *Northwest Perfection Tire Co. v. Perfection Tire Corp.*, 125 Wn.2d 84, 215 P 360 (1923) (contract did not compel buyer to resort exclusively to the remedy of replacement.)

In 1990, the Washington Supreme Court embraced both RCW 62A.2-719(1)(b) and the rule enunciated in *Northwest Perfection Tire*, in *American Nursery Products, Inc. v. Indian Wells Orchard*, 115 Wn.2d 217, 226-27, 797 P.2d 477 (1990). In *American Nursery Products*, the Court interpreted a contract that set forth specific remedies for the purchaser from an apple tree nursery. The contract provided for two

limited remedies. For trees rejected, the contract provided the limited remedy whereby “Grower, at its option, shall replace non-conforming trees or reduce the purchase price.” To address normal mortality, the contract provided that the grower provide, up to a fixed ceiling, understocks for grafting and budding “as may be necessary to compensate for any mortality while growing during the nursery phase.” *Id.* at 225.

The Court held that these stated remedies were not exclusive:

Because these limited remedies were not expressly agreed to in the contract to be exclusive remedies, resort to these remedies is optional under Washington’s Uniform Commercial Code. *See* RCW 62A.2-719(1)(b); *see also* J. White & R. Summers, *Uniform Commercial Code* § 12-9, at 462-63 (2 ed. 1980).

Id. at 226. The Court relied on its prior ruling in *Northwest Perfection Tire*, as well as the UCC rule, and concluded:

[T]here is no expression of intent of exclusivity. The limited remedies are permissive in nature; they are optional. Therefore Indian Wells is not limited to the remedies provided in paragraphs 2.1, 5.2 and 9.3. Rather, Indian Wells has the option to seek other available remedies not validly excluded by contract. *Id.* at 227.

In Washington, whether remedies will be exclusive, or optional and include UCC remedies, depends on the warranty’s words. To effectively override the UCC remedy, the language in the warranty must state that the described remedies are the exclusive remedies. In the absence of such language, the remedies will be optional to the claimant.

2. **LP's warranty has no unmistakable expression that the stated warranty remedies were agreed to be exclusive and the remedies are thus optional to Canterbury.**

The LP written warranty (Ex. 9) provides in relevant part:

LIMITED 25-YEAR SIDING WARRANTY

Louisiana-Pacific Corporation ("L-P") warrants the Inner-Seal® lap and panel sidings, when installed and finished according to the published installation and finishing instructions and when properly maintained, for a period of 25 years from the date of installation against manufacturing defects under normal conditions of use and exposure.

LIMITATIONS

L-P MUST BE GIVEN A 60-DAY OPPORTUNITY TO INSPECT THE SIDING BEFORE IT WILL HONOR ANY CLAIMS UNDER THE ABOVE WARRANTY. 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. THE COST OF LABOR AND MATERIALS OTHER THAN SIDING ARE NOT INCLUDED. WARRANTY PAYMENTS WILL BE BASED UPON THE AMOUNT OF AFFECTED SIDING MATERIAL.

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.

IF THE ORIGINAL SIDING COST CANNOT BE ESTABLISHED BY THE OWNER THE COST SHALL BE DETERMINED BY L-P IN ITS SOLE AND REASONABLE DISCRETION.

DURING THE 6TH THROUGH 25TH YEAR, AS DETERMINED IN THE ABOVE MANNER, WARRANTY PAYMENTS SHALL BE REDUCED EQUALLY EACH YEAR SUCH THAT AFTER 25 YEARS FROM THE

DATE OF INSTALLATION NO WARRANTY SHALL BE APPLICABLE. (Underlining added.)

The stated remedy for defects discovered in the first five years is not applicable to this case. Nonetheless, analysis of this separate and different remedy is helpful in interpreting the stated remedy for damages discovered in years 6 through 25. In apparent recognition that product which fails in the first 5 years is virtually new, there is no depreciation deduction. However, the remedy is also directly tied to the amount the claimant actually paid for the product, not the current replacement cost, allowing payment of “TWICE THE RETAIL COST OF THE SIDING MATERIAL WHEN ORIGINALLY INSTALLED ON THE STRUCTURE.”

The base calculation for compensation for siding discovered to be defective in years 6 through 25 is different. Rather than describe the payment as “TWICE THE RETAIL COST OF THE SIDING MATERIAL WHEN ORIGINALLY INSTALLED,” LP describes the base payment in a different paragraph as “TWICE THE RETAIL COST OF THE ORIGINAL SIDING MATERIAL.” No reference is made to the time of installation. The 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. The 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:

... 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. THE COST OF LABOR AND MATERIALS OTHER THAN SIDING ARE NOT INCLUDED. WARRANTY PAYMENTS WILL BE BASED UPON THE AMOUNT OF AFFECTED SIDING MATERIAL.

* * *

DURING THE 6TH THROUGH 25TH YEAR, AS DETERMINED IN THE ABOVE MANNER, WARRANTY PAYMENTS SHALL BE REDUCED EQUALLY EACH YEAR SUCH THAT AFTER 25 YEARS FROM THE DATE OF INSTALLATION NO WARRANTY SHALL BE APPLICABLE. (Underlining added).

There is no language in LP's warranty to even indicate that the above remedy, applicable to years 6 to 25, was agreed to be the exclusive remedy available to claimants who discover siding defects more than five years after it is installed.² Certainly there is no unmistakable expression in this regard. To the contrary, the written warranty acknowledges that applicable state law may provide additional remedies under the warranty. It provides: "THIS WARRANTY GIVES YOU SPECIFIC LEGAL RIGHTS

² The written warranty does state that during the first 5 years, LP's warranty is "limited" to a refund of twice the retail cost of the siding material when originally installed on the structure." LP argues that indicates exclusivity in the first 5 year period. But the provision does not apply to years 6 to 25 and the warranty contains no such limiting language for that latter period. Where there may be competing reasonable interpretations, pre-printed form contracts should be construed against the drafter. *See, Dennis v. Great American Insurance Company*, 8 Wn. App. 71, 74, 503 P.2d 1114 (1972) (insurance contract consisting of pre-printed forms prepared by experts at the instance of the insurer, without input from the insured, should be strictly construed against the drafter).

AND YOU MAY ALSO HAVE OTHER RIGHTS WHICH VARY FROM STATE TO STATE.” Under Washington law, the failure to provide an explicit expression of agreed exclusivity matters. RCW 62A.719(1)(b). It is as if the warranty itself states “the remedy described above is optional.”

LP argues that the UCC requisites for exclusivity do not require “magic language” that a remedy is the “sole and exclusive remedy.” The UCC, however, “creates a presumption that clauses prescribing remedies are cumulative rather than exclusive.” Official Comment 2 to the UCC 2-719. It is LP’s burden to overcome that presumption with an unmistakable expression that the parties agreed the stated remedies to be exclusive. *Id.*, RCW 62A.2-719(1)(b). LP did not meet its burden.³

LP points the to the title of the warranty – “LIMITED WARRANTY FOR INNER-SEAL SIDINGS” – as well as the warranty language that “L-P DISCLAIMS ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE,” as providing the requisite unmistakable expression of exclusivity of remedies stated. LP’s argument confuses disclaimers of warranties with limitations of available remedies for breach

³ LP cites *Norway v. Root*, 58 Wn.2d 96, 361 P.2d 162 (1961). *Norway*, however, did not address UCC 2-719(1)(b). Moreover, even it was analyzed, the language used in the *Norway* warranty was more likely to satisfy the UCC requirement. The warranty stated: “Dealer’s obligation under this warranty is limited to replacement of, at Dealer’s location, or credit for such parts as shall be returned to Dealer with transportation charges prepaid and as shall be acknowledged by Dealer to be defective. *Id.* at 97.

of warranty. As note in *Ford Motor Co. v. Reid*: “Remedies are not ‘obligations,’ they are the rights arising from the failure to perform obligations.” 465 S.W.2d at 85. Accordingly, such disclaimers of warranties do not qualify as the required expression to limit the rights or remedies available to the buyer. *Id.*

Finally, LP attempts to distinguish *American Nursery, supra*, by noting that the tree contract in that case provided:

The party declaring default shall have all rights provided under the Washington Uniform Commercial Code and other applicable laws of the State of Washington and the terms and provisions of this Agreement; provided that in no event shall Grower be subject to or liable for incidental or consequential damages. All rights and remedies of either party may be exercised consecutively, successively and cumulatively.

115 Wn.2d at 226. The *American Nursery* Court did not, however, rely on this provision for its ruling with regard to the exclusivity of the stated remedies. Rather, the court’s ruling in this regard was based on the directive of RCW 62A.2-719(1)(b) and the fact that “these limited remedies were not expressly agreed to be exclusive” and there was “no expression of an intent of exclusivity.” *Id.* at 226-27.

The trial court correctly instructed the jury that the limited remedy in the warranty is not the sole and exclusive remedy available.

3. The federal court did not limit Canterbury’s remedies under the express warranty, but ruled that issue is

within the province of the state court.

