CONSTRUCTION WARRANTIES

By

Chris E Ryman
Ian P. Faria

Coats, Rose, Yale, Ryman & Lee, P.C.
3 Greenway Plaza, Suite 2000
Houston, Texas 77002
(713) 651-0111 Telephone
(713) 651-0220 Telecopier

www.coatsrose.com

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INTRODUCTION

The law on construction warranties is often complex and is easily confusing. This is due in part to the way these warranties are applied to the persons or entities involved in a construction project. Many of the warranties involve the same concepts (and are even titled the same) but have varying implications depending on whom you represent. This article attempts to sort through the confusion, clarify the different warranties, and explain to whom they apply.[1]

1. UCC WARRANTIES

A. Scope of UCC

Generally, the Uniform Commercial Code ("UCC") is not applicable to typical construction contracts between owners and general contractors because Article 2 of the UCC is restricted to transactions involving a sale of goods, not a sale of services.[2] Nevertheless, transactions in connection with a large construction project often involve the sale of goods within the meaning of the UCC. Manufacturers and distributors of construction materials and equipment are sellers of goods and subject to the warranty provisions of the UCC. Hendrick & Schemm, Suing The Material Supplier, in Construction Litigation: Representing the Owner, R. Cushman, K. Cushman & S. Cook, 2d ed. (1980) [hereinafter "Hendrick at"].

The UCC defines "goods" as:

> all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Chapter 8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified

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[1] We wish to thank Mr. John Henderson for his permission to reproduce his article entitled "Warranties and Latent Defects" which was presented to the 3rd Annual Construction Law Conference in February 1990. This article updates Mr. Henderson's original article and adds new discussion including the warranties created in the Texas Residential Construction Commission Act.

[2] Texas has adopted, with modifications, Article 2 of the UCC as Chapter 2 of the Texas Business and Commerce Code. Consequently, the main source of Texas law concerning product warranties is Chapter 2 of the Texas Business and Commerce Code.

> things attached to realty as described in the section on goods to be severed from realty (Section 2.107).

TEX. BUS. & COM. CODE ANN. § 2.105 (Vernon 1994).

Additionally, when a contractor or subcontractor furnishes a finished product, as opposed merely to construction services, the UCC will apply. For example, a Texas court has held that wellhead control panels which were specifically designed and constructed to meet the particular needs of a gas company were goods within the meaning of the UCC. *Custom Controls Co. v. Ranger Ins.,* 652 S.W.2d 449, 452 (Tex. App.--Houston [1st Dist.] 1983, no writ) (the control panels were identified and movable as defined by the UCC). In addition, fabricated vaporizers that converted liquified gas into gas constituted goods because they were movable. *Trunkline LNG Co. v. Trane Thermal Co*., 722 S.W.2d 722, 724 (Tex. App.— Houston [14th Dist.] 1986, writ refd n.r.e.).

A contract which is predominantly for the rendition of services, even though it involves the furnishing of equipment, is not a transaction for the sale of goods and is therefore not governed by the UCC. Most construction contracts involve the sale of both goods and services; consequently, "the question becomes whether the dominant factor or essence of the transaction is the sale of goods or services." *Freeman v. Shannon Constr., Inc*., 560 S.W.2d 732, 738 (Tex. Civ. App.—Amarillo 1977, writ ref'd n.r.e.); *see also G-W-L, Inc. v. Robichaux*, 643 S.W.2d 392, 394 (Tex. 1982), *overruled on other grounds, Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 355 (Tex. 1987).

> The test for inclusion or exclusion is not whether [goods and services] are mixed, but, ... whether their predominant factor, their thrust, their purpose ... is the rendition of service, with goods incidentally involved ... or is a transaction of sale, with labor incidentally involved.

Freeman, 560 S.W.2d at 738 (quoting *Bonebrake v. Cox*, 499 F.2d 951, 960 (8th Cir. 1974). After distinguishing the sale of bulk cement from the overriding service of forming concrete made from the cement into completed structures, the court concluded that the essence of the transaction in question was the furnishing of services and performance of work required for erecting concrete structures in the apartment complex. *Freeman*, 560 S.W2d at 739. Thus, the Texas UCC was not applicable. *See Montgomery Ward & Co. v. Dalton,* 665 S.W.2d 507, 511 (Tex. App.—El Paso 1983, no writ)(transaction was not governed by the UCC because the essence of the transaction was the furnishing of labor to install the roof); *See also Palmer v. Espey Huston & Assocs., Inc.*, 84 S.W.3d 345, 354-55 (Tex. App.—Corpus Christi 2002, pet. denied).

B. The Three UCC Warranties

The UCC sets forth three warranty theories which may render the manufacturer or distributor of construction materials or equipment ultimately liable to the owner.

1. Express Warranty

Section 2.313 of the Texas Business and Commerce Code provides:

(a) Express warranties by the seller are created as follows:

> (1) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
>
> (2) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
>
> (3) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(b) It is not necessary to the creation of an express warranty that the seller use

> formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

TEX. BUS. & COM. CODE ANN. § 2.313 (Vernon 1994).

An express warranty may either be written or oral. Moreover, the seller does not have to use the word "warrant" or "guarantee" in order to create an express warranty. W. Powers, Texas Products Liability Law 2-6 (1989) [hereinafter "Powers at"]. Thus, while the existence and terms of an express warranty will depend on the specific language of the contract in question, no magic words are necessary. *See Edwards v. Schuh*, 5 S.W.3d 829, 832 (Tex. App.—Austin 1999, no pet.)(no special terms are required to make a warranty); *Church & Dwight Co. v.* Huey, 961 S.W.2d 560, 568 (Tex. App.—San Antonio 1997, pet. denied) (holding that an express warranty need not be a formal clause in a contract; it can be made orally or in less formal writings); see *also La Sara Grain Co. v. First National Bank*, 673 S.W.2d 558, 565 (Tex. 1984) (express warranties are created by the agreement of the parties to the contract); *Luker v. Arnold*, 843 S.W.2d 108, 114 (Tex. App.—Fort Worth 1992, no writ) (holding that express warranties are imposed by the agreements of parties to the contract).

While courts recognize that sellers' opinions and "puffing" are not express warranties, the distinction between an affirmation of fact which relates to goods and an opinion or puffing is not always clear.[3] In the past, Texas courts have found that a sellers' statements claiming that a product would not deteriorate[4] and that it was in "excellent" condition[5] created express

[3] The test used by some courts in deciding whether the statement in question is a warranty or mere opinion is: "did the seller assume to assert a fact of which the buyer is ignorant, or did he merely express a judgment about a thing as to which they may be expected to have an opinion." *General Supply & Equipment Co. v. Phillips*, 490 S.W.2d 913, 917 (Tex. Civ. App.—Tyler 1972, writ ref'd n.r.e.); *see also Crosbyton Seed Co. v. Mechura Farms*, 875 S.W.2d 353, 361 (Tex. App.—Corpus Christi 1994, no writ).

[4] *Phillips*, 490 S.W.2d at 917.

warranties. Powers at 2-6 to 2-7. Nevertheless, the court's decision will depend on the circumstances of each case.[6] Accordingly, statements that might be interpreted as opinions or puffing in some situations may be interpreted as assertions of fact under different circumstances.

An express warranty claim also requires reliance. *American Tobacco v. Grinnell*, 951 S.W.2d 420, 436 (Tex. 1997); *Harris Packaging Corp. v. Baker Concrete Const. Co.*, 982 S.W.2d 62, 66 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) (finding that "Basis of the bargain" imposes the reliance requirement into express warranty claims); *see also Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657, 676-77 (Tex. 2004).

The UCC provides that an express warranty is created when "[a]ny affirmation of fact or promise [is] made by the seller to the buyer which relates to the goods and becomes part of the *basis of the bargain.*" Tex. Bus. & Com. Code § 2.313(a)(1) (emphasis added). "Basis of the bargain" loosely reflects the common-law express warranty requirement of reliance. *American Tobacco*, 951 S.W.2d at 436 (citing *Southwestern Bell Tel. Co. v. FDP Corp.,* 811 S.W.2d 572, 575 & n. 2 (Tex.1991)). Reliance on an express warranty is not required in order for the buyer to recover for a breach. Instead, the UCC only requires that the promise or the affirmation of fact become "part of the basis of the bargain". J. White & R. Summers, Handbook of The Law Under the Uniform Commercial Code 332 (2d ed. 1980) [hereinafter "White at"]

> What the UCC does to the pre-UCC reliance requirement is quite unclear. One may argue that the exchange of the "basis of the bargain" language for the old

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[5] *Valley Datsun v. Martinez*, 578 S.W.2d 485, 490 (Tex. Civ. App.—Corpus Christi 1979, no writ)(seller's statement was more than "dealer's talk" and therefore constituted an express oral warranty).

[6] Factors that might suggest that a statement is an opinion as opposed to a warranty or vice versa are (i) specificity of the statement, (ii) whether the seller hedged, and (iii) the buyer's expertise and knowledge. Powers at 2-12; *See also Humble Nat'l Bank v. DCV, Inc.,* 933 S.W.2d 224, 230 (Tex. App.—Houston [14th Dist.] 1996, writ denied) (To determine whether a statement expresses an opinion or fact, courts look at the following factors: (1) the specificity of the statement; (2) the comparative knowledge of the defendant and plaintiff; and (3) whether the statement pertains to a past or current event or condition, or to a future event or condition).

> "reliance" language will not change the outcome in any cases. (Indeed, we can point to none where we are sure the outcome has been changed.) Others apparently believe that the [UCC] dilutes and perhaps even emasculates the [pre-UCC] reliance requirement. We favor the former interpretation. Why should one who has not relied on the seller's statement have the right to sue?

White at 338-39.

What could "basis of the bargain" mean if it does not include some aspect of reliance? Accordingly, some authorities have concluded that the change in language merely indicates a shift in the burden of proof to the seller rather than a shift in the underlying reliance test. Powers at 2-9. *See also Indust-RI-Chem Laboratory, Inc. v. Par-Pak Co. Inc.*, 602 S.W.2d 282, 294 (Tex. Civ. App.—Dallas, 1980, no writ)(a proper instruction would instruct the jury that the samples were not the basis of the bargain if the jury finds the buyer did not rely on the samples, thus, placing the burden of proof on the seller to show lack of reliance).[7] Nevertheless, the plaintiff/buyer would be well advised to allege and to offer some proof of reliance. Some Texas courts continue to require some form of reliance on the seller's promise or affirmation of fact. *General Supply & Equipment Co. v. Phillips,* 490 S.W.2d 913, 917 (Tex. Civ. App.—Tyler 1972, writ ref'd n.r.e.). Compare *Indust-RI-Chem Laboratory, Inc. v. Par-Pak Co*. *Inc.*, 602 S.W.2d 282, 293 (Tex. Civ. App.—Dallas 1980, no writ)(while the court questioned that reliance was a necessary element to establish an express warranty, it reasoned that the "benefit of the bargain" element incorporated the reliance requirement to some extent); *See American Tobacco v. Grinnell*, 951 S.W.2d 420, 436 (Tex. 1997); *Harris Packaging Corp. v. Baker Concrete Const. Co.*, 982 S.W.2d 62, 66 (Tex. App.—Houston [1st Dist.] 1998, pet. denied).

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[7] Texas Pattern Jury Charge Section 102.9 (2002) reads:

> An express warranty is any affirmation of fact or promise made by Defendant that relates to the goods and becomes part of the basis of the bargain. It is not necessary that formal words such as "warrant" or "guarantee" be used or that there be a specific intent to make a warranty.

The statement or representation which is the basis for an express warranty claim does not have to be incorporated into an actual contract as long as the seller can show that the statement or representation was part of the basis of the bargain. Hendrick at 169.; *See aso Church & Dwight Co. v.* Huey, 961 S.W.2d 560, 568 (Tex. App.—San Antonio 1997, pet. denied) (holding that an express warranty need not be a formal clause in a contract; it can be made orally or in less formal writings). Indeed, an express warranty can arise from a sale of goods if the seller provides the buyer with a sample or model of the goods sold. *Par-Pak Co.*, 602 S.W.2d at 285-86; s*ee also Town & Country Mobile Homes, Inc. v. Benfer*, 527 S.W.2d 523, 524-25 (Tex. Civ. App.—San Antonio 1975, no writ)(when the seller showed the buyer a model, an express warranty was created that the mobile home delivered to the buyer would conform to the model). To create a warranty by sample or model, the defendant must reference the sample or model in a way that suggests the other goods contain the same characteristics. § 2.313 cmt. 6; *Materials Mktg. Corp. v. Spencer*, 40 S.W.3d 172, 174 (Tex. App.—Texarkana 2001, no pet.) (express warranty created when defendant provided plaintiff with sample of tile and brochures).

Similarly, a seller's statement in an advertisement, catalogue, or brochure may constitute an express warranty if it was part of the basis of the bargain. *See Ford Motor Co. v. Lemieux Lumber Co*., 418 S.W.2d 909, 911 (Tex.Civ.App.—Beaumont 1967, no writ)(truck manufacturer's brochure was construed to be an express warranty); *See also Materials Mktg. Corp. v. Spencer*, 40 S.W.3d 172, 174 (Tex.App.—Texarkana 2001, no pet.) (express warranty created when defendant provided plaintiff with sample of tile and brochures); *Church & Dwight Co. v.* Huey, 961 S.W.2d 560, 568 (Tex.App.—San Antonio 1997, pet. denied) (representations in a brochure became part of the basis of the bargain).

In order to recover for the breach of an express warranty, a plaintiff must prove: (1) an express affirmation of fact or promise by the seller relating to the goods; (2) that such affirmation of fact or promise became a part of the basis of the bargain; (3) that the plaintiff relied upon said affirmation of fact or promise; (4) that the goods failed to comply with the affirmations of fact or promise; (5) that the plaintiff was injured by such failure of the product to comply with the express warranty; and (6) that such failure was the proximate cause of plaintiff's injury. *Great Am. Prods. v. Permabond Int'l*, 94 S.W.3d 675, 681 (Tex. App.—Austin 2002, pet. denied); *Morris v. Adolph Coors Co.*, 735 S.W.2d 578, 587 (Tex. App.—Fort Worth 1987, writ ref'd n.r.e.).

