# WARRANTIES AND CONSTRUCTION DEFECT CASES

**Jack A. Walters, III**

**Cooper & Scully, P.C.**
**Founders Square**
**900 Jackson Street, Suite 100**
**Dallas, Texas 75202**
**(214) 712-9500**
**(214) 712-9540 fax**
**www.cooperscully.com**
**jack.walters@cooperscully.com**

**2nd Annual Construction**
**January 26, 2007**

**TABLE OF CONTENTS**

I. INTRODUCTION ..... 1
II. THE TYPES OF TEXAS WARRANTIES ..... 1
A. Statutory Warranties ..... 1
1. Texas UCC ..... 1
2. TRCCA & RCLA ..... 1
3. Other Statutes ..... 1
B. Common-Law Warranties ..... 1
C. Express and Implied Warranties ..... 2
1. Express Warranties Generally ..... 2
2. Creation of Express Warranties ..... 3
3. Implied Warranties ..... 4
III. TEXAS UCC WARRANTIES ..... 4
A. Texas UCC ..... 4
B. Express Warranty for Goods ..... 6
C. Implied Warranty of Merchantability ..... 6
D. Implied Warranty of Fitness for a Particular Purpose ..... 7
IV. COMMON-LAW WARRANTIES FOR SERVICES – GENERALLY ..... 7
A. Common-law Warranties for Services ..... 7
B. Express Warranty for Services ..... 8
C. Implied Warranty of Good & Workmanlike Performance of Repair or Modification Services ..... 8
D. Professional Services ..... 8
E. Transactions involving more than one subject matter ..... 9
V. COMMON-LAW & STATUTORY WARRANTIES – RESIDENTIAL CONSTRUCTION ..... 9
A. TRCCA, TRCC, RCLA, and SIRP ..... 9
1. General Background & Coverage ..... 9
2. Statutory Warranties & Standards ..... 10
3. SIRP ..... 10
B. Implied Warranty of Good & Workmanlike Performance of Residential Construction Services ..... 11
C. Statutory Warranties and Standards ..... 12
D. Implied Warranty of Habitability ..... 12
E. Statutory Warranty of Habitability ..... 12
F. The Impact of the New Warranties & Standards on the Common-law Warranties ..... 12
VI. OTHER CONSIDERATIONS ..... 13
A. Privity (Who can sue & Who can be sued) ..... 13
B. Enforcement under DTPA ..... 14
C. Statutes of Limitation ..... 14
1. Period ..... 14
2. Accrual & Discovery Rule ..... 14
3. TRCCA ..... 15
D. Damages ..... 15

1. Generally ........................................................ 15
2. Measure of Actual Damages ........................................................ 15
3. Proximate Cause ........................................................ 16
E. Defenses ........................................................ 16
1. Statute of Limitations ........................................................ 16
2. Notice, Cure ........................................................ 17
3. Disclaimer ........................................................ 17
4. Contractual provisions limiting damages ........................................................ 17
5. Contractual Defenses ........................................................ 17
6. Professional Services ........................................................ 17
F. Proportionate Responsibility ........................................................ 18
G. Establishing Breach ........................................................ 18
VII. WARRANTY CREATION & AFFILIATION WITH TORT VS. CONTRACT. 18
A. Creation of Express Warranties ........................................................ 18
B. Express or Implied – Grounded in Contract or Tort ........................................................ 18
VIII. TEXAS UCC APPLICATION ........................................................ 19
A. Entities to which Texas UCC Applies ........................................................ 19
B. Transactions involving more than one subject matter ........................................................ 19
IX. RESIDENTIAL VS. COMMERCIAL CONSTRUCTION ........................................................ 19
A. Applicable Warranties (Express or Implied) ........................................................ 19
B. Contract vs. Operation of Law ........................................................ 19
X. PROFESSIONAL SERVICES ........................................................ 19
XI. PRIVITY ........................................................ 20

## TABLE OF AUTHORITIES

## CASES

*American Alloy Steel v. Armco, Inc.*,
777 S.W.2d 173 (Tex.App.—Houston [14th Dist.] 1989, no writ) ............................14

*American Nat'l Pet. Co. v. Transcontinental Gas Pipe Line Corp.*,
798 S.W.2d 274 (Tex. 1990).........................................................................................16

*American Tobacco Co. v. Grinnell*,
951 S.W.2d 420 (Tex. 1997)....................................................................3, 4, 6, 14, 15