Omitting the context of the arguments presented to the federal court, LP quotes fragments from the federal court orders. Thereafter, LP incorrectly states to this Court: “[T]he Federal Court has ruled, in this very case, that Canterbury was entitled only to remedies provided by the Limited Warranty.” (LP Brief at p. 21.) The ruling that LP claims has preclusive is stated Judge Jones’ July 26, 2012 Order:

I conclude that plaintiff is a class member and plaintiff’s remedy, if any, is the 25-year warranty. L-P claims that plaintiff cannot pursue the warranty claim in state court, but the warranty does not contain any language precluding state court action. (Emphasis added.)

(CP 254.) LP’s post-trial claim that the above ruling collaterally estops Canterbury’s claim for relief and restricted the trial court is flatly wrong.

Pre-trial, LP recognized this; its claim that Judge Jones’ decision has preclusive effect came after the jury’s verdict (CP225-26). Pre-trial, LP acknowledged Judge Jones’ affirmation was required. Thus, LP filed its second federal motion asking the court, supposedly based on its first ruling, “to decide the scope of remedies available to Plaintiff on its 25-year Limited Warranty claim” and rule “that the sole and exclusive remedy for Plaintiff is the remedy stated in LP’s 25-year Limited Warranty of twice the retail cost of the original siding less the aging deduction.” (CP 609) Meanwhile, in state court, LP requested a trial

continuance pending a decision from Judge Jones.⁴ (CP 815-822.)

In its November 1, 2012 ruling, Judge Jones expressly rejected the notion that his order decided Canterbury's remedies:

Although L-P frames the pending motion as a request to enforce my earlier opinion and order, I did not make any determination concerning Canterbury's damages, only the claims it could pursue. I ruled that:

[P]laintiff [Canterbury] is a class member and plaintiff's remedy, if any, is the 25-year warranty. L-P claims that plaintiff cannot pursue the warranty claim in state court, but the warranty does not contain any language precluding state court action. Thus, I grant L-P's and Class Council's motion with respect to all of plaintiff's claims except the warranty claim.

Opinion and Order, p. 8. [CP 254.] Thus, there is nothing to "enforce" concerning the amount Canterbury may seek as damages other than the limitation to warranty damages. (Emphasis added.)

(CP 427.) Regarding the required determination, the court ruled:

The Washington state trial court is in the best position to interpret the warranty in light of Washington law, and make rulings concerning Canterbury's remedies and damages. If LP disagrees with the Washington court's

⁴ LP advised the trial court:

The parties are awaiting a ruling from the U.S. District Court in the District of Oregon that will dramatically affect the trial in this case. Specifically, defendant Louisiana Pacific Corporation ("LP") has asked the District Court to order Plaintiff – who is undisputedly a Class Member in the *In re Inner-Seal Siding Litigation* nationwide Class Action – to limit the damages that Plaintiff seek in this case from \$900,000 to approximately \$50,000. The parties anticipate the District Court's ruling in the next 45 days. The District Court's ruling may not only affect the only [sic] the theories at trial, jury instructions, and the nature of the parties exhibits and witness testimony, but could also affect whether the case is tried or settled.

(CP 815-16.) Of course, Judge Jones did not rule as LP requested.

ultimate rulings, LP's remedy is an appeal, not an order of enforcement from this court. (*Id.*)

After Judge Jones ruled, LP withdrew its request for a trial continuance. (CP 824-26.) LP then advised the court in pretrial motions:

The federal court has ruled in this case that it is for this Court to interpret the limited warranty in this case, for this Court to determine the scope of damages available to plaintiff on its breach of warranty claim. (RP 15.)

The federal court did not bind or restrict the state trial court. It confirmed the trial court had full authority and was best positioned to determine available remedies in light of Washington law. (CP 427.) LP's post-trial argument that Judge Jones' July 26 ruling is preclusive on the issue of available warranty remedies is contrary to his subsequent ruling, contrary to LP's position pre-trial and is not asserted in good faith.

4. Without interpretation or modification, the Class Settlement Agreement fully reinstated LP's warranty, and with it all remedies available pursuant to its terms in light of Washington law.

Judge Jones' second ruling conclusively confirmed that the Settlement Agreement has no bearing on the issue of available remedies. Both the class Settlement Agreement and the Final Order expressly give the federal court exclusive jurisdiction with regard to interpretation, implementation, or enforcement of the Settlement Agreement. (CP 345, ¶ 13.3; CP 261, ¶ 9.) Judge Jones was fully informed of all the arguments presented on this appeal, including LP's "policy" arguments. (CP 612-26,

662-71.) Yet, this court with this exclusive jurisdiction refused to intervene and denied LP's second motion.

LP could have appealed Judge Jones' rulings to the Ninth Circuit and requested a trial continuance while the appeal was pending. It did not and those decisions are now final. LP's attempt to correct the deficiencies of its limited warranty through application of the Settlement Agreement is an improper collateral attack on the federal court's unappealed rulings. The arguments may be rejected on this ground alone. They fail even if considered, because LP misconstrues the Settlement Agreement.

LP relies on ¶ 13.1 of the Settlement Agreement which provides that the settlement remedy (which unlike the written warranty paid replacement costs, including labor, less an aging deduction) "shall be the sole and exclusive remedy for any and all Settled Claims." (CP 345.) Of course, that original Agreement was amended to expressly exclude the breach of warranty claim from "Settled Claims." (CP 264.) While the Settlement Agreement establishes the "sole and exclusive remedy" for "Settled Claims," it does not do so for breach of warranty claims, since they are expressly excluded from "Settled Claims."

LP next argues that, as a class member, Canterbury released any right to recover UCC warranty remedies for its breach of warranty claim. To support its argument, LP specially notes that class members released

any claim based on “breach of ... implied warranty” or “any claim for breach of any duty imposed by law.” (LP Brief at p. 18, CP 329.) However, LP again confuses warranty claims and warranty remedies.

In this case, the claim is that LP breached the warranty because the siding it sold to Canterbury was not as warranted, but defective, forming cracks and buckling and delaminating after installation. Canterbury does not assert any implied warranty claims, as those claims were released. The remedy for this breach of LP’s written warranty is in dispute. LP argues the remedy is limited to that identified in the written warranty. The trial court ruled that the remedy stated in the warranty was not the sole and exclusive because LP’s written warranty failed to express that it was agreed to be exclusive. The release in the class settlement does not affect, much less resolve that dispute, as it applies to claims, specifically “Settled Claims” (CP 345-4), which, again, exclude claims under the warranty.

LP argues that the Amended Agreement expressly limited available remedies when it reinstated the warranty. It did not. Beyond revising the definition of “Settled Claims” (CP 264, ¶ 1.3), the reinstated warranty is addressed only at ¶ 6 of the Amended Agreement (CP 268):

Clarification of Release/L-P 25-Year Limited Warranty.

The release in the Settlement Agreement is amended to exclude claims filed against L-P after the expiration of the Settlement Agreement by consumers under the terms

of the L-P 25-year Limited Warranty. At the termination of the Settlement Agreement, L-P's 25-year Limited Warranty shall be in effect for the balance of its term when measured from the date of original installation of the claimant's siding.

This provision simply authorize claims "under the terms of the warranty" after January 1, 2003. It does not revise or delete any of the warranty's express terms, nor does it interpret or even discuss the terms. It merely reinstates warranty, leaving the warranty to operate in the context of applicable Washington law.⁵

C. The Trial Court Properly Instructed The Jury On Failure Of Essential Purpose And The Evidence Supports The Verdict.

"It is the very essence of a sales contract that at least minimum adequate remedies be available." Official Comment 1 to UCC 2-719. Thus parties to a sales contract "must accept the legal consequence that there be at least a fair quantum of remedy for breach of obligations or duties outlined in the contract." *Id.* When a contractual remedy limitation deprives a party of the substantive value of its bargain, it is ineffectual and

⁵ Notably, beginning January 1, 2003, LP may assert all the defenses that were waived during the Settlement Agreement term, including the defenses of improper installment and improper maintenance. However, there is no language in the Amended Agreement expressly authorizing the otherwise waived defenses. The ability to assert the defenses is solely a function of full reinstatement of the limited warranty. It makes no sense to interpret the Amended Agreement to revive LP's waived warranty defenses, yet fail to also revive state law rights expressly acknowledged in the written warranty (Ex. 9), which include having the terms of the warranty construed in light of UCC requirements. Laws in effect at the time of contract "enter in and form a part of it, as fully as if they had been expressly referred to and incorporated in the terms. This principle embraces alike those laws which affect its construction and those which affect its enforcement or discharge." *Dopps v. Alderman*, 12 Wn.2d 268, 273-74, 121 P.2d 388 (1942).

fails of its essential purpose. *Cox v. Lewiston Grain Growers, Inc.*, 86 Wn. App. 357, 370, 936 P.2d 1191 (1997). The concept of the “essential purpose” of remedy limiting provisions was discussed in *Anderson on UCC Damages Under The UCC* at §12.7 (2003):

The courts have had no difficulty in identifying the purpose which must fail in order to invalidate an otherwise reasonable remedy limitation. They have uniformly rejected the ingenious argument of sellers that the purpose of the remedy limitation provision was solely to protect the seller from liability, that it was working just fine in that regard, and it would thus “fail” only if the court were to strike it. The courts respond to this self-serving position by observing that it states only half the case. The provision limiting remedies must also have a purpose from the buyer’s standpoint as well, a purpose of providing the buyer ultimately with a “fair quantum of remedy” or “minimum adequate remedies.” Otherwise, the clause would be invalid at its inception under Section 2-719(1) for its failure to provide the buyer with the substantial value of the bargain made.