2. Implied Warranty of Merchantability

The implied warranty of merchantability is the most important warranty created by the UCC. Section 2.314 of the Texas Business & Commerce Code, provides that:

> (a) Unless excluded or modified (Section 2.316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.
>
> (b) Goods to be merchantable must be at least such as
>
> (1) pass without objection in the trade under the contract description; and
> (2) in the case of fungible goods, are of fair average quality within the description; and
> (3) are fit for the ordinary purposes for which such goods are used; and
> (4) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
> (5) are adequately contained, packaged, and labeled as the agreement may require; and
> (6) conform to the promises or affirmations of fact made on the container or label if any.
>
> (c) Unless excluded or modified (Section 2.316) other implied warranties may arise from course of dealing or usage of trade.

TEX. BUS. & COM. CODE ANN. § 2.314 (Vernon 1994).

Unlike express warranties, implied warranties are imposed by law as a condition of the sale of the goods in question. In addition, recovery for a breach of the implied warranty of merchantability is not conditioned on the buyer's reliance on representations or promises made by the seller. *Khan v. Velsicol Chemical Corp*., 711 S.W.2d 310, 319 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

Under this warranty theory, the seller must, be a merchant[8] dealing in goods of the kind involved in the sale and the buyer must show that the goods where not merchantable. Goods do not need to be perfect in order to be merchantable. White at 356. Rather, "merchantability requires only that a product be of reasonable quality." Powers at 2-17. For the most part, Texas courts have not defined the merchantability standard other than with reference to the language found in subsection 2.314(b) which sets forth the minimum standard that a product must meet in order to be merchantable. *See, e.g.*, *Polaris Indus. Inc. v. McDonald*, 119 S.W.3d 331, 337 (Tex. App.—Tyler 2003) (applying every element of 2.314(b) to determine whether recreational vehicles were unmerchantable); *Chaq Oil Co. v. Gardner Machinery Corp*., 500 S.W.2d 877, 878 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ)(standards of merchantability applicable to the tractor were that it pass without objection in the trade and that it be fit for ordinary purposes for which such tractors were used); *Tracor, Inc. v. Austin Supply & Drywall Co*., 484 S.W.2d 446, 448 (Tex. Civ. App.—Austin 1972, writ ref'd n.r.e.)(sheetrock delivered was merchantable when buyer admitted that sheetrock was of fair average quality and fit for ordinary purposes)

[8] A seller becomes a merchant by (i) dealing in goods of the kind sold or (ii) by his occupation, holding himself out as having "knowledge or skill peculiar to the practices or goods involved." Tex. Bus. & Com. Code Ann. § 2.104(1) (Vernon 1994).

Notwithstanding the above, the Texas Supreme Court has defined the merchantability standard under one of the subsections of § 2.314(b).[9] In *Plas—Tex, Inc. v. U.S. Steel Corp*.,[10] the Supreme Court held that proof of a defect was required in an action for breach of the implied warranty of merchantability brought under Section 2.314(b)(3) of the Texas Uniform Commercial Code. In that case the manufacturer of fiberglass swimming pools had brought suit against the manufacturer and distributor of polyester resins used in the manufacture of the pools, claiming that the resins caused delamination.

After distinguishing the term "defect" in the context of a strict products liability case,[11] the court explained that a "defect" in an implied warranty of merchantability case meant a condition of the goods rendered them "unfit for the ordinary purposes for which they [were] used because of a lack of something necessary for adequacy."[12] *Id.* at 444. In order to show that the goods were defective, the plaintiff does not necessarily have, to use direct expert opinion evidence; instead, the plaintiff can meet his burden by using circumstantial evidence. *Id.* However, if the plaintiff relies solely on circumstantial evidence to establish the defect, he must also show that the goods were handled and used in a proper manner in order to make a prima

[9] Tex. Bus. & Com. Code Ann. § 2.314(b) (Vernon 1994).

[10] 772 S.W.2d 442, 444 (Tex. 1989).

[11] A "defect" in the context of products liability litigation "means a condition of the product that renders it unreasonably dangerous." *Plas-Tex, Inc*., 772 S.W.2d at 444.

[12] The only Texas case that had not required the plaintiff to show a defect in the goods in order to recover under a breach of an implied warranty of merchantability was *Bernard v. Dresser Industries,* 691 S.W.2d 734, 738 (Tex. App.—Beaumont 1985, writ refd n.r.e.). The lower court had tried to distinguish Dresser because it involved personal injuries. The Texas Supreme Court, however, disagreed with this reasoning and stressed that there should only be one test. Consequently, it is necessary to establish a defect in the goods in order to recover under a breach of the implied warranty of merchantability in cases involving both personal injury and economic loss. *Plas-Tex, Inc.,* 772 S.W.2d at 445, 445 n. 6.

facie showing of the defect. *Id.* [13]

To recover for a breach of an implied warranty of merchantability the buyer must not only show the goods were not merchantable, he must prove that the goods where defective or not merchantable at the time they were sold. *Fitzgerald v. Caterpillar Tractor Co.*, 683 S.W.2d 162, 164 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.)(citing to the issue as whether the forklift was fit for the purposes for which it was intended at the time it left the manufacturer's hands); *Clark v. DeLaval Separator Corp*., 639 F.2d 1320, 1326 (5th Cir. 1981)(to recover from the manufacturer, the buyer must establish that the product was defective when it left the manufacturer); *Vintage Homes, Inc. v. Coldiron*, 585 S.W.2d 886, 888 (Tex.Civ.App.—El Paso 1979, no writ)(defects used to establish breach of warranty had to exist at time mobile home was sold or be inherent in the home).

In sum, to establish a cause of action for breach of an implied warranty of merchantability, the buyer must prove (i) that a merchant sold the goods, (ii) that the goods were not merchantable at the time of the sale, (iii) that the defective nature of the goods was the proximate cause of the damage or injury sustained by the buyer, and (iv) that the seller was notified of the damage or injury.[14] Tex. Bus. & Com. Code §§ 2.314, 2.607(c)(1), 2.714, 2.715.

3. Implied Warranty of Fitness

The last UCC warranty that will be discussed is found in Section 2.315 of the Texas Business and Commerce Code.

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the

[13] The plaintiff does not have to present evidence of proper use of the goods to establish a defect in cases where he presents direct evidence as opposed to relying solely on circumstantial evidence. *Plas-Tex, Inc*., 772 S.W.2d at 444 n. 5.

[14] The notice requirement of the UCC is discussed infra p. 17.

> seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

TEX. BUS. & COM. CODE ANN. § 2.315 (Vernon 1994).

The warranty of fitness for a particular purpose is narrower, more specific, and more precise than the warranty of merchantability.[15] White at 358. The implied warranty of fitness differs from the implied warranty of merchantability in several significant ways. First, the seller under the fitness warranty does not have to be a merchant. Second, the buyer must have a particular purpose for the goods and the seller must have reason to know of the buyer's particular purpose at the time of the sale. Third, the fitness warranty requires reliance. The buyer must rely on the seller's skill or judgment in the selection of the goods and the seller must know of such reliance. Fourth, unlike the merchantability warranty under section 2.3l4(b)(3), proof of a defect is not required. *Plas-Tex, Inc.,* 772 S.W.2d at 443 n.2.

The "particular purpose" of the buyer is usually communicated to the seller in the course of the negotiations and occasionally through the contract between the parties. However, it is not necessary that the seller actually know of the buyer's particular purpose. It is sufficient if the seller has reason to know of the buyer's particular purpose. *See Lanphier Construction Co. v. Fowco Construction Co.*, 523 S.W.2d 29, 41 (Tex.Civ.App.—Corpus Christi 1975, writ ref'd n.r.e.)(seller should have known that the asphalt was to be used for paving the parking lots of the new high school).

Whether a buyer relied on a seller's judgment or skill and whether a seller had reason to know of the reliance is usually a fact question that depends on the circumstances of the

[15] If the court finds a breach of the implied warranty of merchantability, the plaintiff usually gains little by an additional finding of a breach of the implied fitness warranty. However, an additional finding of a breach of the fitness warranty could be important if a contractual disclaimer was effective against the merchantability warranty but ineffective against the fitness warranty. White at 357 n. 122.

transaction.[16] Nevertheless, the following factors are relevant to a court's ultimate determination: (i) the relative expertise of the parties; (ii) whether the buyer or his agent participated in the selection of the goods; (iii) whether the buyer or his agent inspected the goods; (iv) whether the buyer initiated the contract negotiations by requesting a product from the seller that would do a certain thing; and (v) whether the buyer had control over the good's specifications.[17]

Accordingly, the following elements must be present if a buyer is to recover on the implied warranty of fitness for a particular purpose: (1) the seller sold or leased goods to the buyer; (2) the seller had knowledge the buyer was (a) buying or leasing the goods for a particular purpose and (b) relying on the seller's skill or judgment to select goods fit for that purpose; (3) the seller delivered the goods that were unfit for the buyer's particular purpose; (4) the buyer notified the seller of the breach; and (5) the buyer suffered injury. Tex. Bus. & Com. Code §§ 2.314, 2.315, 2.607(c)(1).

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[16] In *Mennonite Deaconess Home and Hospital, Inc. v. Gates Engineering Co*., 363 N.W.2d 155, 164 (Neb. 1985), the Nebraska Supreme Court held that a manufacturer of roofing materials breached the implied warranty of fitness for a particular purpose with respect to a roof replacement transaction. Representatives of the roofing manufacturer met with the hospital and the contractor to explain the company's single-ply roofing system. At the conclusion of the meeting, the hospital executed a contract with the contractor for the installation of the manufacturer roofing system. During construction, the manufacturer was on the job site and made a final inspection of the roof after installation. Although the inspection revealed several mistakes in the installation of the roof, both the contractor and the manufacturer refused to correct the defects. The hospital initiated suit after the replacement roof began to leak. *Id* at 158—60.

In placing liability on the manufacturer, the court found that (i) the manufacturer had reason to know of the hospital's particular purpose for a new roof, (ii) that the manufacturer had reason to know the hospital was relying on the manufacturer's skill and judgment in selecting an appropriate roofing system, and (iii) the hospital had actually relied on the manufacturer's skill in connection with the replacement of the hospital roof. *Id* at 164.

[17] If a buyer requests a particular brand or trade name product, he is not relying on the seller's skill or judgment and no warranty results. However, the mere fact that the buyer purchased goods with a particular brand or trade name is not sufficient to show non-reliance if the seller has recommended the goods as adequate for the buyers particular purpose. Powers at 2-25. See also *White* at 360; Tex Bus. & Com. Code Ann. § 2.315, Comment 5 (Vernon 1994).

C. Obstacles to UCC Warranty Claims

1. Privity

Historically, only parties who were in privity of contract with the maker of the warranty could enforce the warranty. Because the owner of a construction project seldom purchases materials or equipment directly from the manufacturer, this lack of privity would have barred the owner's recovery from the manufacturer for damages resulting from defective materials. See Hendrick at 172.

Nevertheless, courts have relaxed the privity requirement, although they have not entirely eliminated it. See Powers at 2-46. Courts have traditionally been inclined to allow recovery if there has been some physical harm resulting from defective materials when contractual privity is lacking, while they have been more restrictive to claims seeking recovery for purely economic losses.[18] Indeed, one authority contends that the "majority position appears to be that economic loss cannot be recovered under UCC breach of warranty theories when the plaintiff is not in privity of contract with the seller." Hendrick at 173.

In Texas, however, the Supreme Court has abolished the vertical privity requirement[19] in suits to recover economic losses for breach of implied warranties.[20] *Nobility Homes of Texas, Inc. v. Shivers*, 557 S.W.2d 77, 81 (Tex. 1977).

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[18] For instance, in *Amstadt v. U.S. Brass*, 919 S.W.2d 644 (Tex.1996), the court found that DTPA liability is not limited to those in contractual privity with the consumer. However, the court ruled that such liability does not extend to all entities in the chain of production or distribution when none of those entites' alleged misrepresentations ever reached the consumer. Although *Amstadt* did not involve a breach of warranty it does give some guidance as to the limits to which the court may require privity.

[19] Nobility Homes was a case involving vertical privity. This type of privity includes all parties in the distribution chain from the manufacturer of the goods to the ultimate buyer. Powers at 2-46. The UCC is neutral with respect to vertical privity and leaves its resolution to the courts. Hawkland UCC Series § 2—318, Comment 3 (1984). Horizontal privity is discussed infra at p. 22.

[20] While the implied warranty of merchantability was the only implied warranty that was before the court, the holding appears to apply with equal force to the implied warranty of fitness. *Nobility Homes*, 557 S.W.2d at 81-83.

Section 2.318 of the UCC deals with horizontal privity.[21] The Texas legislature, however, adopted a non-uniform section rather than any of the three alternatives found in § 2-318 of the UCC. This non-uniform section delegates the question of privity to the courts:

> This chapter does not provide whether anyone other than a buyer may take advantage of an express or implied warranty of quality made to the buyer or whether the buyer or anyone entitled to take advantage of a warranty made to the buyer may sue a third party other than the immediate seller for deficiencies in the quality of the goods. These matters are left to the courts for their determination.

TEX. BUS. & COM. CODE ANN. § 2.318 (Vernon 1994).

The Texas Supreme Court has eliminated the horizontal privity requirement for personal injuries based on breach of a UCC implied warranty. *Garcia v. Texas Instruments, Inc*., 610 S.W.2d 456, 465 (Tex. 1980).[22] While the language in Nobility Homes may be broad enough to suggest that privity in any form is not required in an implied warranty action for economic loss, the Nobility Homes court only addressed the issue of vertical privity. Powers at 2-49. Consequently, Texas courts could possibly be "more restrictive about horizontal privity in cases involving economic loss for breach of an express warranty." *Id.*

2. Notice of Breach

Unless the buyer notifies the seller of the warranty breach within a reasonable time after the breach is discovered, a warranty action is barred. *See* TEX. BUS. & COM. CODE ANN. § 2.607(c)(1) (Vernon l994).[23] Although the statutory language is not restrictive, one Texas court has held that the notice requirement of § 2.607(c)(1) only applies to actions between the buyer

[21] Horizontal privity relates to the relationship between the original manufacturer of the goods and an injured person, other than the buyer, who used or was affected by the goods. Powers at 2-47.