*Archibald v. Act III Arabians*,
755 S.W.2d 84 (Tex. 1988)............................................................................................8

*Arthur's Garage, Inc. v. Racal-Chubb Sec. Sys.*,
997 S.W.2d 803 (Tex.App.—Dallas 1999, no pet.)............................................4, 7, 17

*Austin Co. v. Vaughn Bldg. Corp.*,
643 S.W.2d 113 (Tex. 1982)...........................................................................................5

*B&H Aircraft Sales, Inc. v. Engine Components, Inc.*,
933 S.W.2d 653 (Tex.App.—San Antonio 1996, no writ) .........................................12

*Barnett v. Coppell North Texas Court Ltd.*,
123 S.W.3d 804 (Tex.App.—Dallas 2003, pet. denied).............................................19

*Blackwood v. Tom Benson Chevrolet Co.*,
702 S.W.2d 732 (Tex.App.—San Antonio 1985, no writ) ...........................................7

*CBI NA-CON, Inc. v. UOP, Inc.*,
961 S.W.2d 336 (Tex.App.—Houston [1st Dist.] 1997, writ denied) .........................18

*Centex Homes v. Buecher*,
95 S.W.3d 266 (Tex. 2002)...................................................................................4, 11, 12

*Certain-Teed Prods. Corp. v. Bell*,
422 S.W.2d 719 (Tex. 1968).........................................................................................14

*Chaq Oil Co. v. Gardner Mach. Corp.*,
500 S.W.2d 877 (Tex.App.—Houston [14th Dist.] 1973, no writ) ..............................6

*Chilton Ins. Co. v. Pate & Pate Enters.*,
930 S.W.2d 877 (Tex.App.—San Antonio 1996, writ denied).....................................3

*Chrysler-Plymouth City, Inc. v. Guerrero*,
620 S.W.2d 700 (Tex.App.—San Antonio 1981, no writ) ........................................16

*Church & Dwight Co. v. Huey*,
961 S.W.2d 560 (Tex.App.—San Antonio 1997, pet. denied) ...................................13

*Cocke v. White*,
697 S.W.2d 739 (Tex.App.—Corpus Christi 1985, writ ref'd n.r.e.)..........................11

*Codner v. Arellano*,
40 S.W.3d 666 (Tex.App.—Austin 2001, no pet.) ....................................................20

*Compaq Computer Corp. v. Lapray*,
135 S.W.3d 657 (Tex. 2004).................................................................3, 5, 16

*Conquest Drilling Fluids, Inc. v. Tri-Flo Int'l*,
137 S.W. 3d 299 (Tex.App. - Beaumont 2004, no pet.) ............................................13

*Coulson & Cae, Inc. v. Lake L.B.J. MUD*,
734 S.W.2d 649 (Tex. 1987)....................................................................8, 11

*Crosbyton Seed Co. v. Mechura Farms*,
875 S.W.2d 353 (Tex.App.—Corpus Christi 1994, no writ)........................................4

*Dennis v. Allison*,
698 S.W.2d 94 (Tex. 1985)..........................................................................8

*Donelson v. Fairmont Foods Co.*,
252 S.W.2d 796 (Tex.Civ.App.—Waco 1952, writ ref'd n.r.e.) ..................................2

*Doyle Wilson Homebuilder v. Pickens*,
996 S.W.2d 387 (Tex.App.—Austin 1999, pet. dism'd).............................................12

*Edwards v. Schuh*,
5 S.W.3d 829 (Tex.App.—Austin 1999, no pet.) ......................................................13

*Eli Lilly & Co. v. Casey*,
472 S.W.2d 598 (Tex.App.—Eastland 1971, writ dism'd) ........................................13

*Evans v. J. Stiles, Inc.*,
689 S.W.2d 399 (Tex. 1985)...................................................................11, 12

*Fetzer v. Haralson*,
147 S.W. 290 (Tex.Civ.App.—San Antonio 1912, writ ref'd) .....................................6

*Forestpark Enter. v. Culpepper*,

754 S.W.2d 775 (Tex.App.—Fort Worth 1988, writ denied)........................................9

*Fortune Prod. Co. v. Conoco, Inc.*,
52 S.W.3d 671 (Tex. 2000)........................................................................................16

*G-W-L, Inc. v. Robichaux*,
643 S.W.2d 392 (Tex. 1982), *overruled on other grounds*, 741 S.W.2d
349 (Tex. 1987)..............................................................................................................9