RCW 62A.2-719(2) thus provides that, “where circumstances cause an exclusive remedy to fail of its essential purpose, remedy may be had as provided in this Title.” Whether a remedy has failed of its essential purpose is a fact question to be resolved by the jury. *Anderson on UCC Damages Under The UCC* at §12.8 (2003); *Lewis Refrigeration Company v. Sawyer Fruit, Vegetable and Cold Storage Co.*, 709 F. 2d 427, 431-32 (6th Cir. 1983) (applying Washington law, holding material fact issues on failure of essential purposes warranted presenting issue to jury and denial

of motions for directed verdict and judgment notwithstanding the verdict).

1. The federal court did not rule in 1996 that a protocol not even invented until 2003 was an adequate remedy.

The federal court did not and could not know in 1996 that, after court supervision terminated, LP would administer its warranty so that LP would pay only \$8,283 to “compensate” a consumer who necessarily incurred \$937,000 to repair the damage caused by LP’s defective siding. LP nonetheless insists (without support from the record) that the federal court evaluated the warranty remedy, in advance, assumed that implementation would be unaffected by UCC mandates, and then affirmatively approved it as reasonable and adequate. It appears that Judge Jones disagrees, since he refused to intervene and held that the state court should apply Washington law to the warranty and make rulings concerning Canterbury’s remedies and damages. (CP 427.)

The remedy the federal court scrutinized and deemed reasonable in 1996 was the settlement remedy. That remedy was not limited to a refund for the defective siding based on a 16 year old price for a product no longer made. Class members received repair costs, including labor for installation, reduced by an aging deduction. (RP 532, CP 264.) LP’s representative admitted that, with repair costs, “labor is huge.” (RP 532.) There was, however, no court evaluation of the warranty remedy,

especially as it would be unilaterally implemented by LP many years later.

2. The substantial evidence was more than sufficient to support the court's decision to instruct the jury on the failure of essential purpose issue.

LP does not assert that the trial court's Instruction 11 (CP 200) provided an inaccurate statement of the law on failure of essential purpose. (*see* RP 879.) Rather, LP argues that the trial court should have decided the issue as a matter of law rather than present it to the jury. Boiled down, LP argues that, since for many products (e.g. a toaster), return and refund of the purchase price has been deemed a minimum adequate remedy, the trial court should automatically assume the same here, as a matter of law, without considering the totality of the circumstances concerning LP's warranty administration in this case. Failure of essential purpose, however, is a fact question to be decided by the jury. *Lewis Refrigeration Co., supra*, 709 F. 2d at 431-32 (applying Washington law). The trial court properly presented the issue to the jury.

Again, RCW 62A.2-719(2) provides that, "where circumstances cause an exclusive remedy to fail of its essential purpose" the buyer may receive the UCC remedy for breach of warranty. This inquiry does not focus on the warranty language at the time of contract, but focuses on circumstances that arise post-contract in the implementation of the limited remedy such that limitation causes the warranty to fail of its purpose.

Thus, a limited remedy in a warranty may fail of its essential purpose if the warranted product is to be incorporated into a something (e.g. siding incorporated into a constructed apartment building) but the defect in the warranted product is latent and not discoverable before it is so incorporated. In such circumstances, a mere refund of the purchase price would not provide a minimum adequate remedy. See, *Leprino v. Intermountain Brick Company*, 759 P.2d 835, 6 UCC Rep. Serv.2d 377 (Colo. App. 1988); *Neville Chemical Co. v. Union Carbide Corp.*, 294 F. Supp. 649, 655 (W.D. Penn. 1968); *Earl M. Jorgensen Co. v. Mark Constr. Inc.*, 56 Haw. 466, 540 P.2d 978, 986-87 (1975); *Latimer v. William Mueller & Son, Inc.*, 149 Mich. App. 620, 386 N.W.2d 618, 625 (1986). Another instance in which post-contract circumstances may cause a remedy limitation to fail of its essential purpose is when the seller is required to provide a remedy and, by action, inaction or even inability, causes the remedy to fail. *Jorgensen*, 540 P.2d at 986; *Marr Enterprises, Inc. v. Lewis Refrigeration Co.*, 556 F.2d 951, 955 (9th Cir. 1977).

There was substantial evidence presented to demonstrate that LP's warranty failed of its essential purpose and the trial court properly submitted the issue to the jury. Canterbury could not have contemplated at the time of contract that (1) LP's siding had a latent defect that could not be discovered until well after the product was fully installed on the

buildings; (2) the product failed so consistently that it was discontinued; (3) the defect would be so pervasive that it would require complete replacement to repair the damage caused by the defect; (4) LP would unilaterally (and arbitrarily) define “damage” so that damages would be grossly understated; (5) LP’s rigid protocol would direct a conclusion that only 11% of the LP siding was defective, but inspections by two independent experts would reveal damage in excess of 70%; (6) LP would refuse to even consider any information outside that obtained through LP’s own self-serving inspection protocol, including Canterbury’s expert damage reports; and (7) LP’s limited warranty, as implemented by LP, would yield payment of only \$8,383 to “compensate” Canterbury for the \$937,000 incurred to repair the damages caused by LP’s defective siding. Indeed, the evidence proved there were “circumstances [causing the] exclusive remedy to fail of its essential purpose.” RCW 62A.2-719(2). It was certainly sufficient to present the issue to the jury.

3. The trial court’s ruling on exclusivity did not render the failure of essential purpose issue moot.

Citing *American Nursery*, LP argues that the trial court’s decision on exclusivity rendered moot the issue of whether the LP’s limitation caused the warranty to fail of its essential purpose. The procedural posture of *American Nursery* was quite different. All evidence had been

presented at a bench trial, 115 Wn.2d at 221, and the appellate court was reviewing the fact-finders decisions in the context of the admitted evidence and applicable law. A failure of essential purpose may possibly be rendered moot at the appeal stage following affirmation of a ruling the limited remedies are not exclusive, but it is wholly a different matter when the fact-finder's decision is yet to be final and beyond challenge.

The failure of essential purpose argument was presented as an independent basis for recovery of replacement costs. Canterbury advised that, unless LP was prepared to stipulate that it would not appeal the decision on exclusivity, adjudication of this independent basis to render the remedy limitations invalid remained necessary. (RP 865-66) The law permits a court to submit to the jury alternative defenses and theories even if inconsistent. *Amrine v. Murray*, 28 Wn. App, 650, 654-55, 626 P.2d 24 (1981). Until the appeal period expired without appeal, the Court's decision on exclusivity was not final. Denying Canterbury the opportunity to present its independent basis that the remedy limitations are not enforceable would have denied Canterbury its right to a complete trial.

LP next complains that the jury was not advised that the theories were alternative. LP did not, however, articulate this objection at the time it proffered its exceptions to the instructions. (*See* RP 878-79.) More importantly, LP's proposed special verdict form did not contain the

clarifying language that LP now complains was not presented to the jury. (See CP 172.) Because of this failure, LP's belated objection may not be considered as grounds to overturn the verdict. *David v. Microsoft Corp*, 149 Wn2d 521, 539-40, 70 P.3d 126 (2003); *Raum v. City of Bellevue*, 171 Wn. App. 124, 147-48, 286 P.3d 695 (2012).

D. The Trial Court Properly Instructed The Jury On The Measure Of Damages And The Substantial Evidence Supports The Verdict.

1. LP failed to preserve its jury instruction challenges.

LP challenges Jury Instruction 10 on damages because it included damages beyond that stated in the limited warranty, and for the first time, that the instruction required the jury to award UCC damages at the exclusion of the stated warranty remedy. The totality of LP's jury exceptions are attached at Appendix A. LP first took exception to Instruction 9 providing that the limited remedy in the warranty is not the sole and exclusive remedy available under the warranty. (RP 878-79.)

Regarding Instruction 10, LP stated:

[W]e take exception to Instruction No. 10 regarding the measure of damages. Again, defendant submits that the measure of damages is as stated in the warranty, and specifically excepts to the cost of repair and replacement as part of the instruction No. 10 as inapplicable here and without support in the law. (RP 879.)

LP did not articulate that its exception included an objection that the instruction compelled a certain verdict. More importantly, LP never

offered an alternative instruction to resolve LP's objection. (*See* LP's proposed instructions at CP 151-72.) The proposed special verdict form (CP 172) did not fill the void. It simply asked the jury to calculate the square feet of siding affected by a warranty-covered "condition," and then asked: "What amount of damages, if any, was caused by defendant's breach of warranty." Guidance for the jury's calculation of damages was not provided. Merely proposing a special verdict will not adequately preserve an objection if the proposed form does not specifically address the issue on appeal. *Raum, supra*, 171 Wn. App. at 147-48.

Moreover, Instruction 10, when read with Instruction 9, was permissive. The trial court stated its intent regarding the instructions. Instruction 9 informed the jury: "The limited remedy stated in the warranty is not the sole and exclusive remedy available under the warranty." (CP 198.) It did not advise that the limited remedy was not available. It merely instructed that it was not the only remedy available. Instruction 10 informed the jury of the other available remedy, properly instructing the jury of the UCC remedy through language quoted directly from RCW 62A.2-714(2). (CP 199.) The instruction then informed the jury that "costs of repair and/or replacement may be evidence of the difference between the value of goods as accepted and their value as warranted." (*Id.*) The court confirmed that the instruction did not require

the jury to award repair or replacement costs, but “was an alternative for them to determine the difference in value.” (RP 861.) The court also confirmed that LP’s warranty was admitted (Ex. 9) and the jury was thus informed of the remedy addressed in Instruction 9. (RP 867.)