[22] The issue before the Garcia court was whether to abolish the privity requirement in the context of an action for personal injuries based on a breach of an implied warranty of merchantability between parties in horizontal privity. *Garcia,* 610 S.W.2d 464 (the goods in question were sold and delivered by the defendant to the plaintiffs employer).

[23] Section 2.607(c)(l) states: "Where a tender has been accepted (1) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy; . .."

and his immediate seller. *Vintage Homes, Inc. v. Colciron*, 585 S.W.2d 886, 888 (Tex.Civ.App. -- El Paso 1979, no writ). Another Texas court, however, has rejected the analysis in Vintage Homes. *See Wilcox v. Hillcrest Memorial Park of Dallas,* 696 S.W.2d 423, 424-25 (Tex. App. — Dallas 1985), *aff'd on other grounds*, 701 S.W.2d 842 (Tex. 1986)(action against manufacturer is barred unless the buyer also notifies the manufacturer [remote seller] of warranty breach within a reasonable time).[24]

Since these earlier cases, more recent decisions have found that the failure to notify can be fatal to a breach of warranty claim. In *Leggett v. Brinson*, 817 S.W.2d 154, (Tex.App.—El Paso 1991, no writ), the court ruled that the buyer is required to notify seller that breach of warranty has occurred in order to allow seller an opportunity to cure defect, if any. In *Lochinvar Corp. v. Meyers*, 930 S.W.2d 182 (Tex.App.—Dallas 1996, no pet.), it was decided that the failure to notify the seller of breach of warranty, thereby allowing seller the opportunity to cure, bars recovery on basis of breach of warranty. Most recently, in *U.S. Tire-Tech, Inc. v. Boeran, B.V.*, 110 S.W.3d 194 (Tex.App.—Houston [1st Dist.] 2003, pet. denied), the court found that under the statute setting forth requirements for notice of breach (TEX. BUS. & COM. CODE ANN. § 2.607(c)(1)), a buyer is required to give notice of an alleged breach of warranty to a remote manufacturer. Given the fact that the Texas Supreme Court has not weighed in on the notice requirement, an owner should give prompt notice[25] to the remote seller-manufacturer of

[24] Although the Texas Supreme Court acknowledged the conflict between the Vintage Homes and Wilcox decisions, it reserved judgment on the question. *Wilcox*, 701 S.W.2d at 843.

[25] Whether the owner notifies the manufacturer of the breach within a reasonable time is usually a fact question. Nevertheless, in some cases relatively short delays have been considered unreasonable. See *EPN-Delaval, S.A. V. Inter-Equip, Inc*., 542 F. Supp. 238, 249 (S.D. Tex. 1982) (under the circumstances 65-day delay was unreasonable since seller could clearly have been in a better position to cure the non-conformity of the goods if it had received notice earlier).

defective construction materials and equipment in order to preserve his rights against the manufacturer.

3. Comparative Causation

Another potential obstacle to a warranty recovery was found in the "tort reform" legislation enacted in 1987. It was believed that the concept of "proportionate responsibility" could bar or reduce the plaintiff's recovery for breach of warranty. However, the court in *JHC Ventures, L.P. v. Fast Trucking, Inc.*, 94 S.W.3d 762, 773 (Tex.App.—San Antonio 2002, no pet.) refused to extend the proportionate responsibility statute to UCC breach of warranty claims. *See also Southwest Bank v. Information Support Concepts*, 85 S.W.3d 462, 463 (Tex.App.—Fort Worth 2002, pet. granted). The passage of House Bill 4 in 2003 which further amended Chapter 33 of the Texas Civil Practices and Remedies Code, left undisturbed the courts ruling.

4. Disclaimer and Modification of Warranties

Another obstacle that may bar an owner's recovery for defective materials and equipment is the seller's ability to disclaim or modify either express or implied warranties under § 2-316 of the Texas UCC. Although § 2-316 permits a seller to alter his obligations by disclaiming warranties, it also requires that the seller follow certain formalities in order to disclaim a warranty.

Section 2.316 of the Texas Business and Commerce Code provides:

> a) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this chapter on parol or extrinsic evidence (Section 2.202) negation or limitation is inoperative to the extent that such construction is unreasonable.
>
> (b) Subject to Subsection (c), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language

> to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."
>
> (c) Notwithstanding Subsection (b)
>
> > (1) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and
> > (2) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and
> > (3) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.
>
> (d) Remedies for breach of warranty can be limited in accordance with the provisions of this chapter on liquidation or limitation of damages and on contractual modification of remedy (Sections 2.718 and 2.719).
>
> (e) The implied warranties of merchantability and fitness shall not be applicable to the furnishing of human blood, blood plasma, or other human tissue or organs from a blood bank or reservoir of such other tissues or organs. Such blood, blood plasma or tissue or organs shall not for the purpose of this Title be considered commodities subject to sale or barter, but shall be considered as medical services.
>
> (f) The implied warranties of merchantability and fitness do not apply to the sale or barter of livestock or its unborn young.

TEX. BUS. COM. CODE ANN. § 2.316 (Vernon 1994).

The disclaimer of express warranties is addressed in subsection (a), comment 1 to § 2.316 indicates that subsection (a) was designed to "protect the buyer from unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with [the] language of express warranty." *Accord Mercedes-Benz of North America, Inc. v. Dickenson*, 720 S.W.2d 844 (Tex.App.—Fort Worth 1986, no writ). Thus, an express warranty which is part of the basis of the bargain and clearly goes to the essence of the transaction, cannot

be negated by a contradictory contractual provision disclaiming the warranty. *Mobile Housing Inc. v. Stone*, 490 S.W.2d 611, 615 (Tex.Civ.App.—Dallas 1973, no writ).

In addition, section 2.316(a) makes it clear that express warranties are subject to the rules of parol and extrinsic evidence. Accordingly, section 2.202 provides:

> Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented
>
> > (1) by course of performance, course of dealing, or usage of trade (Section 1.303); and
> >
> > (2) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

TEX. BUS. & COM. CODE ANN. § 2.202 (Vernon 1994 & Supp. 2004).

Comment 2 to Section 2-316 indicates that reference to this section was intended to protect the seller "against false allegations of oral warranties." On the other hand an owner should protect himself by carefully reviewing contracts, purchase orders, or invoices to determine if any oral or written express warranties relating to the materials or equipment have been eliminated by the parol or extrinsic evidence section. For example, according to § 2.202, evidence of an oral or written warranty previously made by the seller could not be admitted into evidence to contradict a disclaimer in a writing which purported to be the parties final expression of their agreement. *See Balderson-Berger Equipment Co. v. Blount*, 653 S.W.2d 902, 907-08 (Tex.App.—Amarillo 1983, no writ)(the language in the written transactional documents excluded any previously expressed oral warranty that the farming equipment would cut green maize). *See also Griffin v. H. L. Peterson Co*., 427 S.W.2d 140, 144 (Tex.Civ.App.—Tyler 1968, no writ)(neither verbal evidence of warranties or evidence of letters sent by seller containing

warranties could be introduced to contradict a subsequently executed document disclaiming warranties.) Thus, a properly worded merger or integration clause can have the same effect as a disclaimer.

Sellers often attempt to disclaim the implied warranties. White at 437. The specific methods for disclaiming either the implied warranty of merchantability or the implied warranty of fitness are set forth in subsections 2.316(b) and (c). While subsection 2.316(b) does not require that the disclaimer of an implied warranty of merchantability be in writing, it does require that if the disclaimer is written, then it must be conspicuous.[26] In addition, the disclaimer language must contain the word "merchantability". On the other hand, a disclaimer of an implied warranty of fitness must be both conspicuous and in writing.[27] Suggested language to use when disclaiming an implied warranty of fitness includes, "There are no warranties which extend beyond the description on the face hereof." TEX. BUS. & COM. CODE ANN. § 2.316(b).

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[26] Section 1.201(b)(10) of the Texas Business and Commerce Code defines conspicuous as follows:

> "Conspicuous," with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. Whether a term is "conspicuous" or not is a decision for the court. Conspicuous terms include the following:
>
> (A) a heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and
>
> (B) language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.

TEX. BUS. & COM. CODE ANN. §1.201(b)(10) (Vernon 1994 & Supp. 2004).

[27] Several Texas Courts have considered whether the disclaimer in question effectively negated the implied warranties. *See S-C Industries v. American Hydroponics System Inc.*, 468 F.2d 852, 855 (5th Cir. 1972) (the language in the purchase order and the special warranty did not exclude the implied warranty of merchantability); *Balderson-Berger Equipment Co. v. Blount*, 653 S.W.2d 902, 908 (Tex.App.—Amarillo 1983, no writ) (the language in the transactional documents exceeded the statutory requirements for disclaiming the implied warranty of fitness); *Willoughby v. Ciba-Geigy Corp*., 601 S.w.2d 385, 388 (Tex.Civ.App.—Beaumont 1979, writ ref'd n.r.e.) (disclaimer of implied warranty printed on side of container was ineffective where plaintiff did not have possession of container nor did plaintiff have knowledge of disclaimer).

Subsection 2.316(c) lists additional methods for disclaiming implied warranties. Texas Courts have approved of these less formal means when disclaiming warranty liability. *See Prudential Ins. Co. of America v. Jefferson Associate, Ltd.,* 896 S.W.2d 156 (Tex.1995) ("as is" agreement excludes implied warranties in contract covered by UCC); *Mid Continent Aircraft Corp. v. Curry County Spranying Servs., Inc*., 572 S.W.2d 308, 313 (Tex. 1978) (there were no implied warranties in sale agreement which contained the "as is" language of the Texas UCC); *Hou-Tex, Inc. v. Landmark Graphics*, 26 S.W.3d 103, 110 (Tex. App.—Houston [14th Dist.] 2000, no pet) (stating that an "as is" language means that seller gives no assurance concerning the value or the condition of the thing sold); *Singleton v. LaCoure*, 712 S.W.2d 757, 759 (Tex.App.—Houston [14th Dist.] 1986, writ ref n.r.e.); *Chaq Oil Co. v. Gardner Machinery Corp*., 500 S.W.2d 877, 879 (Tex.Civ.App.—Houston [14th Dist.] 1973, no writ)(there were no implied warranties with respect to defects which an examination of the goods would have revealed to the buyer); *Kincheloe v. Geldmeier*, 619 S.W.2d 272, 275 (Tex. Civ. App.—Tyler 1981, no writ)(implied warranty of merchantability with respect to purchase of livestock at auction was excluded or modified by usage of trade).

Notwithstanding the above, there is a line of cases which hold that a seller must show that the buyer had notice of the seller's disclaimer, prior to the sale, before it can be effective against the buyer. *See Klo-Zik Co. v. General Motors Corp*., 677 F. Supp. 499, 508 (E.D. Tex. 1987); *see also Willoughby v. Ciba-Geigy Corp.,* 601 S.W.2d 385, 388 (Tex. Civ. App.—Beaumont 1979, writ ref'd n.r.e.) (disclaimer of implied warranties was ineffective where evidence showed that manufacturer's disclaimer had never been disclosed or brought to attention of remote buyer). *Compare R&L Grain Co. v. Chicago Eastern Corp*., 531 F. Supp. 201, 208-09 (N.D. Ill. 1981) (disclaimer of warranties in sales contract between manufacturer and seller was effective to

exclude all implied warranties as to buyer suing as a third party beneficiary even though the buyer was not aware of the warranty exclusion).

Moreover, while § 2.316 does not expressly indicate whether a manufacturer can rely on a subsequent seller's disclaimer of implied warranties to avoid liability in an action commenced by a remote buyer in the chain, it appears that the manufacturer must make his own disclaimers. *Clark v. DeLaval Separator Corp*., 639 F.2d 1320, 1323 (5th Cir.1981). Indeed, a retailer's disclaimer of implied warranties for his own benefit should not be deemed to give notice to the buyer that the manufacturer is also disclaiming any implied warranties. *Id* at 1323-24.

> It therefore appears that under Texas law a manufacturer seeking to disclaim implied warranties must be able to point to a disclaimer which expressly mentions him as excluding certain or all implied warranties. He may disclaim such warranties either by doing so in the materials he includes with the goods, *see Emmons v. Durable Mobile Homes, Inc*., 521 S.W.2d 153 (Tex.Civ.App.—Dallas 1974, no writ), *Lankford v. Rogers Ford Sales*, 478 S.W.2d 248 (Tex.Civ.App.—El Paso 1972, writ ref'd n.r.e.), or by joining as a disclaiming seller in the contract between the retailer and the remote purchaser.

Id. at 1324.

While there is still little case law discussing the issue, the unconscionability provision set forth in section 2.302[28] should be applicable to all contract terms, including a seller's artfully drafted disclaimer. *See Arkwright-Boston Mfrs. Mut. Ins. Co. v. Westinghouse Electric Corp*.,

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[28] This unconscionability provision under the Texas UCC provides:

> (a) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
>
> (b) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

TEX. BUS. & COM. CODE ANN. § 2.302 (Vernon 1994).

844 F.2d 1174, 1184 (5th Cir.1988) (plaintiff failed to prove that clause in contract disclaiming implied warranties was unconscionable).

The effectiveness and even the existence of a disclaimer turns on the language and format used by the seller. Therefore, it is very important that the owner of a construction project carefully examine all proposals, contracts, purchase orders, and invoices relating to construction materials and equipment in order to determine if there has been an attempt to disclaim the UCC Warranties. See Hendrick at 178-79.

5. Modification or Limitation of Remedies

Modification or limitation of a buyer's remedy and a disclaimer are similar concepts since they both enable a seller to avoid liability. The requirements for modifying or limiting a buyer's remedy under section 2.719, however, are significantly different from the disclaimer requirements found in Section 2.316.

Section 2.719 provides:

> a) Subject to the provisions of Subsections (b) and (c) of this section and of the preceding section on liquidation and limitation of damages,
>
> > (1) the agreement may provide for remedies in addition to or in substitution for those provided in this chapter and may limit or alter the measure of damages recoverable under this chapter, 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 or parts; and
> >
> > (2) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.
>
> (b) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this title.
>
> (c) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

TEX. BUS. & COM. CODE ANN. § 2.719 (Vernon 1994).