*Garcia v. Texas Instr., Inc.*,
610 S.W.2d 456 (Tex. 1980).......................................................................................15

*Glockzin v. Rhea*,
760 S.W.2d 665 (Tex.App.—Houston [1st Dist.] 1988, writ denied) ...........................1

*Gupta v. Ritter Homes*,
646 S.W.2d 168 (Tex. 1983)...................................................................................11, 12

*Harris Packaging Corp. v. Baker Concrete Constr. Co.*,
982 S.W.2d 62 (Tex.App.—Houston [1st Dist.] 1998, pet. denied)........................4, 15

*Harrison Cty. Fin. Corp. v. KPMG Peat Marwick*,
948 S.W.2d 941 (Tex.App.—Texarkana 1997), *rev'd on other
grounds*, 988 S.W.2d 746 (Tex. 1999)( ..................................................................7, 14

*Henderson v. Ford Motor Co.*,
547 S.W.2d 663 (Tex.App.—Amarillo 1977, no writ)..........................................13, 15

*Henry Schein, Inc. v. Stromboe*,
102 S.W.3d 675 (Tex. 2002)............................................................................................4

*Humber v. Morton*,
426 S.W.2d 554 (Tex. 1968)..............................................................................11, 12, 18

*Humble Nat'l Bank v. DCV, Inc.*,
933 S.W.2d 224 (Tex.App.—Houston [14th Dist.] 1996, writ denied).....................3, 7

*Hyundai Motor Co. v. Rodriguez*,
995 S.W.2d 661 (Tex. 1999).................................................................................8, 15, 16

*Indust-Ri-Chem Lab., Inc. v. Par Pak Co.*,
602 S.W.2d 282 (Tex.App.—Dallas 1980, no writ) ....................................................13

*JHC Ventures, L.P. v. Fast Trucking, Inc.*,
94 S.W.3d 762 (Tex.App.—San Antonio 2002, no pet.)................................15, 16, 18

*J.M. Krupar Constr. Co., Inc. v. Rosenberg*,
95 S.W.3d 322 (Tex.App.—Houston [1st Dist.] 2002, no pet.) ....................................20

*Kamarath v. Bennett*,
568 S.W.2d 658 (Tex. 1978)....................................................................................11

*Kerrville HRH, Inc. v. City of Kerrville*,
803 S.W.2d 377 (Tex.App.—San Antonio 1990, writ denied).....................................18

*Kline v. U.S. Mar. Corp.*,
882 S.W.2d 597 (Tex.App.—Houston [1st Dist.] 1994, writ denied) ..........................14

*La Sara Grain Co. v. First Nat'l Bank*,
673 S.W.2d 558 (Tex. 1984)......................................................................................1

*MacIntire v. Armed Forces Benefit Ass'n*,
27 S.W.3d 85 (Tex.App.—San Antonio 2000, no pet.)..................................................7

*Mandell v. Hamman Oil & Ref. Co.*,
822 S.W. 2d 153 (Tex.App. - Houston [1st Dist.] 1991, writ denied)..........................13

*March v. Thiery*,
729 S.W.2d 889 (Tex.App.—Corpus Christi 1987, no writ)..................................11, 16

*Melody Home Mfg. Co. v. Barnes*,
741 S.W.2d 349 (Tex. 1987)...............................................................................4, 8, 9

*Melody Home Mfg. Co. v. Morrison*,
502 S.W.2d 196 (Tex.App.—Houston [1st Dist.] 1973, writ ref'd
n.r.e.) ..................................................................................................................15

*Miller v. Spencer*,
732 S.W.2d 758 (Tex.App.—Dallas 1987, no writ) ......................................................17

*Morris v. Kaylor Eng'g Co.*,
565 S.W.2d 334 (Tex.App.—Houston [14th Dist.] 1978, writ ref'd
n.r.e.) ..................................................................................................................15

*Murphy*,
946 S.W.2d at 269......................................................................................................17

*Murphy v. Campbell*,
964 S.W.2d 265 (Tex. 1997)........................................................................................9

*Nast v. State Farm Fire & Cas. Co.*,
82 S.W.3d 114 (Tex.App.—San Antonio 2002, no pet.)................................................7

*National Bugmobiles, Inc. v. Jobi Props.*,
773 S.W.2d 616 (Tex.App.—Corpus Christi 1989, writ denied) ............................7, 13

*PPG Industrial v. JMB/Houston Ctrs. Partners*,
146 S.W. 3d 79 (Tex. 2004)...............................................................................13, 14, 19