At the time of trial, LP clearly understood Instructions 9 and 10 to collectively provide instruction that it was permissive for the jury to award either the limited remedy stated in the warranty or damages based on the difference in value of the siding as accepted and the siding as warranted. First, LP did not include in its exceptions an objection that the instructions compelled a certain outcome. (RP 879.)

More importantly, LP argued its damages theories to the jury in closing. LP began its closing by telling the jury: “This case is about standing behind a product’s warranty.” (R 882.) “It is that warranty, that when you go back to the jury room, Louisiana Pacific will ask that you follow the remedy in the warranty and make your decision on the amount of damages that plaintiff should be awarded.” (RP 883.) LP told the jury that it could determine the difference in value by comparing the purchase price (for the value as warranted) to 1/3 the purchase price (asserting that Canterbury received value for 16 of the 25 years warranted) for the value as accepted. (RP 898-901.) LP also told the jury:

Also what you could do... -- as a damages calculation

would be to follow the warranty. You are familiar with Exhibit 9. The stated remedy is a refund to the owner of the amount of money equal to twice the retain cost of the original siding material.

(RP 902. *See also* CP 910 (“We ask when you go back to the jury room, you follow the warranty remedy...”))

A trial court does not abuse its discretion in giving jury instructions if the instructions permit the parties to argue their theories of the case, are not misleading and read as a whole, properly inform the jury of the applicable law. *Svenfard v. Dept. of Licensing*, 122 Wn.2d 670, 675, 95 P.3d 364 (2004). The trial court did not abuse its discretion. The instructions were consistent with the law and allowed LP to argue its case.

2. The damages awarded are supported by the law and the substantial evidence.

At the request of LP, the Court quoted the full text of RCW 62A.2-714(2) in Instruction 10 to the jury for the measure of damages for breach of warranty. (RP 852-53, CP 199.) In addition to the statute, and consistent with the case law, the instruction also advised of the evidence that may be considered in determining damages. Instruction 10 provided that the measure of damages is:

The difference at the time and place of acceptance between the value of goods accepted and the value they would have had if they had been warranted, unless special circumstances show proximate damages as a different amount.

The cost of repair and/or replacement may be evidence of the difference between the value of goods as accepted and their value as warranted. (Emphasis added.)

LP took exception to the second paragraph. (RP 879.)

The Court's instruction that the cost of repair and/or replacement may be evidence of the difference in value of goods as accepted and their value as warranted was a correct statement of the law.

The cost of repair to bring goods to their warranted condition has been widely recognized by the courts as a valid measure of a buyer's general damages under Section 2-714. While a few courts have erroneously rejected repair costs in favor of measuring damages under the amorphous "value" standards of section (2), the overwhelming judicial consensus is that repair costs are presumptive evidence of the difference between the value of good as accepted and their value as warranted.

...

The ease with which repair costs can be proved at trial has caused courts to regard them as preferable evidence of damages to the more uncertain evidence of values.

Anderson on Damages Under the UCC, § 10:6 at p. 10-19 to 10-21. Prior to closing, LP acknowledged that Washington courts have accepted costs of repair as evidence of the difference in value. (RP 862, *citing Miller, supra*, 51 Wn. App. at 295.) Its objection was to allowing the jury to also consider cost of replacement as a measure of the difference in value. (*Id.*)

Evidence of the cost of repair was presented and no evidence was presented that these actual costs incurred were unreasonable. In this case, evidence was presented that it was not feasible for Canterbury to

selectively replace siding – replacement was required to fully repair the defective and damaged siding. The trial court discerned from the evidence: “I don’t think it is possible to repair without replacing.” (RP 863.) The evidence demonstrated that repair required replacement. The substantial evidence thus supported the instruction.

In circumstances where it is not practical, feasible, economic or reasonable to limit repair to replacement of the “damaged” siding, the law authorizes the costs of total replacement as an appropriate remedy. *In re: Chinese Manufactured Drywall Products Liability Litigation*, 706 F. Supp.2d 655 (E. D. La 2010)(holding selective replacement of damaged drywall unreasonable); *Landis v. Williams Fannin Builders, Inc.*, 193 Ohio App.3d 318, 951 N.E.2d 1078 (2011)(holding repair resulting in mismatched siding unreasonable and that cost of repair may include additional costs necessarily incurred to correct defect). *See also, Hicks v. Kaufman and Broad Home Corporation*, 89 Cal. App.4th 908 (2001). Instruction 10 was, therefore, supported by the law as well.

Finally, LP asserts that the instruction resulted in a windfall to Canterbury – that the jury unfairly awarded full replacement costs despite that Canterbury “enjoyed” the LP siding for 16 years and despite that the award exceeded the purchase price. To begin, Canterbury was not awarded full replacements costs. The jury awarded \$775,214, \$162,000

less than the actual \$937,000 paid to replace the damaged siding. Second, the courts have acknowledged that the UCC remedy of the difference in value as warranted and the value as accepted can yield a damages award well in excess of the purchase price. *Chatlos Systems, Inc. v. Nat'l Cash Register Corp.*, 670 F.2d 1304, 1306-07 (C.A.N.J. 1982) (affirming \$202,000 damages award as difference between value as warranted and value as accepted even though purchase price was \$42,000.)

Moreover, LP fails to account for the nature of the product it sold. LP seems to argue that Canterbury is hardly entitled to any remedy for a product that lasted 16 years. Of course, even under the standards set in LP's limited warranty, surpassing the half-way point of a 25-year warranty before complete failure should not be held out as a product accomplishment. LP's own expectations for its infamously defective product are apparently quite low. Siding, however, is different than other products. It is not like roofing or a furnace where one expects the product to have a limited life-span and require replacement. Rather, like the foundation and framing, siding is expected to last the life of the building.

Ray Dally, who owns Canterbury and has been in construction for decades, testified that he never expected he would need to replace the siding on these apartments. (RP 319-20.) His experience is consistent with his expectation. In his 40 plus years in construction, Dally had never

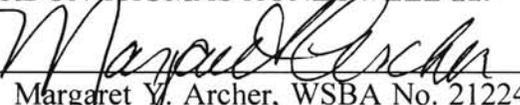
experienced siding failure on any of the homes and apartments he constructed, except, of course, when he installed LP's defective siding on the Canterbury Apartments. (RP 318-19.) RCW 62A.1-106(1) provides that UCC remedies "shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed." That the siding lasted 16 years before the latent manufacturing defect caused deterioration to the point of discovery does not translate to a conclusion that LP's remedy is adequate or that the damages awarded were a windfall.

Finally, LP's claim that trial court erred by refusing LP's proposed special verdict form is without merit. The Court correctly concluded that the proposed form could be seen as a comment on the evidence. (RP 877-78) Moreover, LP has not demonstrated that the general verdict form precluded LP from arguing its case or otherwise prejudiced LP.

CONCLUSION

The jury was properly instructed and its verdict was supported by the law and the substantial evidence. The verdict should be affirmed.

Dated this 30th day of August, 2013.

Respectfully submitted,
GORDON THOMAS HONEYWELL LLP
By 
Margaret Y. Archer, WSBA No. 21224
Attorneys for Respondent

APPENDIX A

LP'S JURY INSTRUCTION EXCEPTIONS
(RP878-880)

1 is something that certainly can be argued in closing as
2 to how they should calculate any damages. To put that
3 as part of the special verdict form would be a comment
4 by the Court.

5 MS. ARCHER: We proposed a Verdict Form A and a
6 Verdict Form B. In light of the fact there is an
7 admission, we should get something that is probably not
8 appropriate.

9 MR. DAHEIM: I can explain it to the jury. It
10 is confusing.

11 MS. ARCHER: We would have to change the
12 concluding instruction as well. I think we are where we
13 are.

14 THE COURT: Do the plaintiffs have any
15 exceptions or objections to the instructions the Court
16 has given or not given.

17 MS. ARCHER: Were you asking plaintiff?

18 THE COURT: Yes.

19 MS. ARCHER: We have no exceptions. I
20 apologize.

21 THE COURT: Ms. Markley?

22 MS. MARKLEY: Yes, Your Honor. Defendant takes
23 exception to the Court's Instruction No. 9. That is the
24 instruction about the limited remedy is not the sole and
25 exclusive remedy for the reasons stated in the previous

Exceptions & Objections

Canterbury Apartments v Louisiana-Pacific - November 27, 2012

1 motions and submissions and arguments to the Court. It
2 is the sole and exclusive remedy.

3 Similarly, we take exception to Instruction
4 No. 10 regarding the measure of damages. Again,
5 defendant submits that the measure of damages is as
6 stated in the warranty, and specifically excepts to the
7 cost of repair and replacement as part of Instruction
8 No. 10 as inapplicable here and without support in the
9 law.

10 L-P takes exception to Instruction No. 11, the
11 failure of essential purpose instruction, on the grounds
12 that the issue is one of law for the Court to decide.
13 It is inapplicable here where the Court has instructed
14 the jury that it can go beyond the remedy stated in the
15 warranty to the damage formula in the UCC.