The language of section 2.719 clearly indicates that disclaimers and remedy limitations are governed by separate standards. Notice that the seller's limitation of the buyer's remedy for a breach of the implied warranty of merchantability does not have to be conspicuous or mention the word "merchantability". Unlike the disclaimer section, section 2.719 does not expressly require that remedy limitations conform to a specific format. Indeed, Comment 1 to section 2.719 explains that:

> Under this section parties are left free to shape their remedies to their particular requirements and reasonable agreements limiting or modifying remedies are to be given effect.

Although parties to a contract are free to shape their own remedies, the parties must expressly agree that the remedy set forth in the contract is exclusive or otherwise the remedy is merely optional.[29] *See Calloway v. Manion*, 572 F.2d 1033, 1038 (5th Cir. 1978). Even though the contract provides for an exclusive remedy, the buyer can still avoid the effect of the limitation clause if he can establish (i) that the exclusive remedy provided in the contract "fails of its essential purpose" or (ii) that the limitation of consequential damages is "unconscionable". *See* TEX. BUS. & COM. CODE ANN. § 2.719(b)-(c) (Vernon 1994). Thus, if the buyer can show that the limitation clause fails of its essential purpose or is unconscionable, he may disregard the exclusive remedy in the contract and pursue other remedies that are available to him under the UCC.[30] *See Riley v. Ford Motor Co*., 442 F.2d 670, 673 & n. 5 (5th Cir.1971)(in a decision

[29] Normally, remedies are presumed to be cumulative unless the parties expressly agree that the remedy described is the sole remedy under the contract. *See* TEX. BUS. & COM. CODE ANN. § 2.719, Comment 2 (Vernon 1994).

[30] Comment 1 to Section 2.719 explains that "it is of the very essence of a sales contract that at least minimal adequate remedies be available." Consequently, if the remedy provided in the contract fails in its purpose or is unconscionable, the remedy is stricken and the buyer can pursue the general remedy provisions under the UCC. Further, one commentator has remarked that Section 2.719(b) "is not concerned with arrangements which were oppressive at their inception, but rather with the application of an agreement to novel circumstances not

applying Alabama law, the limitation of remedy to cost of repairing or replacing failed its essential purpose since the defendant failed to put the car in good running condition); *Mercedes-Benz of North America, Inc. v. Dickenson*, 720 S.W.2d 844, 854 (Tex.App.—Fort Worth 1986, no writ) (limitation of remedy failed its essential purpose by depriving the buyer of the substantial value of his bargain when the warrantor did not correct the defect within a reasonable time). *But see Arkwright-Boston Mfrs. Mut. Ins. Co. v. Westinghouse Electric Corp*., 844 F.2d 1174, 1184-85 (5th Cir.1988) (plaintiff failed to establish that the limitation of remedies was, unconscionable since buyer was a knowledgeable and experienced turbine buyer). *See also* Hendrick at 179 (buyer's contention that the limitation of remedy was unconscionable is more successful when used by a consumer against a commercial entity rather than when used in a purely commercial context).

In sum, a well drafted limitation of remedies clause will usually protect the seller against large damages judgments. Accordingly, the owner should be aware of the following three principal types of remedy limitations that have been upheld in Texas: (i) clauses that limit buyer's recovery to cost of repair or replacement,[31] (ii) clauses that limit buyer's recovery to return of goods for credit on other goods,[32] and (iii) clauses that limit a buyer's monetary recovery for actual damages.[33] *See* Powers at 2-36.

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contemplated by the parties." White at 466 (quoting 1 N.Y. State Law Revision Commission, 1955 Report 584 (1955)).

[31] *See Orr Chevrolet Inc. v. Courtney*, 488 S.W.2d 883, 886-87 (Tex.Civ.App.—Texarkana 1972, no writ); *Lankford v. Rogers Ford Sales*, 478 S.W.2d 248, 251 (Tex.Civ.App.—El Paso 1972, writ ref'd n.r.e.).

[32] *See Calloway v. Manion*, 572 F.2d 1033, 1037-38 (5th Cir. 1978).

[33] *See Murray v. Ford Motor Co.*, 97 S.W.3d 888, 891 (Tex. App.—Dallas 2003, no pet.); *Rinehart v. Sonitrol of Dallas, Inc*., 620 S.W.2d 660, 663 (Tex.Civ.App.—Da1las 1961, writ ref'd n.r.e.).

6. Statute of Limitations

An owner's action brought under the Texas UCC for breach of express or implied warranties is limited by § 2.725 which provides:

> a) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.
>
> (b) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.
>
> (c) Where an action commenced within the time limited by Subsection (a) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.
>
> (d) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this title becomes effective.

TEX. BUS. & COM. CODE ANN. §2.725 (Vernon 1994).

The section provides a four-year limitations period for breach of warranty actions.[34] Although the parties may reduce the limitations period to not less than one year, the four-year period may not be extended by the parties' agreement.

Pursuant to this section, an owner's cause of action generally accrues when the goods are delivered,[35] regardless of when the owner suffers damage or becomes aware of the defect.

[34] The four-year statute of limitations under § 2.725 is applicable to personal injury actions based on breach of the implied warranty provisions in the Texas UCC, rather than the two-year personal injury statute of limitation. See *Garcia v. Texas Instruments, Inc*., 610 S.W.2d 456 (Tex 1980).

Safeway Stores, Inc. v. Certainteed Corp., 710 S.W.2d 544, 546 (Tex.1986) (the statutory language clearly indicates that a cause of action for breach of warranty accrues at the time of the delivery of the goods, not at the time of discovery); *see also Clark v. DeLaval Separator Corp*., 639 F.2d 1320, 1325 (5th Cir. 1981) (cause of action for breach of implied warranty was barred despite buyer's lack of knowledge of alleged breach when the goods were delivered); *Southerland v. Northeast Datsun, Inc*., 659 S.W.2d 889, 892 (Tex. App.—El Paso 1983, no writ) (the limitations period began to run when delivery of the motor home occurred, regardless of when the buyer became aware of the alleged defects).[36]

Although the breach of a warranty arising from a contractual relationship usually accrues at the time of delivery, an exception to this general rule extends the seller's liability into the future.[37] The cause of action under the exception accrues "when the breach is or should have been discovered." TEX. BUS. & COM. CODE ANN. § 2.725(b) (Vernon 1994).

> First, it should be clear that this extension of the normal warranty period does not occur in the usual case, even though all warranties in a sense apply to the future performance of goods. The quoted portion of 2-725(2) applies only in a case in which the warranty "explicitly extends to future performance." Presumably such a case would be one in which the seller gave a "lifetime guarantee" or one in which he, for example, expressly warranted that an automobile would last for 24,000 miles or four years whichever occurred first.

White at 419.

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[35] Section 2.725 expressly states that "cause of action accrues when the breach occurs . . .. A breach of warranty occurs when tender of delivery is made. . . ." TEX. BUS. & COM. CODE ANN. § 2.725(b) (Vernon 1994).

[36] Compare *Vaughn Bldg. Corp. v. Austin Co.*, 620 S.W.2d 678, 681 (Tex. Civ. App.—Dallas 1981), *aff'd on other grounds*, *Austin Co. v. Vaughn Building Corp*., 643 S.W.2d 113 (Tex. 1982) (a cause of action for breach of an implied warranty accrues when the buyer discovers or should have discovered his injury). The Vaughn court, however, did not review the UCC statute of limitations, Section 2.275, in this warranty action based on a written construction contract. Instead, the court relied on pre—UCC cases or cases where the cause of action had accrued before 1967 to support a "discovery rule" theory or the accrual of a cause of action for breach of an implied warranty under Texas law.

[37] This exception applies where "a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance. . . ." See Tex. Bus. & Com. Code § 2.725(b) (Vernon 1994).

While numerous buyers have argued that the warranty in their cases explicitly extended to future performance, few Texas courts have agreed. *See Clark v. DeLaval Separator Corp*., 639 F.2d 1320, 1325 (5th Cir.1981) (implied warranty of merchantability in a contract for the sale of milking equipment did not fall within the exception under 2.725(b)); *Safeway Stores, Inc. v. Certainteed Corp.*, 710 S.W.2d 544, 548 (Tex. 1986) (implied warranty covering roofing material did not extend to future performance while a fact issue existed as to whether express warranty was an explicit reference to future performance); *Muss v. Mercedes-Benz of North America, Inc.,* 734 S.W.2d 155, 158 (Tex. App.—Dallas 1987, writ ref'd n.r.e.) (the repair warranty pertained to the seller's obligation to make repairs in the future "rather than to future compliance by the goods with some performance standard"). *But see Trunkline LNG Co. v. Trane Thermal Co*., 722 S.W.2d 722, 725 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.) (statute of limitations may have been extended by seller's obligation to repair or replace defective goods).

The Fifth Circuit, while recognizing that there was no specific Texas law on the subject, concluded that an implied warranty because of its very nature could not extend to the future performance of the goods. *Clark,* 639 F.2d at 1325. Texas authority has since addressed this very issue and agreed with the Clark decision.[38] *See Safeway Stores, Inc. v. Certainteed Corp*., 710 S.W.2d 544, 547-48 (Tex. 1986) (based on previous case law and the clear language of Section 2.725(b), an implied warranty is incapable of explicitly extending to future performance). In *Safeway Stores*, the Texas Supreme Court reasoned that only express warranties explicitly extended to the future performance of the goods. *Id* at 546. Moreover, the Supreme

[38] "Implied warranties relate to the condition, kind, characteristics, suitability, etc. of sold goods at the time of the sale; thus, the statute of limitations on implied warranties runs from the date of sale." *Safeway Stores, Inc. v. Certainteed Corp*., 710 S.W.2d 544, 546 (Tex.1986).

Court explained that an express warranty had to specifically refer to a specific date in the future in order to meet the exception under Section 2.725(b). *Id* at 548. [39]

D. Damages for Breach of UCC Warranty

The basic formula for calculating the buyer's damages when the accepted goods are not as warranted is found at Section 2.714 of the Texas UCC.

> (a) Where the buyer has accepted goods and given notification (Subsection (c) of Section 2.607) he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.
>
> (b) 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 damages of a different amount.
>
> (c) In a proper case any incidental and consequential damages under the next section may also be recovered.

TEX. BUS. & COM. CODE ANN. § 2.714 (Vernon 1994) (emphasis added). The difference-in-value formula of subsection 2.714(b) allows a buyer to recover for loss of value in goods that do not conform to a warranty. *See Simmons v. Simpson*, 626 S.W.2d 315, 317 (Tex. App.—El Paso 1980, no writ) (usually, the measure of damages in the sale of equipment is the difference between market value when delivered and market value as warranted in contract); *Melody Home Mfg. Co. v. Morrison*, 502 S.W.2d 196, 202 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.) (the court properly used the actual cash market value of the mobile home instead of the contract price since the measure of damages under Section 2.714(b) is based on value rather

[39] The Safeway Stores court held that a fact issue existed as to whether the supplier's express warranty that its two-ply roof was 'bondable up to 20 years' was an explicit reference to future performance of the goods. *Safeway Stores, Inc. v. Certainteed Corp*., 710 S.W.2d 544, 548 (Tex.1986).

than price);[40] *Chaq Oil Co. v. Gardner Machinery Corp*., 500 S.W.2d 877, 878 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ) (buyer sought to recover both the purchase price and cost of repairs; however, the proper measure of damages was the difference in market value of equipment as delivered and as warranted); *Head & Guild Equipment Co. v. Bond*, 470 S.W.2d 909, 912 (Tex. Civ. App.—Beaumont 1971, no writ) (buyer was entitled to damages equivalent to the difference in the market value of the dragline as delivered and the market value as warranted); *Celotex Corp. v. Fisher*, 288 S.W.2d 319, 320 (Tex. Civ. App.—Fort Worth 1956, no writ) (difference-in-value formula is the proper measure of damages for failure of warranty in sale of siding installed on plaintiff's buildings).

Although the difference-in-value formula is widely used, the proper measure of damages will vary with the circumstances of each case. *Celotex*, 288 S.W.2d at 320. For example, "useful objective measurement of the difference in value as is and as warranted is the cost of repair or replacement."[41] White at 377. *See also Ortiz v. Flintkoto Co*., 761 S.W.2d 531, 536 (Tex. App. —Corpus Christi 1988, writ denied) (in action by builder against manufacturer of defective wallboard, cost of repair was proper measure of damages when repairs could be made without impairing entire structure or "expending sums in excess of the value of the structure"); *Flintkoto Supply Co. v. Thompson*, 607 S.W.2d 41, 43 (Tex. Civ. App. —Beaumont 1980, no writ) (proper measure of damages for defects was re-roofing or replacement of shingles); *Rogowicz v. Taylor*

[40] Nevertheless, when the fair market value of the goods cannot be easily determined, the purchase price may be used as evidence of the market value as warranted. *Superior Trucks, Inc. v. Allen*, 664 S.W.2d 136, 146 (Tex. App. —Houston [Dist.] 1983, writ ref'd n.r.e.) (quoting Chrysler Corp. v. Schuenemann 618 S.W.2d 799 (Tex .Civ. App.—Houston [Dist.] 1981, writ ref'd n.r.e.)). If the goods have some value, the buyer's recovery is limited to the difference between the value of the goods as delivered and the purchase price. However, if the goods have no value then the full purchase price may be recovered. *Smith v. Kinslow*, 598 S.W.2d 910, 913 (Tex. Civ. App. --Dallas 1980, no writ). "This rule may be harmonized with the difference-in-value rule on the theory that if the amount paid represents the value as warranted and the article as delivered had no value, the difference in value would be the same as the amount paid." Id.

[41] Some courts have resorted to the special circumstances language in § 2.714(b) as authority for recognizing the cost of repair or replacement as the proper measure of damages under the circumstances. White at 377 n. 6.

and Gray, Inc., 498 S.W.2d 352, 354 (Tex. Civ. App.—Tyler 1973, writ ref'd n.r.e.) (cost of repairs was proper measure of damages for breach of warranty where defect in foundation could be remedied without impairing the structure of the home as a whole); *Builders Supply Inc. v. Anderson*, 281 S.W.2d 649, 650 (Tex. Civ. App.—San Antonio 1955, writ ref'd n.r.e.) (while cost of repairs is proper measure of damages where repairs or replacements can be completed without destroying the whole building, another rule of damages is applicable when defects damage the whole structure).