*Pako Corp. v. Thomas*,
855 S.W.2d 215 (Tex.App.—Tyler 1993, no writ).....................................................14

*Parkway Co. v. Woodruff*,
901 S.W.2d 434 (Tex. 1995)...................................................................................7, 8, 14

*Perry v. Breland*,
16 S.W. 3d 182 (Tex.App. - Eastland 2000, pet. Denied) ..........................................13

*Plas-Tex, Inc. v. U.S. Steel Corp.*,
772 S.W.2d 442 (Tex. 1989)..........................................................................................6

*Raymond v. Rahme*,
78 S.W.3d 552 (Tex.App.—Austin 2002, no pet.) .....................................................20

*Redman Homes, Inc. v. Ivy*,
920 S.W.2d 664 (Tex. 1996).........................................................................................16

*Richman v. Watel*,
565 S.W.2d 101 (Tex.App.—Waco 1978), *writ ref'd n.r.e.*, 576
S.W.2d 779 (Tex. 1978)..................................................................................................15

*Rocky Mountain Helicopters, Inc. v. Lubbock Cty. Hosp. Dist.*,
987 S.W.2d 50 (Tex. 1988)..............................................................................................7

*S.V. v. R.V.*,
933 S.W.2d 1 (Tex. 1996)...............................................................................................15

*Safeway Stores v. Certainteed Corp.*,
710 S.W.2d 544 (Tex. 1986)......................................................................................14, 15

*Signal Oil & Gas Co. v. Universal Oil Prods.*,
572 S.W.2d 320 (Tex. 1978)......................................................................................15, 16

*Smith v. Kinslow*,
598 S.W.2d 910 (Tex.App.—Dallas 1980, no writ) ...................................................16

*Sorokolit v. Rhodes*,
889 S.W.2d 239 (Tex. 1994)...................................................................................7, 8, 17

*Southerland v. Northeast Datsun*,
659 S.W.2d 889 (Tex.App.—El Paso 1983, no writ) ....................................................6

*Southwestern Bell Tel. Co. v. FDP Corp.*,
811 S.W.2d 572 (Tex. 1991)..............................................................................3, 7, 8, 17

*Superior Trucks, Inc. v. Allen*,
664 S.W.2d 136 (Tex.App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.) ........................................................................................................15

*Texas Processed Plastics, Inc. v. Gray Enters.*,
592 S.W.2d 412 (Tex.App.—Tyler 1979, no writ).....................................................13

*Tips v. Hartland Developers, Inc.*,
961 S.W.2d 618 (Tex.App.—San Antonio 1998, no writ) .........................................19

*Trans-Gulf Corp. v. Performance Aircraft Servs.*,
82 S.W.3d 691 (Tex.App.—Eastland 2002, no pet.) .....................................................7

*USF&G v. Eastern Hills Methodist Church*,
609 S.W.2d 298 (Tex.Civ.App.—Fort Worth 1980, writ ref'd n.r.e.) .........................14

*U.S. Tire-Tech, Inc. v. Boeran*,
110 S.W.3d 194 (Tex.App.—Houston [1st Dist.] 2003, pet. denied)................6, 13, 14

*Underkofler v. Vanasek*,
53 S.W.3d 343 (Tex. 2001)...........................................................................................14

*Valley Datsun v. Martinez*,
578 S.W.2d 485 (Tex.App.—Corpus Christi 1979, no writ)........................................3

*Van Zandt v. Fort Worth Press*,
359 S.W.2d 893 (Tex. 1962)...........................................................................................7

*White Budd Van Ness P'Ship v. Major-Gladys Drive Joint Venture*,
798 S.W.2d 805 (Tex.App.—Beaumont 1990, writ dism'd) .........................................9

*White Budd Van Ness P'Ship v. Major-Gladys Drive Joint Venture*,
811 S.W.2d 541 (Tex. 1991)...........................................................................................9

*Wilcox v. Hillcrest Mem'l Park*,
696 S.W.2d 423 (Tex.App.—Dallas 1985), *writ ref'd n.r.e.*, 701 S.W.2d 842 (Tex. 1986)( ..........................................................................................17