16 The defendant also takes exception to the
17 failure to give its Proposed Instruction No. 7 regarding
18 spoliation, and its Proposed Instruction No. 9 regarding
19 the measure of damages, which is -- should be under --
20 as stated in the limited remedy -- limited warranty.

21 THE COURT: We had quite a bit of discussion on
22 the record yesterday afternoon about each of those
23 subject matters. I think the Court has made its
24 position clear. I think the parties have made their
25 positions clear as well. I do appreciate the briefing

1 and the argument, the advocacy on this. The Court is
2 not going to change any of the decisions it made
3 yesterday. It is going to give the instructions that it
4 has proposed.

5 Any other issues we need to address before we
6 bring the jury out?

7 MS. MARKLEY: Yes, Your Honor. I have a few
8 items to put on the record with regard to the exhibit
9 record. I discussed this with counsel before. If I am
10 looking at the correct one, which is one I have just
11 been handed, Exhibit 219, 220 and 221 are showing as
12 not --

13 JUDICIAL ASSISTANT: You are not looking at the
14 right one.

15 MS. MARKLEY: All right. Exhibit 219 is shown
16 as neither offered nor admitted. These are the
17 inspector's photographs that were taken and discussed on
18 the record. At this time, I would offer Exhibit 219 as
19 an exhibit.

20 MR. DAHEIM: I have no objection. It was an
21 oversight of counsel.

22 THE COURT: 219 will be admitted.

23 MS. MARKLEY: That I believe is all.

24 Thank you.

25 THE COURT: Mr. Daheim, you are giving closing

APPENDIX B

JURY INSTRUCTION

(CP 198)

INSTRUCTION NO. 9

The limited remedy stated in the warranty is not the sole and exclusive remedy available under the warranty.

APPENDIX C

JURY INSTRUCTION

(CP 199)

INSTRUCTION NO. 10

It is the duty of the Court to instruct you as to the measure of damages. By instructing you on damages the Court does not mean to suggest the amount of any damages that should be awarded. With regard to the breach of warranty claim of Plaintiff, in your determination of damages, you are to use the following measure of damages in the amounts proved by Plaintiff:

The difference at the time and place of acceptance between the value of goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

The costs of repair and/or replacement may be evidence of the difference between the value of goods as accepted and their value as warranted.

APPENDIX D

JURY INSTRUCTION

(CP 200)

INSTRUCTION NO. 11

If the remedy provided in the warranty fails of its essential purpose, the remedy is the difference at the time and place of acceptance between the value of goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount. The costs of repair and/or replacement may be evidence of the difference between the value of goods as accepted and their value as warranted.

A limitation of remedies fails of its essential purpose when the limitation deprives a party of the substantive value of its bargain, or it fails to provide minimum adequate remedies.

APPENDIX E

LP'S PROPOSED JURY INSTRUCTION AND VERDICT FORM

(CP 151-172)



11-2-15698-8 39639089 DFPIN 12-06-12

ORIGINAL



- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28
- 29
- 30
- 31
- 32
- 33
- 34
- 35
- 36
- 37
- 38
- 39
- 40
- 41
- 42
- 43
- 44
- 45
- 46
- 47

THE HONORABLE EDMUND MURPHY

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

CANTERBURY APARTMENT HOMES
LLC, a Washington limited liability
company,

Plaintiff,

v.

LOUISIANA PACIFIC CORPORATION,
a Delaware corporation,

Defendant.

No. 11 2 15698 8

DEFENDANT LOUISIANA PACIFIC
CORPORATION'S PROPOSED JURY
INSTRUCTIONS WITH CITATIONS

Defendant Louisiana Pacific Corporation hereby submits the attached proposed jury
instructions with citations for trial.

JURY INSTRUCTIONS - I

LEGAL25147913 I

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone. 206 359.8000
Facsimile 206 359.9000

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47

DATED: November 12, 2012

PERKINS COIE LLP

By /s/ Ashley A. Locke
Ashley Locke, WSBA No. 40521
ALocke@perkinscoie.com
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000

Julia Markley, WSBA No. 36095
JMarkley@perkinscoie.com
1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
Telephone: 503.727.2000
Facsimile: 503.727.2222

James H. Gidley, WSBA No. 17000
JGidley@perkinscoie.com
1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
Telephone: 503.727.2000
Facsimile: 503.727.2222

Attorneys for Defendant
Louisiana Pacific Corporation

JURY INSTRUCTIONS - 2

LEGAL25147913 I

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: 206 359 8000
Facsimile: 206 359 9000

Jury Instruction No. 1**Part I – Before Voir Dire of Prospective Jurors**

This is a civil case brought by plaintiff Canterbury Apartment Homes LLC against defendant Louisiana-Pacific Corporation. The plaintiff's lawyers are Warren J. Daheim and Margaret Archer. The defendant's lawyers are James Gidley and Julia Markley.

The plaintiff claims that defendant breached its express warranty. The defendant denies this claim in part, and denies that plaintiff is entitled to all of the damages that it seeks.

It is your duty as a jury to decide the facts in this case based upon the evidence presented to you during this trial. Evidence is a legal term. Evidence includes such things as testimony of witnesses, documents, or other physical objects.

One of my duties as judge is to decide whether or not evidence should be admitted during this trial. What this means is that I must decide whether or not you should consider evidence offered by the parties. For example, if a party offers a photograph as an exhibit, I will decide whether it is admissible. Do not be concerned about the reasons for my rulings. You must not consider or discuss any evidence that I do not admit or that I tell you to disregard.

The evidence in this case may include testimony of witnesses or actual physical objects, such as papers, photographs, or other exhibits. Any exhibits admitted into evidence will go with you to the jury room when you begin your deliberations. When witnesses testify, please listen very carefully. You will need to remember testimony during your deliberations because testimony will rarely, if ever, be repeated for you.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. However, the lawyers' statements are not evidence or the law. The evidence is the testimony and the exhibits. The law is contained in my instructions. You must disregard anything the lawyers say that is at odds with the evidence or the law in my instructions.

Our state constitution prohibits a trial judge from making a comment on the evidence. For example, it would be improper for me to express my personal opinion about the value of a particular witness's testimony. Although I will not intentionally do so, if it appears to you that I have indicated my ~~personal opinion concerning any evidence~~, you must disregard that opinion entirely.

You may hear objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

In deciding this case, you will be asked to apply a concept called "burden of proof." The phrase "burden of proof" may be unfamiliar to you. Burden of proof refers to the measure or amount of proof required to prove a fact. The burden of proof in this case is proof by a preponderance of the evidence. Proof by a preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that a proposition is more probably true than not true.

During your deliberations, you must apply the law to the facts that you find to be true. It is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you think it ought to be. You are to apply the law you receive from my instructions to the facts and in this way decide the case.

At this time, I would like to introduce you to the court reporter, _____, who will record everything that is said or done in this courtroom during this trial. *S/He* is responsible for recording these proceedings accurately. What *s/he* transcribes is referred to as the "record."

I would also like to introduce you to the court clerk, _____, and the bailiff, _____.

The job of the court clerk is to keep track of all documents and exhibits and to make a record of rulings made during the trial. The bailiff keeps the trial running smoothly. You will be in the care of the bailiff throughout this trial. *[Mr.] [Ms.]* will help you with any problems you may have related to jury service. Please follow any instructions that *s/he* gives you.

(The judge explains the procedure for voir dire, and voir dire then begins.)

Part II—After Voir Dire:

Now I will explain the procedure to be followed during the trial.

First: The lawyers will have an opportunity to make opening statements outlining the testimony of witnesses and other evidence that they expect to be presented during trial.

Next: The plaintiff will present the testimony of witnesses or other evidence to you. When the plaintiff has finished, the defendant may present the testimony of witnesses or other evidence.

Each witness may be cross-examined by the other side.

Next: When all of the evidence has been presented to you, I will instruct you on what law applies to this case. I will read the instructions to you out loud. You will have individual copies of the written instructions with you in the jury room during your deliberations.

Next: The lawyers will make closing arguments.

Finally: You will be taken to the jury room by the bailiff where you will select a presiding juror. The presiding juror will preside over your discussions of the case, which are called deliberations. You will then deliberate in order to reach a decision, which is called a "verdict." Until you are in the jury room for those deliberations, you must not discuss the case with the other jurors or with anyone else, or remain within hearing of anyone discussing it. "No discussion" also means no e-mailing, text messaging, blogging, or any other form of electronic communication.

You will be allowed to take notes during this trial. I am not instructing you to take notes, nor am I encouraging you to do so. Taking notes may interfere with your ability to listen and observe. If you choose to take notes, I must remind you to listen carefully to all testimony and to carefully observe all witnesses.

At an appropriate time, the bailiff will provide a note pad and a pen or pencil to each of you. Your juror number will be on the front page of the note pad. You must take notes on this pad only, not on any other paper. You must not take your note pad from the courtroom or the jury room for any reason. When you recess during the trial, please _____. At the end of the day, the note pads must be left _____. While you are away from the courtroom or the jury room, no one else will read your notes.

You must not discuss your notes with anyone or show your notes to anyone until you begin deliberating on your verdict. This includes other jurors. During deliberation, you may discuss your notes with the other jurors or show your notes to them.