Section 2.714(c) also allows the buyer to recover incidental and consequential damages in appropriate cases. The standards for recovery of incidental and consequential damages are set forth in Section 2.715.

> (a) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.
>
> (b) Consequential damages resulting from the seller's breach include
>
> (1) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
>
> (2) injury to person or property proximately resulting from any breach of warranty.

TEX. BUS. & COM. CODE ANN. § 2.715 (Vernon 1994). While the Texas UCC does not define incidental damages, Section 2.715(a) lists some expenses that are considered incidental damages.[42] Generally, courts have allowed buyer's expenses which are reasonably incurred and incidental to the seller breach as damages under this subsection. White at 384.

[42] Comment 1 to § 2.715 indicated that the list of incidental damages is illustrative rather than exhaustive of the kinds of incidental damages.

On the other hand, the test for recovery of consequential damages under subsection 2.715(b) is "one of reasonable foreseeability of probable consequences." White at 389. Thus, a buyer may recover losses which were within the contemplation of the parties and were reasonably foreseeable at the time of contracting.[43] *See Rogowicz v. Taylor and Gray, Inc*., 498 S.W.2d 352, 356 (Tex. Civ. App.--Tyler 1973, writ ref'd n.r.e.) (time when parties entered into contract is significant in deciding what was within the contemplation of the buyer and seller).

Texas courts have allowed the buyer to recover consequential damages in construction cases where the seller knew the exact needs of the subcontractor and the resulting damages were reasonably foreseeable. *See Lanphier Constr. Co. v. Fowco Constr. Co.*, 523 S.W.2d 29, 42 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.) (supplier knew the needs of the subcontractor when he supplied the asphalt and he could have reasonably foreseen that if the asphalt was defective the entire job would have to be redone).

In addition, Texas courts have allowed lost profits as consequential damages in construction cases where the buyer has met the foreseeability and certainty requirements:

> The generally accepted rule is that where it is shown that a loss of profit is a natural and probable consequence of the act or omission complained of and that amount is shown with sufficient certainty, there may be a recovery therefor; but anticipated profits cannot be recovered where they are dependent upon uncertain and changing conditions, such as market fluctuations or a change of business, or where there is no evidence from which they may be intelligently estimated. Evidence to establish profits must not be uncertain or speculative. It is not necessary that profits should be susceptible of exact calculation it is sufficient that there be data from which they may be ascertained with a reasonable degree of certainty and exactness.

General Supply and Equipment Co. v. Phillips, 490 S.W.2d 913, 921 (Tex. Civ. App.—Tyler 1973, writ ref'd n.r.e.) (emphasis added). Consequently, courts have denied recovery of lost

[43] Comment 3 to Section 2.715 makes it clear that the seller is liable for consequential damages if he had reason to know of the buyer's general or particular requirements regardless of whether he consciously accepted the risk of such loss.

profits where the business is new or unestablished since proof of future profits would be too speculative.

However, in *Harper Building Systems, Inc. v. Upjohn Co*.,[44] the court allowed recovery of lost profits when the plaintiff was forced to cease construction of 250 tennis courts due to defective urethane foam panels. The court distinguished this case from other new business cases because it had made a profit of $5,000 prior to the breach of warranty and had contracts for a definite number of panels at a definite price. *Harper Building Systems,* 564 S.W.2d at 126.

Besides the "foreseeability" and "certainty" restrictions, another limitation on the recovery of consequential damages-is found in § 2.715(b)(1). A buyer can recover only for losses "which could not reasonably be prevented by cover or otherwise". This mitigation principle has been applied in the construction context. In *Wilson v Hays*,[45] a buyer of used brick was not entitled to recover consequential damages for the seller's breach, because there was no evidence that the buyer had attempted to mitigate his losses. *Wilson*, 544 S.W.2d.at 836.

Section 2.715(b)(2) allows recovery for "injury to person or property proximately resulting from any breach of warranty." It is important to note that an action brought under § 2.715(b)(2) has a major advantage over actions brought under § 2.715(b)(l), i.e. the foreseeability requirement is absent from § 2.715(b)(2). Accordingly, a seller could be liable for injury to the buyer or his property "even if he did not know of or have reason to know of the buyer's intended use." *See* White at 396.

Finally, indemnity is available for a breach of warranty under the UCC. Section 2.607(e)(1) of the UCC states:

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[44] 564 S.W.2d 123, 126 (Tex.Civ.App.—Beaumont 1978, writ ref'd n.r.e.).

[45] 544 S.W.2d 833, 836 (Tex. Civ. App.—Waco 1977, writ ref'd n.r.e.).

(e) Where the buyer is sued for breach of a warranty or other obligation for which his seller is answerable over

(1) he may give his seller written notice of the litigation. If the notice states that the seller may come in and defend and that if the seller does not do so he will be bound in any action against him by his buyer by any determination of fact common to the two litigations, then unless the seller after seasonable receipt of the notice does come in and defend he is so bound.

2. NON UCC WARRANTIES

A. Express Warranties of the Contractor

Express warranties by the contractor are created by agreement between the contractor and the owner. Any action by the owner for a contractor's breach of an express warranty would be based on the contract, and therefore, is governed by the law of contracts. *See Smith v. Kinslow*, 598 S.W.2d 910, 912 (Tex. Civ. App.—Dallas 1980, no writ).

> An express warranty is entirely a matter of contract, wherein the seller may define or limit his obligation respecting the subject of the sale, and provide as to the manner of fulfilling the warranty or the measure of damages for its breach.

S. I. Property Owners' Association, Inc. v. Pabst Corp., 714 S.W.2d 358, 361 (Tex.App.—Corpus Christi 1986, writ ref'd n.r.e.)(quoting *Donelson v. Fairmont Foods Co*., 252 S.W.2d 796, 799 (Tex. Civ. App.—Waco 1952, writ ref'd n.r.e.); *See also Edwards v. Schuh*, 5 S.W.3d 829, 832 (Tex. App.—Austin 1999, no pet.). Thus, no specific terms or magic words are necessary in order for the contractor to create an express warranty. *See Edwards v. Schuh*, 5 S.W.3d 829, 832 (Tex. App.—Austin 1999, no pet.)(no special terms are required to make a warranty). An express warranty, however, must be explicit. *S. I. Property*, 714 S.W.2d at 361.

A good example of an express warranty can be found in Section 3.5.1 of the AIA Document A201 (General Conditions of the Contract for Construction) 1997 ed. The following language sets out an express warranty by the general contractor to the owner. The section provides:

> The Contractor warrants to the Owner and Architect that materials and equipment furnished under the Contract will be of good quality and new unless otherwise required or permitted by the Contract Documents, that the Work will be free from defects not inherent in the quality required or permitted, and that the Work will conform with the requirements of the Contract Documents. Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective. The Contractor's warranty excludes remedy for damage or defect caused by abuse, modifications not executed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear under normal usage. If required by the Architect, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

Section 1.1.3 of the A201 defines the "Work" which the contractor warrants in Section 3.5.1 to include "all other labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the Contractor's obligations." These provisions on their face impose liability on the contractor for construction work of inferior quality, even though there is no specific violation of the plans and specifications. Furthermore, the warranty does not appear to be based on negligence and should protect the owner from defects arising from faulty materials even if the defects could not have been reasonably discovered by the contractor.

In addition to the express warranty of Section 3, the A201 also contains an express guarantee by the contractor to remedy defective work for a period of one year following substantial completion.[46]

B. Implied Warranties of Contractor

Most of the case law on implied warranties in construction has developed from disputes between homebuilders and owners. There are few such cases involving commercial projects. But a recent case in Dallas has made it clear that these implied warranties are applicable to commercial development projects, too. *Barnet v. Coppell North Texas Court, Ltd.*, 123 S.W.3d 804 (Tex. App.—Dallas 2003, pet. denied). In *Barnett*, the court held that an owner is excused

[46] AIA Document A201, § 12.2.2 (1997 Ed.)

from the obligation to pay the builder, if the builder fails to properly complete the project. The builder was found to have breached the implied warranty that the construction would be done in a good and workmanlike manner, and to have negligently misrepresented that he would complete the project. *See also, Continental Dredging v. De-Kaizered, Inc*., 120 S.W.3d 380 (Tex. App.—Texarkana 2003, pet. denied)(holding that the implied warranty of good and workmanlike construction applies when it has not expressly been excluded by contract and replaced by a different contractual warranty).

The law imposes certain implied warranties based upon the contractual relationship between the contractor and the owner. Unlike express warranties, implied warranties are "created by operation of law and are grounded more in tort than in contract." *La Sara Grain v. First National Bank*, 673 S.W.2d 558, 565 (Tex. 1984); s*ee also Dennis v. Allison*, 698 S.W.2d 94 (Tex. 1985) (implied warranties are a strict liability concept).

In the construction context, Texas courts have recognized the following common law implied warranties:[47] (1) implied warranty of habitability; (2) implied warranty of construction in a good and workmanlike manner; (3) implied warranty of good and workmanlike performance of repairs; and (4) implied warranty to comply with the building code. *See Melody Home Manufacturing Co. v. Barnes*, 741 S.W.2d 349, 354 (Tex.1987)(court recognized an warranty to repair or modify existing tangible goods or property in a good and workmanlike manner"); *Evans v. J. Stiles, Inc*., 689 S.W.2d 399, 400 (Tex.1985)(court acknowledged that implied warranty of

[47] As early as 1926, Texas courts indicated that a builder impliedly warranted that his work would conform to the owner's plans and specifications. *See City of Huntsville v. McKay*, 286 S.W. 305, 307 (Tex. Civ. App.— Texarkana 1926, no writ); *Rawson v. Fuller*, 230 S.W.2d 355, 357 (Tex. Civ. App.—Dallas 1950, writ ref'd n.r.e.). Nevertheless, the implied warranty to construct in a workmanlike manner may have absorbed the plans and specifications warranty over the years since the workmanship warranty extends beyond the contractor's obligation to comply with plans and specifications. *See* Note, Evans v. J. Stiles, Inc.: The Need For A Blueprint In Texas Home Buyer Protection 37 Baylor L. Rev. 567, 575 (1985); *See also Miller v. Spencer*, 732 S.W.2d 758, 760 (Tex. App.—Dallas 1987, no writ).

construction in a good and workmanlike manner was separate from the implied warranty of habitability); *Humber v. Morton*, 426 S.W.2d 554, 555 (Tex.1968)(contractor impliedly warranted that house was suitable for human habitation)(establishing the implied warranties that a home will be constructed in a 'good and workmanlike manner' and is 'suitable for human habitation'); *Tips v. Hartland Developers, Inc.,* 961 S.W.2d 618, 621 (Tex.App.—San Antonio 1998, no writ)(establishing the implied warranty that contractor will comply with relevant municipal building codes).

The implied warranty of habitability was the result of a developing trend to apply the principles of implied warranty not only to the sale of personal property, but to the sale of residential housing as well. J. Acret, Construction Litigation Handbook § 14.03 (1986) [hereinafter "Acret at"]. While the application of the implied warranty of habitability is determined on a case-by-case basis, the warranty is limited to latent defects and usually arises in cases involving the sale of new homes by the builder/vendor. Acret at 264; *Centex Homes v. Buecher*, 95 S.W.3d 266, 275 (Tex. 2002) (holding that the implied warranty of habitability extends only to latent defects which does not include defects, even substantial ones, that are known by or expressly disclosed to the buyer). In order to constitute a breach of the implied warranty of habitability, the defect must be of a nature which will render the premises unsafe, unsanitary, or otherwise unfit for living purposes. *See Centex Homes v. Buecher*, 95 S.W.3d 266, 273 (Tex. 2002); *Kamarath v. Bennett*, 568 S.W.2d 658, 661 (Tex. 1978) (there is an implied warranty of habitability by lessor of apartment building that units will be fit for humans to inhabit).

In Texas, the implied warranty of habitability and the implied warranty of good workmanship provide separate and distinct protection for the new home buyer. *See Buecher*, 95

S.W.3d at 272; *Evans v. J. Stiles, Inc.*, 689 S.W.2d 399, 400 (Tex. 1985) (possible to breach warranty of good workmanship without breaching warranty of habitability). The implied warranty of good workmanship focuses on the builder's conduct, while the implied warranty of habitability focuses on the condition of the completed structure. *Buecher*, 95 S.W.3d at 272-73. Through the implied warranty of good workmanship, the common law recognizes that a new home builder should perform with at least a minimal standard of care. *Id*. This standard requires the builder to construct the home in the same manner as would a generally proficient builder engaged in similar work and performing under similar circumstances. *Id*; *see also Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 354-55 (Tex. 1987). Many courts considered the implied warranty of workmanship as part of the implied warranty of habitability. *See Evans*, 689 S.W.2d at 400. Unlike a suit for the breach of the habitability warranty, the owner in an action for breach of the workmanship warranty does not have to prove that the property is uninhabitable. *Id.* Instead, [i]mplicit in the 'good and workmanlike' standard is the idea of a reasonable standard of skill and diligence." *Miller v. Spencer*, 732 S.W.2d 758, 760 (Tex. App.—Dallas 1987, no writ). Further, a 'good and workmanlike' manner has been defined "as the manner in which an ordinary prudent person engaged in similar work would have performed under similar circumstances." *Id.* Thus, in addition to the express warranties contained in the construction contract, the contractor has a duty to furnish adequate materials and to construct the project in a good and workmanlike manner. *See Moore v. Werner*, 418 S.W.2d 918, 920 (Tex. Civ. App.—Houston [14th Dist.] 1967, no writ); *see also Humber v. Morton*, 426 S.W.2d 554, 561 (Tex. 1968).

Using the above guidelines, a Texas court has discussed the workmanship warranty in the context of a commercial construction project. *See James Holmes Enterprises, Inc. v. John*

Bankston Constr. & Equip. Rental, Inc., 664 S.W.2d 832, 835 (Tex. App.—Beaumont 1983, writ ref'd n.r.e.). In James Holmes, a contractor sued for sums due under a contract for the construction of concrete manholes. The court, however, rendered a take nothing judgment against the contractor after finding that the contractor had failed to perform the construction work in a good and workmanlike manner. *Id.*

In *Melody Home Mfg. Co. v. Barnes*,[48] the Texas Supreme Court extended the theory of implied warranty to service transactions. In this Deceptive Trade Practices Consumer Protection Act ("DTPA") case, the purchasers of a mobile home sued the manufacturer for breach of an implied warranty that repairs to the mobile home would be done in a good and workmanlike manner. *Melody Home*, 741 S.W.2d at 351. The court reasoned that the "application of implied warranty to services would encourage justifiable reliance on the service providers who would have more incentive to increase and maintain the quality of the services they provide." *Id*. at 353-54.