*Womco, Inc. v. Navistar Int'l Corp.*,

84 S.W.3d 272 (Tex.App.—Tyler 2002, no pet.) ....................................................17

## STATUTES

10 Tex. Admin. Code § 301.1 (12), (20), & ( ..........................................................10, 11

10 Tex. Admin. Code § 304.1(b) ..................................................................10, 11

10 Tex. Admin. Code § 304.3(a)(1)-( .........................................................12, 15

10 Tex. Admin. Code § 313.1(a)(3).......................................................................10

15 U.S.C. § 2311(b) .......................................................................................1

## MISCELLANEOUS

*Webster's New International Dictionary Unabridged* 2578 (3rd ed. 1993) ........................1

*Webster's New Universal Unabridged Dictionary* 1632 (1st ed. 1996) ..............................8

13

# WARRANTIES AND CONSTRUCTION DEFECT CASES

## I. INTRODUCTION

What is a "warranty"? The term "warranty" is difficult to define in the abstract. Generally, it can be defined as written guarantee of the integrity of a product and the good faith of the maker given to the purchaser and generally specifying that the maker will for a period of time be responsible for the repair or replacement of defective parts and will sometimes also provide periodic servicing. *Webster's New International Dictionary Unabridged* 2578 (3rd ed. 1993). There is no clear definition in relevant Texas statutes, and its meaning as set forth in Texas caselaw is ambiguous. *La Sara Grain Co. v. First Nat'l Bank*, 673 S.W.2d 558, 565 & n.4 (Tex. 1984). A "warranty" can loosely be defined as a guaranty of the condition or quality of a product or service made by the seller to the buyer. This guaranty or "warranty" is independent of any promises, obligations, or duties arising out of the sale transaction itself, and thus, a breach of the warranty gives rise to a separate action for damages. *Glockzin v. Rhea*, 760 S.W.2d 665, 669 (Tex.App.—Houston [1st Dist.] 1988, writ denied).

## II. THE TYPES OF TEXAS WARRANTIES

The four main types of warranties are statutory warranties, common-law warranties, express warranties, and implied warranties. Warranties are created either by statute or the common-law. Statutory warranties are created by legislative bodies and are set forth in codes, ordinances, and other legislative enactments. Common-law warranties are created by courts and judges and are generally set forth in the published opinions of the courts. Statutory and common-law warranties can be either affirmatively expressed or impliedly asserted.

### A. Statutory Warranties

#### 1. <u>Texas UCC</u>

The primary source of statutory warranties in Texas is the Texas Uniform Commercial Code ("Texas UCC"), which is set forth in relevant portion in chapters 2 and 2A of the Texas Business & Commerce Code. The Texas UCC warranties cover transactions involving the sale or lease of "goods." The three relevant Texas UCC warranties are: (1) express warranty of goods; (2) implied warranty of merchantability; and (3) implied warranty of fitness for a particular purpose.

#### 2. <u>TRCCA & RCLA</u>

With regard to residential construction, warranty law is now virtually all statutory. The two primary statutory sources of warranty law related to residential construction are (1) the Texas Residential Construction Commission Act ("TRCCA"), and corollary warranties and standards established by the Texas Residential Construction Commission ("TRCC"); and (2) the Residential Construction Liability Act ("RCLA").

#### 3. <u>Other Statutes</u>

Other potentially relevant statutes for both residential and commercial construction include the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, the Texas Manufactured Housing Standards Act, and section 92.061 of the Texas Property Code. The Magnuson-Moss Act provides for actions on express warranties covering consumer products. 15 U.S.C. § 2311(b). It applies only to consumer goods distributed in commerce. *Id.* § 2301(1). The Texas Manufactured Housing Act mandates that all new HUD homes sold to consumers in Texas be covered by written warranties from both the manufacturer and retailer. Tex. Occ. Code §§ 1201.351(a), 1201.352(a). The Texas Property Code provides for a statutory duty to repair and statutory remedies related to real estate leases. Tex. Prop. Code § 92.061.

### B. Common-Law Warranties

Generally, common-law warranties are created when there is a demonstrated and

compelling public policy need, and no protection from statutory warranties. A demonstrated and compelling need arises when there are no adequate remedies available to the wronged party. Inadequacy of remedies may be present when other rules of law, such as the requirements of privity of contract or buyer reliance, are used to prevent relief to consumers. Inadequacy may also be present when public policy considerations necessitate judicial intervention. For instance, when it is difficult to determine who should bear responsibility, creation of an implied warranty can determine burden allocation.