You are not to assume that your notes are necessarily more accurate than your memory. I am allowing you to take notes to assist you in remembering clearly, not to substitute for your memory. You are also not to assume that your notes are more accurate than the memories or notes of the other jurors.

After you have reached a verdict, your notes will be collected and destroyed by the bailiff. No one will be allowed to read them.

You will be allowed to propose written questions to witnesses after the lawyers have completed their questioning. You may ask questions in order to clarify the testimony, but you are not to express any opinion about the testimony or argue with a witness. If you ask any questions, remember that your role is that of a neutral fact finder, not an advocate.

Before I excuse each witness, I will offer you the opportunity to write out a question on a form provided by the court. Do not sign the question. I will review the question to determine if it is legally proper.

There are some questions that I will not ask, or will not ask in the wording submitted by the juror. This might happen either due to the rules of evidence or other legal reasons, or because the question is expected to be answered later in the case. If I do not ask a juror's question, or if I rephrase it, do not attempt to speculate as to the reasons and do not discuss this circumstance with the other jurors.

By giving you the opportunity to propose questions, I am not requesting or suggesting that you do so. It will often be the case that a lawyer has not asked a question because it is legally objectionable or because a later witness may be addressing that subject.

Throughout this trial, you must come and go directly from the jury room. Do not remain in the hall or courtroom, as witnesses and parties may not recognize you as a juror, and you may accidentally overhear some discussion about this case. I have instructed the lawyers, parties, and witnesses not to talk to you during trial.

It is essential to a fair trial that everything you learn about this case comes to you in this courtroom, and only in this courtroom. You must not allow yourself to be exposed to any outside information about this case. Do not permit anyone to discuss or comment about it in your presence. You must keep your mind free of outside influences so that your decision will be based entirely on the evidence presented during the trial and on my instructions to you about the law.

Until you are dismissed at the end of this trial, you must avoid outside sources such as newspapers, magazines, on-line blogs, the internet, or radio or television broadcasts which may discuss this case or issues involved in this trial. By giving this instruction I do not mean to suggest that this particular case is newsworthy; I give this instruction in every case.

During the trial, do not try to determine on your own what the law is. Do not seek out any evidence on your own. Do not consult dictionaries or other reference materials. Do not conduct any research, including on the internet, about any information, issues, or people involved in this case. Do not inspect the scene of any event involved in this case. If your ordinary travel will result in passing or seeing the location of any event involved in this case, do not stop or try to investigate. You must keep your mind clear of anything that is not presented to you in this courtroom.

Throughout the trial, you must maintain an open mind. You must not form any firm and fixed opinion about any issue in the case until the entire case has been submitted to you for deliberation.

As jurors, you are officers of this court. As such, you must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a just and proper verdict.

To accomplish a fair trial takes work, commitment, and cooperation. A fair trial is possible only with a serious and continuous effort by each one of us, working together.

Thank you for your willingness to serve this court and our system of justice.

WPI 1.01 (with slight modifications).

Jury Instruction No. 2

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law as I explain it to you, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

In order to decide whether any party's claim has been proved, you must consider all of the evidence that I have admitted that relates to that claim. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of the witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things they testify about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal

interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

The law does not permit me to comment on the evidence in any way. I would be commenting on the evidence if I indicated my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during trial or in giving these instructions, you must disregard it entirely.

As to the comments of the lawyers during this trial, they are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by the evidence or the law as I have explained it to you.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

As jurors, you have a duty to consult with one another and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors. Listen to one another carefully. In the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon the evidence. You should not surrender your honest convictions about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Finally, the order of these instructions has no significance as to their relative importance. They are all equally important. In closing arguments, the lawyers may properly discuss specific instructions, but you must not attach any special significance to a particular instruction that they may discuss. During your deliberations, you must consider the instructions as a whole.

WPI 1.02.

Instruction No. 3

Plaintiff has the burden of proof in this case. When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case, that the proposition on which that party has the burden of proof is more probably true than not true.

WPI 21.01.

Instruction No. 4

The parties have admitted that certain facts are true. You must accept as true the following facts:

1. The LP Inner-Seal® Siding was installed in 1995 on the 24 structures in the Canterbury Apartments.
2. Packed with the Inner-Seal® Siding that the Ray Dally Construction Company purchased in 1995 for installing on the Canterbury Apartments was LP's Inner-Seal® Limited Warranty.
3. The August 1995 version of the LP Inner-Seal® Limited Warranty is the operative version of the Limited Warranty.

(The judge or attorney should read the admitted evidence.)

WPI 6.10.02, Defendant's Objections and Answers to Requests for Admission.

Instruction No. 5

The plaintiff has the burden of proving each of the following propositions on their claim of breach of warranty:

- 1) That LP breached the express warranty;
- 2) That plaintiff suffered damages because of the breach of express warranty; and
- 3) The amount of damages, if any, that plaintiff suffered because of the breach of express warranty.

If you find from your consideration of all the evidence that each of these propositions has been proved, your verdict should be for the plaintiff on this claim. On the other hand, if any of these propositions has not been proved, your verdict should be for the defendant.

WPI 300.02 (modified).

Instruction No. 6

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts. You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

WPI 2.10, *Kohfeld v United Pac Ins. Co*, 85 Wn. App. 34, 42-43 (1997).

Instruction No. 7

In presenting its case, plaintiff did not produce the siding that it claims is affected. The general rule is that where evidence which would properly be part of a case is within the control of, or available to, the party whose interest would naturally be to produce it and he or she fails to do so without satisfactory explanation, you may draw the inference that, if produced, it would be unfavorable to him or her.

Applying that general rule to this case and to plaintiff's failure to produce the evidence, you may draw the inference that it would have been unfavorable to it, if you find all of the following: that the siding existed, was within its control, that it would naturally have been in its interest to produce the siding, and that there has been no satisfactory explanation of the failure to produce

Marshall v Bally's Pacwest, Inc., 94 Wn.App. 372, 381-81, 972 P.2d 475 (1999) (stating presumption in spoliation involves weighing the importance of the evidence and whether the other party had an adequate opportunity to examine the evidence)

Instruction No. 8

Plaintiff claims breach of an express warranty contending that the siding did not conform to an affirmation or promise made by the defendant to the plaintiff about the goods. A breach of express warranty occurs when (1) the seller made an affirmation of fact or promise to the buyer that relates to the siding, (2) that affirmation of fact or promise became part of the basis of the bargain, and (3) the buyer demonstrates that the siding failed to conform to the affirmation of fact or promise. If you find that the siding conformed to that express warranty, your verdict will be for defendant.

RCW 62A.2-313(1)(a); *Fed Signal Corp v. Safety Factors, Inc*, 125 Wn.2d 413 (1994).

Instruction No. 9

If you find that the limited warranty “failed its essential purpose,” you are to use (1) the difference in value of goods as delivered to the value of the goods conformed, (2) losses incurred in the ordinary course of events, and (3) incidental and consequential damages to determine the measure of damages to plaintiff.

RCW 62A.2-714; *Fed Signal Corp v Safety Factors, Inc.*, 125 Wn.2d 413, 445 (1994); *Hofstee v Dow*, 109 Wn.App. 537, 544 (2001)

Instruction No. 10

When you begin to deliberate, your first duty is to select a presiding juror. The presiding juror's responsibility is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

You will be given [*the exhibits admitted in evidence and*] these instructions. You will also be given a special verdict form that consists of several questions for you to answer. You must answer the questions in the order in which they are written, and according to the directions on the form. It is important that you read all the questions before you begin answering, and that you follow the directions exactly. Your answer to some questions will determine whether you are to answer all, some, or none of the remaining questions.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. [For this purpose, use the form provided in the jury room.] In your question, do not state how the jury has voted, or in any other way indicate how your deliberations are proceeding.

The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

In order to answer any question on the special verdict form, *[ten]* *[five]* jurors must agree upon the answer. It is not necessary that the jurors who agree on the answer be the same jurors who agreed on the answer to any other question, so long as *[ten]* *[five]* jurors agree to each answer.

When you have finished answering the questions according to the directions on the special verdict form, the presiding juror will sign the verdict form. The presiding juror must sign the verdict whether or not the presiding juror agrees with the verdict. The presiding juror will then tell the bailiff that you have reached a verdict. The bailiff will bring you back into court where your verdict will be announced.

WPI 1.11.

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

CANTERBURY APARTMENT HOMES
LLC,

No. 11 2 15698 8

Plaintiff,
LOUISIANA PACIFIC CORP.,

Defendant.

SPECIAL VERDICT FORM

We, the Jury, answer the questions submitted by the court as follows:

Question 1: How many square feet, if any, of plaintiff's LP Inner-Seal® siding was affected by a condition covered by the Limited Warranty?

Answer: _____

(INSTRUCTION Proceed to answering question 2)

Question 2: What amount of damages, if any, was caused by defendant's breach of express warranty?

Answer: _____

(INSTRUCTION: Sign, date, and return this verdict form.)

Please date and sign this form and return it to the Judge.