After holding that an implied warranty to repair or modify existing tangible goods or property in a good and workmanlike manner was available, the court defined good and workmanlike manner as:

> that quality of work performed by one who has the knowledge, training or experience necessary for the successful practice of a trade or occupation and performed in a manner generally considered proficient by those capable of judging such work.

Id. at 354. Accordingly, although the court did not require repairmen to guarantee the results of their work, it did require that the services be performed in a good and workmanlike manner. Id.

[48] 741 S.W.2d 349, 353-54 (Tex. 1987).

at 355.[49] Further, the court held that the implied warranty to perform repairs in a good and workmanlike manner could not be waived or disclaimed.[50] *See also Buecher*, 95 S.W.3d at 270.

C. Extension to Subsequent Purchasers

The case of *Gupta v. Ritter Homes*, 646 S.W.2d 168 (Tex. 1983) extended the implied warranties of good and workmanlike performance and habitability to subsequent purchasers. *But see PPG Indus., Inc. v. JMB/Houston Ctrs. Partners Ltd. P'ship*, 146 S.W.3d 79, 89 (Tex. 2004) (impliedly overruling *Gupta* and holding that a downstream buyer can sue a remote seller for breach of an implied warranty, but cannot sue under the DTPA). In Gupta, the second owner of a home sued the seller and the original builder for foundation settlement. The Court held that the implied warranties of habitability and good workmanship are implicit in the contract between the builder and the first purchaser, and that these implied warranties are automatically assigned to the subsequent purchaser.

These implied warranties, citing *Humber v. Morton*, cover latent defects not discoverable by a reasonably prudent inspection at the time of sale. The court was also quick to point out that the implied warranty is enforceable against the builder, but not the selling homeowner. *See also Bynum v. Prudential Residential Services, Ltd P'ship*, 129 S.W.3d 781, 793-94 (Tex. App.—Houston [1st Dist.] 2004, pet. denied)(declining to extend the implied warranties of workmanship and habitability in case against selling homeowner and real estate company

[49] See also *Western Steel Co. v. Coast Investment Corp*., 760 S.W.2d 725 (Tex. App.—Corpus Christi 1988, no writ). In an action brought by the general contractor against the air conditioning subcontractor, the court held that the air conditioning system was installed by the subcontractor in a good and workmanlike manner. *Id*. at 727. In reaching its decision, the court relied on Melody Homes to provide a definition of 'good and workmanlike' manner. *Id*.

[50] The court explained that to allow service providers to disclaim this implied warranty would encourage shoddy workmanship.

because they neither built home nor remodeled the home). So the later purchaser has an enforceable claim against the original builder, and privity is not required.

D. Duty to Adequately Supervise

In *Jim Walter Homes v. Reed*, 711 S.W.2d 617 (Tex. 1986), the Court expanded an owner's rights. In this case, the homeowners sued their builder for numerous causes of action, including breach of express and implied warranties, and gross negligence in construction and supervision. The Jim Walter appeals court assumed that there is a common law duty to perform the contract with care and skill, and held that this duty encompasses a duty to adequately supervise the construction. This assumption resulted in a new implied warranty by a builder: that the construction would be adequately supervised. Among other problems, the owners proved at trial that the concrete in the foundation was below the 2500 psi specification promised. The builder had made two misrepresentations: he misrepresented the quality of the concrete in place, and misrepresented that it had been tested, when it had not.

The Texas Supreme Court reversed the award of exemplary damages, holding that gross negligence in supervision cannot support exemplary damages, because even an intentional breach of contract would not support exemplary damages. The Court also explained that there was no injury in tort beyond the object of the contract, citing *Montgomery Ward v. Scharrenbeck*, 204 S.W.2d 508 (Tex. 1947).

E. Waiver of Implied Warranties

One of the most recently reported case from the Texas Supreme Court relating to implied warranties is *Centex Homes v. Buecher*, 95 S.W.3d 266, 275 (Tex. 2002). In *Buecher*, the sales contract contained a clause in all caps and bold type attempting to effectuate a waiver of the implied warranties of habitability and good and workmanlike construction:

> At closing Seller will deliver to Purchaser, Seller's standard form of homeowner's Limited Home Warranty against defects in workmanship and materials, a copy of which is available to Purchaser. PURCHASER AGREES TO ACCEPT SAID HOMEOWNER'S WARRANTY AT CLOSING IN LIEU OF ALL OTHER WARRANTIES, WHATSOEVER, WHETHER EXPRESSED OR IMPLIED BY LAW, AND INCLUDING BUT NOT LIMITED TO THE IMPLIED WARRANTIES OF GOOD WORKMANLIKE CONSTRUCTION AND HABITABILITY. PURCHASER ACKNOWLEDGES AND AGREES THAT SELLER IS RELYING ON THIS WAIVER AND WOULD NOT SELL THE PROPERTY TO PURCHASER WITHOUT THIS WAIVER. Purchaser's initials in the margin indicate their approval of this section 8.

This contract substituted a limited one-year warranty for the implied warranties. The class action plaintiffs, as buyers of the Centex homes, asserted fraud, misrepresentation, negligence, DTPA, and sought to avoid the disclaimer of the implied warranties.

The trial court relied on *G-W-L v. Robichaux*, 643 S.W.2d 392 (Tex. 1982) (implied warranties can be waived with express language), and ruled in favor of the builder that the warranties had been waived. The Court of Appeals, sitting en banc, held that buyers could not waive the implied warranties by contract, and reversed. The earlier cases were in conflict. The Texas Supreme Court had established the implied warranties in *Humber v. Morton* (1968), but held they could be waived in *Robichaux* (1982). The homeowners argued *Robichaux* (1982) was overruled by *Melody Home* (1987), which said the implied warranties could not be waived or disclaimed.

Claiming that the cases are not in conflict, the Texas Supreme Court nevertheless drew a distinction between warranty of habitability (*Humber v. Morton*) and warranty of good and workmanlike construction (*Robichaux*). The Court explained that the implied warranty of good workmanship is a standard of care citing *Evans v. J. Stiles Inc.*, 689 S.W.2d 399 (Tex. 1985). The warranty of habitability is a warranty as to condition of the home, not the builder's standard of care. The Court held that the parties could substitute an express limited warranty for the

implied warranty of good and workmanlike construction, but not for habitability: "safe, sanitary, and otherwise fit for human habitation," which the Court noted is a strict liability concept.

In short, the *Buecher* court ruled that the implied warranty of good workmanship may be disclaimed by the parties when their agreement provides for the manner, performance or quality of the desired construction. The court went on to add that the warranty of habitability could generally not be disclaimed. The court continued by stating that the warranty of habitability only extends to latent defects, and not to defects, even substantial ones, that are known by or expressly disclosed to the buyer. *Centex Homes v. Buecher*, 95 S.W.3d 266, 275 (Tex. 2002).

F. Warranties of the Architect

While an architect is liable for his failure to exercise reasonable care and skill in performing his duties, the general rule in Texas has been that:

> A warranty by an architect will not be implied unless there is the clearest reason for it, and the burden of showing such reason rests on the one seeking to establish the warranty.

Ryan v. Morgan Spear Associates, Inc., 546 S.W.2d 678, 681 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.) (quoting 6 Tex. Jur. 2d Architects and Engineers § 32 (1959)). The *Ryan* court found that the contract between the owner and the architect did not contain any special guarantees or warranties that the plans and specifications would be free from the alleged inherent defects. In the absence of such special warranties, the only implication arising from the contract was that "the architect would use reasonable care in preparation of the plans and supervision of the construction of the project." *Ryan,* 546 S.W.2d at 682.

In 1985, the Texas Supreme Court refused to extend the implied warranty concept to professional service providers. *See Dennis v. Allison*, 698 S.W.2d 94 (Tex. 1985); *See also Murphy v. Cambell*, 964 S.W.2d 265, 269 (Tex. 1997) (holding that there is no cause of action

for breach of an implied warranty of accounting services); *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 440 (Tex. 1995) (finding that there was no implied warranty to perform future development services). In a case involving the most egregious circumstances, the court explained that it was "not necessary to impose an implied warranty theory as a matter of public policy because the plaintiff patient [had] adequate remedies to redress wrongs committed during treatment." *Dennis*, 698 S.W.2d at 96. Although *Dennis* arose out of a doctor's assault on his patient, the court's reasoning should apply to professional services rendered by an architect. Moreover, while the Supreme Court later extended the implied warranty theory to repair services, it expressly reserved the question of "whether an implied warranty applies to services in which the essence of the transaction is the exercise of professional judgment by the service provider." *Melody Home*, 741 S.W.2d at 354. *See also Forestpark Enterprises, Inc. v. Culpepper*, 754 S.W.2d 775, 779 (Tex. App.—Fort Worth 1988, writ ref'd) (shopping center manager did not breach implied warrant of good and workmanlike performance by refusing to evict game room tenant since matter involved the exercise of professional judgment by the manager, a service provider).

Nevertheless, an argument can be made that the professional/non-professional distinction reserved in Melody Homes may not be that significant to architects who prepare drawings regarding the modification of existing structures after the Supreme Court's decision in *Archibald v. Act III Arabians*, 755 S.W.2d 84, 88 (Tex. 1988) (Gonzalez, J. dissenting). In *Archibald*, a horse owner sued the horse's trainer for damages resulting from the mare's death. The owner's DTPA claim alleged that the horse trainer had breached an implied warranty that "its horse training services would be performed in a competent, safe and humane manner." *Archibald*, 755 S.W.2d at 85. The court agreed with the owner, and held that horse training services were within the scope of the good and workmanlike performance warranty recognized in *Melody Home*. *Id*.

at 86. In reaching its decision, the court noted that the good and workmanlike performance warranty, by its very terms, extended to a broad range of services. Further, the court explained that since a horse was an existing tangible good under the Texas UCC and horse training involved the modification of an existing good, the services rendered by the trainer were within the ambit of the implied warranty of good and workmanlike performance. *Id.* *See also* TEX. BUS. & COM. CODE ANN. § 2.105 (Vernon 1994). An architect who prepares drawings which modify an existing structure should be no different than a horse trainer for purposes of the *Melody Home* warranty.

G. Implied Warranty of Owner to Contractor Regarding Sufficiency of Plans and Specifications

As early as 1918, the United States Supreme Court decided that a contractor was not responsible for the consequences resulting from defects in plans and specifications furnished by the owner if the contractor was obligated to build according to such plans and specifications. *United States v. Spearin*, 248 U.S. 132 (1918). Moreover, the court held that the contract between the owner and the contractor impliedly warranted that the plans and specifications provided by the owner were sufficient.[51] *Id*.

> The risk of the existing system proving adequate might have rested upon [contractor], if the contract for the dry dock had not contained the provision for relocation of the 6-foot sewer. But the insertion of the articles prescribing the character, dimensions and location of the sewer imported a warranty that if the specifications were complied with, the sewer would be adequate. This implied warranty is not overcome by the general clauses requiring the contractor to examine the site, to check up the plans, and to assume responsibility for the work until completion and acceptance.

Id.

[51] This appears to be the rule in most jurisdictions. See J. Canterbury, Jr., Texas Construction Law Manual § 6.31 (1981).

The seminal Texas case in this area is *Lonergan v. San Antonio Loan & Trust Co*., 104 S.W. 1061 (1907). In *Lonergan,* the Texas Supreme Court reasoned that the contractor implied that he understood the plans when he contracted to construct the building according to the specifications provided by the owner. *Id*. at 1065. Further, the court held that any warranty or guaranty as to adequacy or suitability of the plans and specifications by the owner must be expressed in the contract. *Id*. at 1065-66. Consequently, the owner was not a guarantor of the sufficiency of the specifications simply because, he submitted the plans for bids on the work and thereafter entered into a contract with the contractor. *Id*. at 1066.

Although *Lonergan* is the only Texas Supreme Court decision on this subject,[52] there is a subsequent line of authority in Texas which holds that an owner does impliedly warrant the sufficiency of the plans and specifications supplied to the contractor. See *Shintech, Inc. v. Group Constructors, Inc.*, 688 S.W.2d 144, 151 (Tex. App.—Houston [14th Dist.] 1985, no writ) (there is an implied warranty that plans and specs are sufficient where contract is silent on the subject); *Turner, Collie & Braden, Inc. v. Brookhollow, Inc*., 624 S.W.2d 203, 208 (Tex. Civ. App.—Houston [1st Dist.] 1981), *aff'd in part and rev'd in part on other grounds*, 624 S.W.2d 160 (Tex. 1982) (court concluded that Lonergan was not applicable to the facts); *Baytown v. Bayshore Constructors, Inc*., 615 S.W.2d 792, 793 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.) (failure of owner to provide suitable plans and specs constituted a breach of contract entitling contractor to recover damages resulting from breach); *Newell v. Mosley*, 469 S.W.2d 481, 483 (Tex. Civ. App.—Tyler 1971, writ ref'd n.r.e.) (contractor relied on owners implied warranty that plans and specs were sufficient).

[52] It should be noted that Lonergan was decided before the Supreme Court's decision in Spearin. Additionally, several cases decided since Lonergan have always found the facts of their case distinguishable from Lonergan. For instance, *see North Harris County Junior College District v. Fleetwood Construction Company*, 604 S.W.2d 247, (Tex.Civ.App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.).

Other Texas courts have followed the Lonergan decision. *See Ruberoid Co. v. Scott*, 249 S.W.2d 256, 259 (Tex. Civ. App.—Dallas 1952, no writ) (owner does not warrant that materials, plans, and specs are sufficient unless the contract so stipulates); *Emerald Forest Utility Dist. v. Simonsen Constr. Co.*, 679 S.W.2d 51, 53-54 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) (contractor had no breach of warranty action against owner because owner did not expressly warrant the specifications); *San Antonio v. Forgy*, 769 S.W.2d 293, 291 n.1 (Tex. App.—San Antonio 1989, writ denied) (finding that unless so expressed in the contract, an owner that furnishes a prime contractor plans and specifications is not a guarantor of the sufficiency of the plans and specifications); *Alamo Community College Dist. v. Browning Const. Co.*, 131 S.W.3d 146, 155 (Tex. App.—San Antonio 2004, pet. filed) (finding that the owner was responsible for design errors because of the express language in the contract).