Likewise, once established, common-law warranties are applied only when there are no adequate *legal* remedies. Oftentimes, subsequent to the creation of a common-law warranty, adequate legal remedies will be provided through legislative action. When this occurs, statutory warranties can partially or completely eliminate the common-law warranties. A statutory warranty can render a common-law warranty by “codification” or elimination. Codification maintains the warranty but sets forth its substance in statutory sources. Statutory action can also specifically eliminate a common-law warranty, whether or not the statute provides a substitute warranty. Some statutory action only partially eliminates a common-law warranty. In such a situation, the statute may partially codify, eliminate, or replace the substance of a common-law warranty. The substance of the common-law warranty not covered by statute remains intact.

Examples of legislative action eliminating or modifying common-law warranties are: (1) Texas UCC warranties of title and against infringement, which abolished the common-law warranty of quiet possession, (2) Texas Property Code section 92.061 which limited the common-law warranty of habitability, and (3) the Texas UCC warranty of merchantability which abolished the common-law implied warranty that food is fit for human consumption. An example of explicit statutory elimination of common-law warranty rules is found in comment 2 of section 1.103 of the Texas Business & Commerce Code, which provides that principles of law in conflict with applicable provisions of the Texas UCC do not apply.

Reconciling the impact of legislative enactments, the following common-law warranties are currently recognized in Texas: (1) express warranty for services, (2) implied warranty of good and workmanlike performance in the repair and modification of existing tangible goods or property, (3) implied warranty of good and workmanlike performance in the construction of a residential property, (4) implied warranty of habitability in the sale of residential property, and (5) implied warranty of suitability in the lease of commercial property. In light of the TRCCA, TRCC, and RCLA, application of common-law warranties to residential construction depends on whether defects were discovered on or after September 1, 2003, and whether construction commenced on or after June 1, 2005. For more recent construction, there are no implicit warranties for residential construction. All warranties for residential construction are now statutory and are codified in the TRCCA.

## C. Express and Implied Warranties

### 1. Express Warranties Generally

Express warranties are created and defined primarily by agreements between parties and the negotiated aspects of such agreements. The focus is on the parties’ active conduct and words, as well as the documents evidencing such negotiation, such as contract documents. In light of the fact that express warranties arise out of parties’ negotiated agreements, breach of an express warranty is considered similar to a breach-of-contract action, rather than a tort. Since an express warranty is generally a matter of contract, the parties are in large part able to define or limit the “contractual” obligations respecting the thing sold or the services rendered, and to specify how the warranty is to be fulfilled. *Donelson v. Fairmont Foods Co.,* 252 S.W.2d 796, 799 (Tex.Civ.App.—Waco 1952, writ ref’d n.r.e.). Accordingly,

express warranties can generally be disclaimed. *See Southwestern Bell Tel. Co. v. FDP Corp.*, 811 S.W.2d 572, 575 (Tex. 1991); Tex. Bus. & Com. Code § 2.316.

2. Creation of Express Warranties

Creation of express warranties under both the Texas UCC and common-law requires an affirmative representation by the seller or lessor, which becomes part of the "basis of the bargain." The representation can be oral or written, must be communicated to the buyer, and must relate to the quality or characteristics of the goods or services, or under the Texas UCC, relate to the title of the goods. The requirement that the representation relate to the quality, characteristics, or title distinguishes breaches of warranty from breaches of contract. *Chilton Ins. Co. v. Pate & Pate Enters.*, 930 S.W.2d 877, 890-9 (Tex.App.—San Antonio 1996, writ denied); *see Southwestern Bell Tel. Co. v. FDP Corp.*, 811 S.W.2d 572, 576 (Tex. 1991). A warranty provision describes the character, quality, or title of goods or services, while a contractual provision identifies the subject matter of the sale or lease. *See Chilton*, 930 S.W.2d at 891-92; *Humble Nat'l Bank*, 933 S.W.2d at 233-34. Representations related to contractual duties can form the basis of a breach of contract action not a breach of warranty action. *Humble*, 933 S.W.2d at 234.