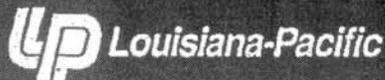
Dated: November __, 2012

APPENDIX F

LP LIMITED WARRANTY

(Trial Exhibit 9)

LIMITED WARRANTY FOR INNER-SEAL[®] SIDINGS



LIMITED 25-YEAR SIDING WARRANTY

Louisiana-Pacific Corporation ("L-P") warrants the Inner-Seal[®] lap and panel sidings, when installed and finished according to the published installation and finishing instructions and when properly maintained, for a period of 25 years from the date of installation against manufacturing defects under normal conditions of use and exposure.

LIMITATIONS

L-P MUST BE GIVEN A 60-DAY OPPORTUNITY TO INSPECT THE SIDING BEFORE IT WILL HONOR ANY CLAIMS UNDER THE ABOVE WARRANTY. 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. THE COST OF LABOR AND MATERIALS OTHER THAN SIDING ARE NOT INCLUDED. WARRANTY PAYMENTS WILL BE BASED UPON THE AMOUNT OF AFFECTED SIDING MATERIAL.

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.

IF THE ORIGINAL SIDING COST CANNOT BE ESTABLISHED BY THE OWNER THE COST SHALL BE DETERMINED BY L-P IN ITS SOLE AND REASONABLE DISCRETION.

DURING THE 6TH THROUGH 25TH YEAR, AS DETERMINED IN THE ABOVE MANNER, WARRANTY PAYMENTS SHALL BE REDUCED EQUALLY EACH YEAR SUCH THAT AFTER 25 YEARS FROM THE DATE OF INSTALLATION NO WARRANTY SHALL BE APPLICABLE.

THE ABOVE WARRANTY SHALL APPLY ONLY IF THE INNER-SEAL SIDING IS SUBJECTED TO NORMAL SIDING USE AND EXPOSURE. 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.

IMPORTANT NOTICE:

FAILURE TO INSTALL, FINISH AND MAINTAIN IN ACCORDANCE WITH L-P'S PUBLISHED INSTRUCTIONS MAY CAUSE DAMAGE TO THE SIDING AND WILL VOID THIS WARRANTY.

CONDITIONS COVERED BY THIS WARRANTY

- DELAMINATION OF THE OVERLAY FROM THE SUBSTRATE.
- RESIN SPOTS.
- SPOTS ON OVERLAY RESULTING FROM A MANUFACTURING PROCESS WHICH CANNOT BE COVERED WITH PAINT.
- FOLDED OR "POPPED" WAFERS/STRANDS THAT BREAK THE OVERLAY SURFACE.

- CRACKING, PEELING, CHIPPING OR FLAKING OF THE OVERLAY SURFACE.
- EXCESSIVE OR MISSING SEALANT ON EDGES AND/OR GROOVES.
- DIMENSIONAL VARIANCE FROM SPECIFICATIONS, AT THE TIME OF SALE.
- PATTERN VARIANCES FROM SPECIFICATIONS.

CONDITIONS NOT COVERED BY THIS WARRANTY

- FAILURES DUE TO MOISTURE IN THE WALL CAVITY.
- FAILURES DUE TO INSUFFICIENT PAINT COVERAGE ON FACE AND EXPOSED EDGES.
- FAILURES DUE TO FAILURE OF THE PAINT SYSTEM.
- FAILURES RELATED TO MOLD, MILDEW AND/OR ALGAE ON PAINTED SIDING SURFACE.
- FAILURES DUE TO FACE NAILING ON LAP SIDING.
- FAILURES DUE TO INADEQUATE SPACING AND/OR SEALANT.
- FAILURES DUE TO UNCONTROLLED WATER RUNOFF OR INADEQUATE FLASHING.
- FAILURES DUE TO SIDING BEING IN DIRECT CONTACT WITH MASONRY AND/OR LESS THAN 6" FROM THE GROUND.
- FAILURES DUE TO SPRINKLERS SPRAYING ON THE SIDING.

DISCLAIMER: LOUISIANA-PACIFIC DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED, REGARDING UTILITY, GRADE INNER-SEAL SIDING, INCLUDING IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. THE FOREGOING EXPRESS WARRANTIES ARE APPLICABLE ONLY TO OUR A-GRADE PRODUCT AND NOT OUR UTILITY GRADE WHICH IS SOLD "AS IS AND WITH ALL FAULTS". EXCEPT FOR THE EXPRESS WARRANTY AND REMEDY SET FORTH ABOVE, L-P DISCLAIMS ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. NO OTHER WARRANTY WILL BE MADE BY OR ON BEHALF OF THE MANUFACTURER OR THE SELLER OR BY OPERATION OF LAW WITH RESPECT TO THE PRODUCT OR ITS INSTALLATION, STORAGE, HANDLING, MAINTENANCE, USE, REPLACEMENT OR REPAIR. NEITHER L-P NOR THE SELLER SHALL BE LIABLE BY VIRTUE OF ANY WARRANTY, OR OTHERWISE, FOR ANY SPECIAL, INCIDENTAL OR CONSEQUENTIAL LOSS OR DAMAGE RESULTING FROM THE USE OF THE PRODUCT. L-P MAKES NO WARRANTY WITH RESPECT TO INSTALLATION OF THE PRODUCT BY THE BUILDER OR THE BUILDER'S CONTRACTOR, OR ANY OTHER INSTALLER. SOME STATES DO NOT ALLOW THE EXCLUSION OR LIMITATION OF INCIDENTAL OR CONSEQUENTIAL DAMAGES, AND IN SUCH STATES THE ABOVE LIMITATION OR EXCLUSION MAY NOT APPLY TO YOU. THIS WARRANTY GIVES YOU SPECIFIC LEGAL RIGHTS AND YOU MAY ALSO HAVE OTHER RIGHTS WHICH VARY FROM STATE TO STATE.

SEE REVERSE SIDE FOR WARRANTY CHECKLIST TO ENSURE SIDING PERFORMANCE AND VALIDITY OF WARRANTY.

LP Louisiana-Pacific
111 SW Fifth Avenue
Portland, Oregon 97204

®, Louisiana-Pacific and Inner-Seal are registered trademarks of Louisiana-Pacific Corporation.

NOTE: Louisiana-Pacific Corporation periodically updates and revises its product information. To verify that this version is current, contact one of the sales offices.

August 1995
2-3-DS-5 150M

Printed in USA

DOF Printed using totally chlorine-free pulp.

LP000339

8/95

WARRANTY CHECKLIST FOR INNER-SEAL® SIDING

LP Louisiana-Pacific

THIS CHECKLIST PROVIDES GUIDELINES FOR PROPER INSTALLATION, FINISHING AND MAINTENANCE OF INNER-SEAL LAP AND PANEL SIDINGS. FOLLOWING THESE RECOMMENDATIONS WILL ENSURE YEARS OF SIDING PERFORMANCE AND THAT YOUR WARRANTY IS VALID.

CONSTRUCTION/INSTALLATION

- Siding was stored off the ground and kept dry.
- Siding was kept dry during the installation process.
- Installation meets local building and energy codes.
- Dry exterior wall cavity design and construction have been utilized. A vapor retarder on the warm side of all exterior walls is required to prevent interior moisture from gaining access to the wall cavity. (Weather barrier over the sheathing is recommended.)
- An exterior weather barrier is required when lap siding is applied direct to studs.
- Stud spacing and blocking meets local code requirements and provides a flat, smooth plane for the siding.
- A minimum of 6" clearance ground-to-siding exists around the perimeter of the home.
- Siding joints are directly over studs with 3/16" spacing for lap siding joints.
- Spacing of 3/16" at all corner, window, door, and utility trim joints has been allowed.
- Siding has a minimum 2" clearance on roof eaves and chimneys.
- Siding is protected from direct contact with any form of masonry, foundations, chimneys, patios, steps, and sidewalks.
- Proper length corrosion resistant nails have been used. (No stapling allowed.)
- Blind nailing is used for all lap siding (1991 forward).
- 1-1/2" overlap on 6" and wider siding nailed 1" from the top. 1" minimum overlap on 6" siding nailed 1/2" from the top.
- For panel siding, exposed nails are driven only to the siding surface.
- Nail panel siding 6" o.c. around perimeter and 12" o.c. on intermediate supports.

- Siding material is not suitable for trim and/or fascia and should not be used for these applications.

SEALING/FINISHING

- Siding was finished within 90 days of installation.
- Siding was clean of construction dirt, dust, and stains before painting.
- Siding has been finished with a minimum of 2.5 dry mils in addition to the factory primer.
- Paint is a high quality 100% acrylic latex or other compatible finish specifically recommended and warranted for factory primed siding.
- Paint was applied according to the manufacturer's recommendations for temperature and moisture conditions. (Some paint manufacturers recommend an alkyl primer over factory-primed wood sidings.)
- Semigloss paints provide better performance against moisture, mold, and mildew and should be used in high moisture, high humidity climates.
- All bottom edges are fully painted with a minimum of 2.5 dry mils in addition to the factory primer.
- All joints, cuts, and exposed nails (lap siding) are sealed with a high quality nonhardening 25-year paintable sealant.

OWNER MAINTENANCE

- Sprinklers do not splash water on the siding.
- Water from roofs and gutters is diverted away from the siding.
- Shrubs, trees, and plants do not have direct contact with the siding.
- The painted surface is kept free of mold, mildew, and algae.
- The siding is repainted before the paint falls.