Although recent Texas cases have followed the rule that was announced in Spearin, the Lonergan decision has never been explicitly overruled. Moreover, one of the cases relied on by several Texas courts that have followed the Spearin rule is not good authority because the owner in that particular case expressly agreed to provide the contractor with sufficient plans and specifications. *See Board of Regents of University of Texas v. S & G Construction Co*., 529 S.W.2d 90, 95 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.)**,** *overruled on other grounds*.

H. Developer's Implied Warranties

It was not until 1992 that a Texas Court found an implied warranty on the part of a developer. In *Luker v. Arnold*, 843 S.W.2d 108, 116-18 (Tex. App—Fort Worth 1992, no writ), the Court established that a developer impliedly warrants that it will develop in a good and workmanlike manner.

What does it mean to develop in a good and workmanlike manner? The developer must act in "the manner in which an ordinary person engaged in similar work would have performed under the circumstances." *Luker,* 843 S.W.2d at 115. In other words, where the developer has undertaken to do more than just sell raw land, the developer must act as an ordinary and prudent developer would. For example, the developer must properly plat the subdivision, properly install utilities, and assure that the general contractors in the development met all applicable deed restrictions. *See Id*. at 115-119; *but see Parkway Co. v. Woodruff*, 901 S.W.2d 434 (Tex. 1995) (no implied warranty that developer's post-sale development services would be performed in good and workmanlike manner).

I. Public Owner's Implied Warranties

No Texas court has expressly held a public owner impliedly warrants the accuracy and suitability of the plans and specifications it supplies to a contractor. However, three Texas cases have cited *Spearin* and applied its principles to an owner's obligation to ensure the accuracy and suitability of the plans and specifications.

In *Chapman & Cole v. Itel Container Int'l, B.V.,* 865 F.2d 676 (5th Cir. 1989), the United States Court of Appeals followed the *Spearin* doctrine and held that *Lonergan* was inapplicable. The Court applied the principle that the Owner's obligation to supply accurate and suitable plans and specifications cannot be "overcome by the usual clauses requiring builders to visit the site, to check the plans, and to inform themselves of the requirements of the work." *See Chapman & Cole,* 865 F.2d at 683 (citing *Spearin*, 248 U.S. at 137.). The Court then found that where the contractor "carried out the construction according to the plans prepared by [Owner] and mutually approved…. [Contractor] cannot be held responsible for defects in those plans." *Chapman & Cole*, 865 F.2d at 683. See also *Our Lady of Victory College & Academy v. Maxwell Steel Co*.,

278 S.W.2d 321, 323 (Tex. Civ. App.—Fort Worth 1955, writ ref d n.r.e.) (following the holding of *Spearin*, while citing both Spearin and Lonergan and holding that finding that the true rule is that where a builder, who has been engaged to superadd to a structure already built, completes his work as contracted, according to plans agreed upon, he is not responsible for the subsequent destruction of the building caused by its own inherent weakness).

A Houston Court of Appeals has found that a public owner's implied warranty exists, but chose not to enforce the implied warranty based on the facts of the case. In *I.O.I. Systems, Inc. v. City of Cleveland*, 615 S.W.2d 786 (Tex. App.—Houston [1st Dist] 1980, writ ref'd n.r.e.), the Court would have held that the City of Cleveland warranted the accuracy and suitability of the plans and specifications it supplied to the contractor; however, the Court refused to enforce the implied warranty against the public owner because the contractor had not properly performed the work spelled out in the plans and specifications supplied by the public owner. See *Id*. at 790-791.

Although no Texas court has expressly held that a public owner impliedly warrants the accuracy and suitability of its plans and specifications, the groundwork has been laid for the application of this implied warranty to a public owner.

J. Subcontractor's Implied Warranties

A subcontractor can be held to have provided the following implied warranties under Texas law: (1) good and workmanlike performance,[53] (2) fitness for a particular purpose,[54] and (3) merchantability.[55] A subcontractor's implied warranties are:

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[53] See, e.g., *Thomas v. Atlas Foundation Co., Inc*., 609 S.W.2d 302, 303-304 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.).

[54] See, e.g., *Metro Nat'l Corp. v. Dunham-Bush, Inc*., 984 F. Supp. 538 (S.D. Tex. 1997).

[55] See, e.g., *U.S. Tire-Tech v. Boeran, B.V.,* 110 S.W.3d 194, 198 (Tex. App.—Houston [1st Dist.] 2002, pet. denied) (citing *Nobility Homes of Texas, Inc. v. Shivers*, 557 S.W.2d 77, 81 (Tex. 1977)).

> judicially interjected into agreements whenever necessitated by public policy to ensure that the parties receive that for which they bargained.…
> …
> … In short, it is the character and quality of the end product of the contract for goods or services that determines whether there has been a breach of warranty.[56]

The number of cases discussing a subcontractor's implied warranty obligations is relatively few because most defective work claims against subcontractors are covered by the express terms of a written subcontract agreement. This is likely the case because, as a practical matter, a general contractor is better positioned to ensure that its contract clearly states the subcontractor's obligations. Additionally, an ever increasing number of claims between subcontractors and general contractors are being decided by arbitration.[57] For these reasons, most recent cases have discussed the subcontractor's implied warranties in terms of the subcontractor's obligations to the project owner.[58]

1. The History of Subcontractor's Implied Warranties

Drury v. Reeves was the first Texas case found to recognize a subcontractor's implied warranties.[59] In Drury, the subcontractor had improperly performed sheet metal and roofing work on an apartment project. The Austin Court of Appeals affirmed the trial court's finding that the subcontractor impliedly warranted to the general contractor that the work was performed "in a

[56] See *Chilton Ins. Co. v. Pate & Pate Enters., Inc*., 930 S.W.2d 877, 890 (Tex. App.—San Antonio 1996, writ denied)(citing *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 353 (Tex. 1987).

[57] For example, the American Arbitration Association reports that it has seen the number of arbitrations it handles more than triple, from 60,808 in 1990 to 218,032 in 2001.

[58] *Rayon v. Energy Specialties, Inc*., 121 S.W.3d 7 (Tex. App.—Fort Worth 2002 no writ); *U.S. Tire-Tech v. Boeran, B.V.,* 110 S.W.3d 194, 198 (Tex. App.—Houston [1st Dist.] 2002, pet. denied); *J.M. Krupar Constr. Co. v. Rosenberg*, 95 S.W.3d 322 (Tex. App.—Houston [1st Dist.] 2002, no pet.); *Raymond v. Rahme*, 78 S.W.3d 552, 562–63 (Tex. App.—Austin 2002, no pet.); *Goose Creek Consol. Indep. Sch. Dist. v. Jarrar's Plumbing, Inc*., 74 S.W.3d 486 (Tex. App.—Texarkana 2002, no pet.); *Codner v. Arellano*, 40 S.W.3d 666, 673 n.4 (Tex. App.—Austin 2001, no pet.).

[59] 539 S.W.2d 390 (Tex. Civ. App.—Austin 1976, no writ).

good and workmanlike manner"[60] and "the materials were fit for the purpose for which they were intended."[61] Although the Court did not discuss the details of the obligations imposed by these implied warranties, it held that the proper measure of damages was "the reasonable cost of remedying the defects."[62]

In 1980, *Thomas v. Atlas Foundation* extended the subcontractor's warranty of good and workmanlike performance to the owner of the home.[63] In *Atlas*, the homeowners claimed that the subcontractor had violated the Deceptive Trade Practices Act (hereinafter "DTPA") by failing to construct the porch in a good and workmanlike manner.[64] The Fort Worth Court of Appeals held the owner was entitled to recover its actual damages - the cost to repair the porch; but the Court also went a long way to distinguish the subcontractor's failure to perform its work from a "deceptive" act. The Court explained that no treble damages could be recovered because the subcontractor was not responsible for any misleading act that induced the homeowner to enter into its contract with the general contractor.[65]

In 1986, the Fort Worth Court of Appeals held that the 1997 amendments to the definition of "consumer" under the DTPA expanded a subcontractor's implied warranty liability

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[60] *Id*. at 393.

[61] *Id*. at 392.

[62] *Id*. at 394.

[63] *See Thomas v. Atlas Foundation Co., Inc*., 609 S.W.2d 302 (Tex. Civ. App.—Fort Worth 1980, writ ref d n.r.e.).

[64] *See id*. at 303.

[65] *See id*.; *Anthony Indus., Inc. v. Ragsdale*, 643 S.W.2d 167, 174-75 (Tex. App.—Fort Worth 1982, writ ref d n.r.e.) (Note: the DTPA was subsequently amended to include not only intent requirements but also indemnity obligations—See Footnote 15).

to commercial consumers.[66] In addition to common-law warranty liability, the Tex. Bus. & Com. Code can require a subcontractor to indemnify a general contractor for damages resulting from DTPA violations to the extent that the subcontractor has caused those damages.[67]

2. When Implied Warranties Don't Apply

Implied warranties do not apply to the following types of construction:

(i) "fences, driveways, and ancillary construction in and of themselves."[68]

(ii) "promise of timely performance is contractual and is not a warranty."[69]

(iii) any promise, representation, affirmation, term, or specification that is set forth in writing and/or expressed orally will be held to be an express warranty and/or contract term, but not an implied warranty.[70]

3. Recent Trends in Limitations and Disclaimers of Implied Warranties

Although owners were previously entitled to bring breach of implied warranty claims against subcontractors,[71] owners have lost this right in the last couple of years. The Courts of

[66] *See Wood v. Component Constr. Corp*., 722 S.W.2d 439, 443 (Tex. App.—Fort Worth 1986, no writ) (citing 1977 amendment to the DTPA), *overruled on other grounds by Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1 (Tex. 1991).

[67] *See* Tex. Bus. & Com. Code. Ann. § 17.555 (O'Connor's 2002); See *also Amstadt v. U.S. Brass Corp*., 919 S.W.2d 644, 652 (Tex. 1996).

[68] *See Ragsdale,* 643 S.W.2d at 174 (citing *Turner v. Conrad*, 618 S.W.2d 850, 853 (Tex. Civ. App.—Fort Worth 1981,writ ref'd n.r.e.).

[69] *Pate & Pate*, 930 S.W.2d at 892.

[70] *See id*. at 890-892.

[71] See *Thomas v. Atlas Foundation*, 609 S.W.2d 302 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.); *Safeway Stores, Inc. v. Certainteed Corp*., 687 S.W.2d 22 (Tex. App.—Dallas 1984, writ ref'd n.r.e.); *B & L Cherry Hill Assocs. Ltd v. Fedders Corp*., 696 S.W.2d 667 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

Appeals in Austin, Texarkana, Houston and Fort Worth have all held in recent cases that a subcontractor does not owe implied warranties to an owner.[72]

Subcontractors (and general contractors) may attempt to expressly disclaim all implied warranties through the terms of their contracts. The Texas Supreme Court's recent ruling in *Centex Homes v. Buecher*[73] gives a contractor the right to disclaim the implied warranty of good and workmanlike performance if the parties' "agreement provides for the manner, performance or quality of the desired construction."[74] Further, Tex. Bus. & Com. Code §2.316(b) allows for the disclaimer of both the implied warranty of fitness for a particular purpose and the implied warranty of merchantability if disclaimed in a writing that conspicuously disclaims them by name.[75] Thus, by combining these two sources of law, subcontractors should be able to effectively disclaim all recognized implied warranties, allowing the subcontractor to focus on fulfilling the express terms of its contract with the general contractor.

3. NEW LIMITED STATUTORY WARRANTIES

Title 16, Texas Property Code, Chapter 401, et. seq. created the new Texas Residential Construction Commission Act ("TRCCA"). The TRCCA only applies to residential projects.

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[72] *See Rayon v. Energy Specialties, Inc.*, 121 S.W.3d 7 (Tex. App.—Fort Worth 2002 no writ); *J.M. Krupar Constr. Co. v. Rosenberg*, 95 S.W.3d 322 (Tex. App.—Houston [1st Dist.] 2002, no pet.); *Raymond v. Rahme*, 78 S.W.3d 552, 562–63 (Tex. App.—Austin 2002, no pet.); *Goose Creek Consol. Indep. Sch. Dist. v. Jarrar's Plumbing, Inc.*, 74 S.W.3d 486 (Tex. App.—Texarkana 2002, no pet.); *Codner v. Arellano*, 40 S.W.3d 666, 673 n.4 (Tex. App.—Austin 2001, no pet.).

However, the Houston Court of Appeals [1st Dist.] has recently stated that it would allow an owner to bring a breach of implied warranty claim against a remote party (the manufacturer) in the context a contract dominated by the sale of goods. *See U.S. Tire-Tech v. Boeran, B.V.,* 110 S.W.3d 194, 198 (Tex. App.—Houston [1st Dist.] 2002, pet. denied)(citing *Nobility Homes of Tex., Inc. v. Shivers*, 557 S.W.2d 77, 81 (Tex. 1977)) ("The Texas Supreme Court held in 1977 that privity of contract is not required in order to recover purely economic loss from the breach of an implied warranty of merchantability").

[73] *See Centex Homes v. Buecher*, 95 S.W.3d 266 (Tex. 2002).

[74] *Id*. at 274-75.

[75] Tex. Bus. & Com. Code §2.316(b) (Vernon's 1994).

The commission is charged with adopting limited statutory warranties and building and performance standards. The warranty periods are: (1) one year for workmanship and materials; (2) two years for plumbing, electrical, heating and air-conditioning delivery systems; and (3) ten years for major structural components of the home. The warranty period begins on the earlier of occupancy or transfer of title from the builder to the initial homeowner.