A representation can be communicated by affirmation of fact, by promise, by description, or in the case of Texas UCC warranties, by displaying a sample or model. An affirmation of fact can be either a factual assertion about a matter on which plaintiff is ignorant, or a declaration of belief related to a matter on which the plaintiff has no special knowledge and the defendant would be expected to have an opinion. *See Valley Datsun v. Martinez*, 578 S.W.2d 485, 490 (Tex.App.—Corpus Christi 1979, no writ). However, a mere expression of opinion or affirmation of value will not suffice. Tex. Bus. & Com. Code § 2.13(b). Distinguishing a fact from an opinion depends on the specificity of the statement, the comparative knowledge of the defendant and plaintiff, and whether it relates to a post or current event or condition in contrast to a future event or condition. *Humble Nat'l Bank v. DCV, Inc.*, 933 S.W.2d 224, 230 (Tex.App.—Houston [14th Dist.] 1996, writ denied). Similar to an affirmation of fact, a representation by promise must be more than a mere expression of opinion or affirmation of fact. Tex. Bus. & Com. Code § 2.313(b). A representation by description does not have to be communicated with words. It can be communicated through technical specifications, blueprints, and the like, or established by a course of dealing. *Id.* § 2.313 cmt. 5. In Texas UCC warranties, the representation can be communicated by displaying a sample or model of the good. To create a warranty in this way, the defendant must reference the sample or model in a way that suggests the other goods contain the same characteristics. *Id.* § 2.313 cmt. 6. A sample is taken from the goods when they are available; a model is shown when the goods are not available. In light of the fact that a sample is taken from the actual present goods, the presumption that the goods contain the same characteristics is stronger than when a model is shown. This is especially true when a model is shown and the plaintiff subsequently modifies the model. *Id.* Thus, when samples are used, a presumption that the goods will be of the same quality or character will apply unless specifically negated.

In Texas UCC and common-law breach of express warranty actions, the plaintiff must prove that the defendant's representation was the "basis of the bargain." Tex. Bus. & Com. Code § 2.313; *American Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 436 (Tex. 1997) (UCC); *Humble Nat'l Bank*, 933 S.W.2d at 233 (common-law); *FDP Corp.*, 811 S.W.2d at 576 n.3 (common-law). The Texas UCC does not specifically define what constitutes "basis of the bargain." According to the Texas Supreme Court, this can "loosely" be viewed as a requirement of reliance. *Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657, 677 (Tex. 2004); *American Tobacco*, 951 S.W.2d at 436. However, proof of reliance may not be

required in all cases. When the representation occurs during the bargain, there is a rebuttable presumption that the representation became part of the "basis of the bargain." Tex. Bus. & Com. Code § 2.313 cmt. 3; *Crosbyton Seed Co. v. Mechura Farms*, 875 S.W.2d 353, 361 (Tex.App.—Corpus Christi 1994, no writ). In such cases, the plaintiff does not have to prove reliance unless the defendant first offers proof on nonreliance. Tex. Bus. & Com. Code § 2.313 cmt. 3. In contrast, if the representation is made subsequent to the bargain, there is no rebuttable presumption and the plaintiff must offer evidence of reliance. *See Harris Packaging Corp. v. Baker Concrete Constr. Co.*, 982 S.W.2d 62, 66-67 (Tex.App.—Houston [1st Dist.] 1998, pet. denied). In these cases, proof of reliance requires an existing contract, and the representation must be considered a "modification" as defined by section 2.209 of the Texas UCC. *Id*. Despite the evidentiary presumptions that can allocate the burden of proof, it is clear that some reliance is required. *See American Tobacco*, 951 S.W.2d at 436. However, the precise level of reliance that must be shown is not clear. *See Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 686 (Tex. 2002).

3. <u>Implied Warranties</u>

In contrast to express warranties, implied warranties arise by operation of law. In other words, they are created when certain court or legislature defined factual situations or sets of conditions exist. They do not require any particular language or action by the parties to create them. Thus, the focus is not so much on the parties' conduct, words or documents evidencing negotiation between the parties; but rather, on the public policy considerations the courts and legislative authorities took into account in issuing judicial opinions and enacting statutes and codes. Accordingly, a breach of an implied warranty is considered a tort rather than a breach of contract.

Most, but not all, common-law warranties may be disclaimed. The common-law implied warranty of good and workmanlike performance of services in the construction of residential property can be disclaimed. *Centex Homes v. Buecher*, 95 S.W.3d 266, 268 (Tex. 2002). The warranty can be disclaimed by an express agreement between the parties that provides for the manner, performance, or quality of the desired construction. *Id*. In contrast, the implied warranty of good and workmanlike performance of repair and modification services cannot be disclaimed. *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 355 (Tex. 1987); *Arthur's Garage, Inc. v. Racal-Chubb Sec. Sys.*, 997 S.W.2d 803, 812-13 (Tex.App.—Dallas 1999, no pet.); see also *Centex Homes v. Buecher*, 95 S.W.3d 266, 270 (Tex. 2002). The common-law warranty of habitability can be disclaimed only in limited circumstances, such as a home buyer's express and full knowledge of defects. *Centex Homes*, 95 S.W.3d at 274.