For a copy of the warranty or installation and technical questions call L-P customer services:

800-648-6893

8am - 5pm Central Standard Time

LP000340

APPENDIX G

TRIAL COURT'S RULING ON EXCLUSIVE
REMEDY

(RP 831-834)

1 MS. MARKLEY: That was an oversight on my part.
2 Now the Court looks like it has the correct one.

3 THE COURT: Yes.

4 Ms. Archer, I know you want to argue again. I
5 have heard a lot of argument on this. I am ready to
6 rule.

7 MS. ARCHER: I accept that you are done.

8 THE COURT: It is an issue that has come up in
9 motions in limine. It has also come up and been touched
10 on in some of the other motions we have dealt with, the
11 halftime motion for judgment as a matter of law, also at
12 the end of the case, the last motion we just heard.

13 The question is whether the limited warranty is
14 the only remedy -- the remedy under the limited warranty
15 is the only remedy available to the plaintiff. Although
16 the plaintiff has argued that this could be something
17 that the Court could have the jury decide, I do believe
18 it is an issue of law that is to be decided by this
19 Court.

20 The plaintiff wants the Court to instruct the
21 jury in its proposed Instruction No. 7 that the limited
22 remedy stated in the warranty are not the sole and
23 exclusive remedies available under the warranty. The
24 defendant wants the Court to instruct the jury in its
25 proposed Instruction No. 9, the subsequently proposed

1 Instruction No. 9, that I instruct you that the limited
2 warranty in this case is the only remedy available to
3 the plaintiff.

4 Now the warranty was admitted as Exhibit No. 9
5 in this case. It states, under the limitations section,
6 that L-P must be given a 60 day opportunity to inspect
7 the siding before it will honor any claims under the
8 above warranty. Also, if after inspection and
9 verification of the problem, L-P determines that there
10 is a failure covered by the above warranty, L-P will
11 refund to the owner an amount of money equal to twice
12 the retail cost of the original siding material. The
13 cost of labor and materials other than siding are not
14 included. Warranty payments will be based upon the
15 amount of affected siding material. It talks about the
16 first five years, the obligation is limited to twice the
17 retail cost of the siding, which is the highest amount
18 that L-P would pay under this.

19 Then the issue that is presented in this case
20 is the period of time during the six to 25th year which
21 the warranty describes that the warranty payments shall
22 be reduced equally each year such that after 25 years
23 from the date of installation no warranty shall be
24 applicable. There is a disclaimer section which
25 indicates that except for the express warranty and

1 remedy set forth above, L-P disclaims all other
2 warranties express or implied, including implied
3 warranties of merchantability or fitness for a
4 particular purpose. Goes on to say that the warranty
5 gives you specific legal rights, and you may also have
6 other rights which vary from state to state.

7 The Court has to look at RCW 62A.2.719(1)(b),
8 which says, "Resort to a remedy is provided is optional
9 unless the remedy is expressly agreed to be exclusive,
10 in which case it is the sole remedy. It must be agreed
11 by the parties to be the exclusive remedy." As has been
12 pointed out, that has to be an unmistakable expression
13 of that. "In this warranty, L-P disclaims other
14 warranties but does not clearly state that the remedy
15 provided is the exclusive remedy." It certainly had the
16 ability to include language which says that this is the
17 sole and exclusive remedy, but it did not do that in
18 this case. Under this warranty, L-P holds all the
19 cards. It determines it will honor the claim under the
20 warranty. It determines, after the inspection and
21 verification, if there is a failure under the warranty,
22 according to the criteria and the protocols that it has
23 developed. It determines the amount of affected siding
24 under the criteria and the protocols that it has
25 developed, which were different, as has been pointed out

1 at trial, from the protocols that were used under the
2 class action lawsuit.

3 In looking at the entire warranty, which was
4 admitted as Exhibit 9, the Court does find that the
5 limited remedies under the warranty are not the sole
6 remedy available to the plaintiff. The Court would give
7 the plaintiff's proposed Instruction No. 7 instead of
8 the defendant's proposed Instruction No. 9.

9 I think at this point we'll take a short break
10 for about ten minutes. I would like to come back and
11 address the spoliation issue, then work on the measure
12 of damages. I think the other ones we could probably
13 work through a little more rapidly, but those seem to be
14 the two biggest ones, at least in this Court's mind.

15 MS. ARCHER: I did a chart on where we agreed
16 or at least what the numbers are of the common
17 instructions for that second phase, if that is helpful.

18 THE COURT: That would be helpful. I don't
19 know if you have had a chance to talk with counsel about
20 that. If you have some agreed areas of common ground,
21 that would be an area that we can perhaps expedite some
22 discussions. If you want to hand that forward, I'll
23 take a look at it over break.

24 MS. ARCHER: You said we are going to focus on
25 spoliation and measure of damages?

APPENDIX H

TRIAL COURT'S RULING ON FAILURE OF
ESSENTIAL PURPOSE

(RP 806-808)

1 overseeing the settlement. The notice of the class
2 action previously cited to the Court specifically
3 references the depreciation schedule. That would not
4 have been necessary if the remedy in the warranty were
5 also not a part of the only remedy available to class
6 members on a breach of warranty claim.

7 The federal court here said that it was for
8 this court, the state court to decide the remedies
9 available to the plaintiff. It is as a matter of
10 Washington law that -- and how Washington courts
11 interpret contracts such as this warranty that the
12 settlement agreement and the amendment to the settlement
13 agreement and the history between these parties,
14 specifically the class and Louisiana-Pacific, comes in
15 to inform this Court's decision in interpreting the
16 language of the warranty.

17 THE COURT: As has been pointed out by counsel,
18 the Court has dealt with a portion of this motion
19 previously at the end of the plaintiff's case. The
20 defendants brought a motion for judgment as a matter of
21 law, which the Court denied. At that time the grounds
22 for the motion were the plaintiff had not established
23 the essential elements of the breach of warranty claim
24 and that the plaintiff had not presented substantial
25 evidence to support their claim for the amount of

1 damages over \$939,000, I believe it was that was
2 indicated as the damages.

3 The Court denied the motion at that time and
4 will deny it again as far as those particular factors.
5 I don't think anything has changed in the argument or
6 the evidence that has been presented that causes the
7 Court to change its opinion in regards to those issues.

8 The additional grounds that have been presented
9 are there has been no evidence that the remedy failed of
10 its essential purpose, that there was a minimum adequate
11 remedy that was provided to the plaintiff. What the
12 Court has to do is look at what would have to be done in
13 this case, and what was actually done in this case, that
14 the warranty itself calls for payment for affected
15 siding, damaged siding, as determined by L-P. That can
16 be all over the place on any particular building or any
17 particular side of a building. The way this siding is
18 installed, with the lap siding, you can't just simply
19 pull off the damaged boards and replace them. There has
20 to be removal of the boards surrounding it all the way
21 up to the top, whether that is at the belly band or
22 higher, depending on how it is installed. You can't
23 simply tear out the affected boards and replace them.

24 What has been offered under the warranty, as
25 determined by L-P, is \$8,300 for what they consider to

1 be the percentage of the damaged siding, about 11
2 percent of the total amount that covered all these
3 buildings. The plaintiff replaced the entire amount of
4 siding for all the buildings to the tune of over
5 \$900,000. There is a wide range, as has been pointed
6 out in the testimony of Mr. Amento, as to the valuations
7 of the extent of damage from as low as 11 percent to as
8 high as 70 percent of the siding. That is an issue for
9 the jury to decide.

10 In looking at whether there has been a minimum
11 adequate remedy, given the fact of what has to be done,
12 the Court finds that there is -- there has been a
13 showing and presentation of sufficient evidence to show
14 that the remedy has failed of its essential purpose.
15 There is not minimum adequate remedy given what has to
16 be done to the siding to make the replacement of the
17 affected siding.

18 The other alternative grounds are that if the
19 remedy is optional, plaintiff can invoke the UCC
20 remedies, there has been insufficient evidence to show
21 that the goods as warranted and the goods as received,
22 no evidence of what the goods were when they were
23 received, the value of the siding, how to place a value
24 on the siding as to it lasting for 16 years instead of
25 the warranted 25 years. No evidence of the value as

FILED
COURT OF APPEALS
DIVISION II

2013 SEP -3 AM 9:03

STATE OF WASHINGTON

BY _____
DEPUTY

COURT OF APPEALS, DIVISION II
OF STATE OF WASHINGTON

CANTERBURY APARTMENT HOMES
LLC,
Respondent,
v.
LOUISIANA PACIFIC CORPORATION,
Appellant.

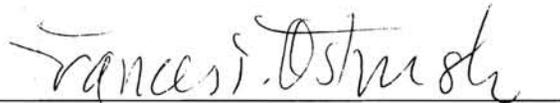
NO. 44545-0

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 30th day of August, 2013, I did serve via email and U.S. Postal Service, true and correct copies of Respondent Canterbury Apartment Homes LLC's Brief by addressing for delivery to the following:

Kathleen M. O'Sullivan
Abha Khanna
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
KOSullivan@perkinscoie.com
AKhanna@perkinscoie.com

Julia E. Markley
PERKINS COIE LLP
1120 NW Couch Street,
Tenth Floor
Portland, OR 97209-4128
JMarkley@perkinscoie.com



Frances T. Ostruske
Gordon Thomas Honeywell LLP
PO Box 1157
Tacoma, WA 98401-1157
(253)620-6500

ORIGINAL