1. Elimination of Implied Warranties in Residential Construction

In addition to the limited statutory warranties, the TRCCA created a warranty of habitability which is part of the sale of each new home. The warranty of habitability is defined as: a builder's obligation to construct a home or home improvement that is in compliance with the limited statutory warranties and building and performance standards adopted by the TRCCA and that is safe, sanitary, and fit for humans to inhabit. Tex. Prop. Code § 430.002. A contract between a builder and a homeowner may not waive the limited statutory warranties and building and performance standards adopted by the TRCCA. Tex. Prop. Code § 430.007. However, a builder and homeowner may contract for more stringent warranties and building standards than those adopted by the TRCCA. Tex. Prop. Code § 430.002

The warranties established under the TRCCA supercede all implied warranties. Tex. Prop. Code § 430.006. The only warranties that exist for residential construction or residential improvements are warranties created by the TRCCA, or by other statutes expressly referring to residential construction or residential improvements, or any express, written warranty acknowledged by the homeowner and the builder. *Id*.

A homeowner can bring a cause of action for breach of a limited statutory warranty adopted by the TRCCA. In that action, the recoverable damages are limited to the "menu" of

damages in Section 27.004 of the Texas Property Code (commonly referred to as the Residential Construction Liability Act or RCLA).[76] Tex. Prop. Code § 430.011.

2. Building Standards Adopted

The TRCCA requires substantial compliance with the non-electrical standards of the International Residential Code for One- and Two-Family Dwellings (the "IRC"), and the National Electrical Code (the "NEC"). Tex. Prop. Code § 430.001. For the first time, the State of Texas has statewide building standards. Depending on the location of the home, either the IRC and NEC apply or the version enforced by the municipality applies.

The TRCCA adopted Chapter 304, relating to Warranties, Building and Performance Standards. This new chapter outlines the statutorily mandated minimum warranties, building and performance standards for residential construction throughout the State of Texas. As such, all

[76] Section 27.004(e)-(g) of the Texas Property Code lists the two menus of damages the claimant is eligible for depending on if a reasonable offer of settlement is made. Subsection (e) addresses if a reasonable offer of settlement is made and is either not accepted or if the claimant does not permit a reasonable opportunity to inspect or repair. Subsections (f) and (g) addresses the damages menu available if a reasonable offer of settlement is not made:

> (e) … the claimant:
> (1) may not recover an amount in excess of:
> (A) the fair marked value of the contractor's last offer of settlement under Subsection (b); or
> (B) the amount of a reasonable monetary settlement or purchase offer made under Subsection (n); and
> (2) may recover only the amount of reasonable and necessary costs and attorney's fees as prescribed by Rule 1.04, Texas Disciplinary Rules of Professional Conduct, incurred before the offer was rejected or considered rejected.
>
> (f) If a contractor fails to make a reasonable offer under subsection (b), the limitations on damages provided for in Subsection (e) shall not apply.
>
> (g) Except as provided in Subsection (e), in an action subject to this chapter the claimant may recover only the following economic damages proximately caused by a construction defect:
> (1) the reasonable cost of repairs necessary to cure any construction defect;
> (2) the reasonable and necessary cost for the replacement or repair of any damaged goods in the residence;
> (3) reasonable and necessary engineering and consulting fees;
> (4) the reasonable expenses of temporary housing reasonably necessary during the repair period;
> (5) the reduction in current market value, if any, after the construction defect is repaired if the construction defect is a structural failure; and
> (6) reasonable and necessary attorney's fees.

homebuilders and remodelers in Texas must now offer these new warranties and follow these building and performance standards.

The commission made this chapter effective on June 1, 2005. Accordingly, this chapter applies to all residential construction that commences on or after June 1, 2005, if the construction is for a new home, material improvement to an existing home or an interior renovation to an existing home that costs in excess of $20,000. The new requirements for builders and remodelers are the first written minimum warranties, building and performance standards ever required in Texas.

Subchapter A of Chapter 304 provides for definitions, the applicability of the International Residential Code and National Electrical Code to residential construction, the implementation of warranty and performance standards and general conditions that identify builder and homeowner responsibilities. It also describes general builder responsibilities, general homeowner responsibilities and general exclusions from or conditions affecting the application of the performance standards contained in the chapter. This subchapter also describes the minimum warranty periods adopted by the commission and the warranty of habitability.

Subchapter B of Chapter 304 provides performance standards for those components of a home or home improvement that are subject to the minimum one-year warranty. This subchapter provides standards for components of a home including foundations, framing, doors, windows, electrical fixtures, plumbing accessories, cooling and heating systems, interior trim, fencing and pest control.

Subchapter C of Chapter 304 provides for performance standards for plumbing, electrical, heating and air-conditioning delivery systems that are subject to the minimum two-year warranty period. This subchapter provides for specific standards of performance for

elements such as wiring, breakers, electrical fixtures, plumbing accessories, pipes, wastewater treatment systems, heating and cooling system components and ductwork.

Subchapter D of Chapter 304 provides performance standards for foundations and other structural components of a home that are subject to the minimum ten-year warranty.

These new warranties and building performance standards are important because the TRCCA will use the standards when it considers post-construction disputes between builders and homeowners under the state-sponsored inspection and dispute resolution process (known as "SIRP"). The SIRP process must be undertaken before either party in a dispute may proceed with further legal action. The third-party inspectors approved by the TRCCA will make recommendations for repair or replacement of those elements or components of a home that do not meet these standards during the applicable warranty period based upon the expected level of performance set for residential construction. Most importantly, compliance with these warranties, building and performance standards is necessary since a contract between a builder and a homeowner may not waive or modify to lessen the warranty of habitability or the limited statutory warranties and building and performance standards.

In addition to the IRC and NEC, the limited statutory warranties and building an performances standards also must also include: (1) standards for mold reduction and remediation; (2) standards for various interior and exterior components of a home; and (3) that are not less stringent than the standards required by the United States Department of Housing and Urban Development. Tex. Prop. Code § 430.003, 430.005.

3. Effective Date, Retroactivity and Accrual

The warranties and building and performance standards adopted by the TRCCA apply only to residential construction that begins on or after the effective date of those warranties and

building and performance standards as determined by the TRCCA. See comments to Tex. Prop. Code § 430.001. The warranties in effect at the time a home was built or remodeled governs any breach of warranty claim. For a dispute regarding a home built or remodeled before September 1, 2003, the dispute can be subject to the dispute resolution process under Chapter 428 of the Texas Property Code if the defect is discovered after September 1, 2003 and the home is retroactively registered. See Emergency Rule 301.1(a)(1) adopted December 18, 2003 by Texas Residential Construction Commission; Emergency Rule 313.01 adopted January 6, 2004 by Texas Residential Construction Commission.

4. RECENT DEVELOPMENTS IN THE STATUTE OF LIMITATIONS

Often a warranty claim is not made until the cause of the problem is determined, because builders and owners want to fix the root cause. In two 2005 decisions, the court ruled that the discovery rule did not apply and found that the statute of limitations barred certain claims. The following summaries are of construction defect cases involving foundations. In each case, the statute of limitations was analyzed and applied.

A. *Reynolds v. Guido*, 166 S.W.3d 789, 793-94 (Tex.App.—Dallas 2005, pet. denied)

Mrs. Reynolds's admitted knowledge of structural problems with her home before the end of November 1996. By that time, she testified she had witnessed kitchen tiles breaking apart along a crack in the floor, cracks zigzagging the length of a wall over the staircase, and sheetrock cracking in a number of places. By February of 1997, Mr. Reynolds characterized the cracking, leaking and related problems as "fairly severe" and had engaged an attorney to address the problems with contractors.

By February 1998, an expert hired by the Reynolds examined the home, performed tests, and recommended a repair method. Then, sometime before May of 1998, the Reynolds learned of the two-finger-wide crack in the slab all the way across the living room floor and made a claim under their homeowners' insurance policy. The court found that this testimony and evidence established that the Reynolds knew or should have known of their injury by this time, at the very latest. *See, e.g., Polk Terrace, Inc. v. Curtis,* 422 S.W.2d 603, 604-05 (Tex.Civ.App.-Dallas 1967, writ ref'd n.r.e.) (limitations began to run when homeowners discovered cracking in masonry and sheetrock that would put reasonable person on notice); *see also Winn v. Martin Homebuilders, Inc.,* 153 S.W.3d 553, 558 (Tex.App.-Amarillo 2004, pet. denied); *J.M. Krupar Const. Co., Inc. v. Rosenberg,* 95 S.W.3d 322, 330-31 (Tex.App.-Houston [1st Dist.] 2002, no pet.).

In light of the court's ruling of when the Reynolds knew or should have known of their injury, it analyzed when an action arises and if the discovery rule was applicable. In the opinion the court stated:

> Ordinarily, a cause of action accrues when the wrongful act effects an injury, regardless of when the plaintiff learned of such injury. *Moreno v. Sterling Drug, Inc.,* 787 S.W.2d 348, 351 (Tex.1990). The discovery rule, on which appellants rely, is a narrow exception to this rule: it operates to toll the running of the period of limitations until the time a plaintiff discovers, or through the exercise of diligence should have discovered, the nature of his injury. *Id.* Once a claimant discovers the injury--or in the exercise of reasonable diligence should have done so--limitations commences. *Childs v. Haussecker,* 974 S.W.2d 31, 40 (Tex.1998).

The Reynolds filed their lawsuit in December 2000. This court found that the discovery rule did not apply and therefore since the Reynolds knew or should have known about the injury by 1998, the statute of limitations applied to their negligence claims.

B. *Dean v. Frank W. Neal & Associates, Inc*., 166 S.W.3d 352, 357 (Tex.App.—Fort Worth 2005, no pet. h.).

Mrs. Dean's deposition testimony shows that the Deans first observed cracking in the garage in July 1996 while the house was under construction. In an affidavit, Mrs. Dean testified that after they moved into the house, they noticed "more minor problems" with cracking in the garage and "various places" in the house, but they were assured that "these were normal cosmetic cracks that would occur with settlement of the [r]esidence." In his affidavit testimony, Lewis (a co-defendant) stated that after the October 1997 meeting, he sent one of his employees to the house to dig a hole in front of the slab so that the parties could inspect it. Thus, the court found that by no later than December 1997 the Deans themselves were aware that soil movement was causing cracking in their home to the extent that testing and monitoring of the foundation was necessary. The Deans contend that they could not have discovered the soil movement that caused the foundation problems until August 1998, when they received a report by an engineer that concluded the soil under the house had expanded more than HBC (a co-defendant) originally predicted. The court further found that the evidence showed that the Deans knew there was some cracking in the house and, thus, movement in the foundation in 1996 and 1997; they just did not know the extent of the work or expense necessary to repair it.

In light of the court's ruling of when the Deans knew or should have known of their injury, it analyzed if the discovery rule was applicable. In the opinion the court stated:

> The discovery rule is a limited exception to the statute of limitations. *Computer Assocs. Int'l, Inc. v. Altai, Inc.,* 918 S.W.2d 453, 455 (Tex.1996). The discovery rule is applied when the nature of the injury is inherently undiscoverable. *Id.* at 456. Thus, the discovery rule should be applied only when "it is difficult for the injured party to learn of the negligent act or omission." *Id.* A cause of action accrues when the plaintiff knew or should have known of the wrongful injury. *KPMG Peat Marwick,* 988 S.W.2d at 749-50. A plaintiff need not know the full extent

> of the injury before limitations begins to run. *Murphy v. Campbell,* 964 S.W.2d 265, 273 (Tex.1997).

The Deans filed their lawsuit in January 2002. This court found that the discovery rule did not apply and therefore since the Deans knew or should have known about the injury by 1997, the statute of limitations applied to all of their claims.

The impact of these two decisions has yet to be determined. However, they make clear the point that a cause of action accrues when the plaintiff knew or should have known of the wrongful injury. *KPMG Peat Marwick,* 988 S.W.2d at 749-50. Moreover, a plaintiff need not know the full extent of the injury before limitations begins to run. *Murphy v. Campbell,* 964 S.W.2d 265, 273 (Tex.1997). As such, warranty claims may be made without sufficient information, solely in an effort to avoid the running of limitations.

CONCLUSION

Construction warranties continue to evolve. The passage of the TRCCA and the court's continued efforts to further define the implied warranties have changed the landscape to a certain degree in residential construction. It is very important to clearly identify early on in your representation whether you have potential UCC warranty claims or Non UCC warranty claims. Furthermore, it is always important to remember whether you are dealing with commercial construction or residential construction. The law differs depending on this distinction (i.e. the TRCCA does not apply to commercial construction). Additionally, you should review the elements of each warranty claim to evaluate potential claims and defenses. A good resource is O'Connor's Causes of Action.

IAN P. FARIA | *Associate*

IAN P. FARIA, Associate, experienced in handling commercial and business litigation, and real estate litigation (with an emphasis on construction defects litigation). Experience includes representing various companies, lending institutions, homeowners, homebuilders, general contractors, and subcontractors in commercial and residential construction disputes, as well as in corporate, business and other real estate disputes. Also practices regularly before the American Arbitration Association.

Education:

- St. Lawrence University (B.A. 1995)
- South Texas College of Law (J.D. 1999)

Professional Associations:

- State Bar of Texas (Litigation and Construction Sections)
- Houston Bar Association (Litigation and Construction Sections)
- Houston Young Lawyers Association
- Defense Research Institute
- Director of the Bay Area Builders Association – Council of the Greater Houston Builders Association

Professional Activities:

- 2003-Present; Associate - Litigation Section - Coats, Rose, Yale, Ryman & Lee, P.C.
- 2000-2003; Associate – Litigation Section - Sheiness, Scott, Grossman & Cohn, L.L.P.
- Admitted to bar 2000, State of Texas
- Admitted to practice before United States Court of Appeals, Fifth Circuit
- United States District Courts for the Northern, Southern, Eastern, and Western Districts of Texas

Publications and Presentations:

- "Texas Residential Construction Liability Act – Is it a Sword or a Shield," presented to the University of Texas Continuing Legal Education Construction Law Seminar, Dallas, Texas, September 2003.
- "Construction Warranties," presented to the State Bar of Texas, 18th Annual Construction Law Conference, San Antonio, Texas, March 2005.
- Currently authoring a column entitled "Legal Lines" that is published monthly in the Houston Builder Magazine by the Greater Houston Builders Association.

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A Professional Corporation

3 Greenway Plaza, Suite 2000 Houston, Texas 77046
Phone: 713-651-0111 Fax: 713-651-0220
Web: www.coatsrose.com