## III. TEXAS UCC WARRANTIES

The relevant Texas UCC warranties are (1) express warranty for goods, (2) implied warranty of merchantability, and (3) implied warranty of fitness for a particular purpose.

### A. Texas UCC

The Texas UCC warranties protect the quality, characteristics, and/or title of "goods" sold or leased. Generally, "goods" are all things that are (1) movable and (2) identified at the time a contract is entered. An item is "movable" when it is capable of being moved or displaced. Mobile homes and motor vehicles are considered movable, while a house is not. Items can be "identified at the time of contract" in the following ways: (1) by explicit agreement, (2) if the goods exist at the time of contract and are identified, (3) if the goods are future goods, when they are shipped, marked, or otherwise designated by the seller as the goods to which the contract refers, and (4) for crop sales, when the crops are planted or otherwise become growing crops.

Some items that are specifically considered "goods" in sales transactions are: (1) mobile homes, (2) motor vehicles, (3)

specially manufactured goods, (4) things attached to realty that can be severed by either party without harm, such as growing crops, (5) things to be severed by the seller, such as minerals like oil and natural gas and structures. Items that are specifically not considered "goods" in sales transactions are: (1) homes, (2) money, unless it is the money itself that is being sold, and (3) things to be severed by the buyer, such as minerals including oil and natural gas. Used goods are sometimes covered by the UCC. The Texas UCC is silent on whether used goods are covered, thus the courts have defined when used goods are subject to UCC warranty liability. The implied warranty of title applies to used goods, and express warranties typically apply to used goods. The implied warranties of merchantability and fitness for a particular purpose do not apply if the buyer knows the goods are used.

Under the Texas UCC, parties who sell or contract to sell goods are subject to warranty liability. This includes those parties who manufacture or assemble goods and sell their completed products. Some UCC warranties, including the warranties of merchantability and against infringement, also require that the seller be a "merchant." The term merchant implies some level of expertise or involvement with regard to the good. It does not include casual or inexperienced sellers. Under the Texas UCC, a "merchant" is somebody who (1) deals in goods of the kind sold, by transacting business in that good, or (2) by its occupation, either directly or through an agent or intermediary, holds itself out as having knowledge peculiar to the practices or goods involved in the sale. An explicit representation of special knowledge is not required because the occupation of selling a particular good represents special knowledge of that good. In addition to actual sellers, upstream manufacturers or initial suppliers of goods can be subject to warranty liability under the Texas UCC. The degree, if any, to which such manufacturers or initial suppliers can be subject to liability depends upon whether the warranty is express or implied and whether the alleged damages are purely economic or for personal injury. Further, parties who did not actually buy or contract to buy goods, including a subsequent buyers and non-buyers, can bring suit for breach of warranty against those sellers, manufacturers, or initial suppliers with whom they are within a certain level of privity.

Most (excluding consumer leases) Texas UCC warranties also contain a condition precedent to a plaintiff's recovery, which requires a plaintiff to provide oral or written notice to the defendant sufficient to provide an opportunity to cure any defect. It is the plaintiff's duty to notify the defendant, and the duty is not excused even if the defendant has knowledge of the breach or defect. The notice must be provided to the seller or lessor, or their agent or representative. In breach of express warranties, it is unclear whether notice has to be given to defendants who are remote sellers or manufacturers not a party to the contract. Similar to the privity requirements discussed below, there is a split in the Texas Courts of Appeals, and the Texas Supreme Court has expressly declined to decide this issue. *See Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657, 674 n.14 (Tex. 2004).

The timeframe in which notice must be given depends on whether a specific time is specified in the parties' agreement, and on the type of buyer. If the parties' agreement provides a specific notice time it will control. *See* Tex. Bus. & Com. Code §§ 1.205 cmt. 2 (general requirement), 2.607(c)(1) (sales), 2A.516(c)(1) (leases). In the absence of a specific provision, the courts will apply a reasonable time. Tex. Bus. & Com. Code § 1.205; *Austin Co. v. Vaughn Bldg. Corp.*, 643 S.W.2d 113, 115 (Tex. 1982). Determination of what constitutes reasonable time depends on the nature, purpose, and circumstances of the action, and on the type of buyer. Tex. Bus. & Com. Code §§ 1.205(a), 2.607 cmt. 4, 2.607(c)(1), 2A.516(c)(1). Generally, the time period is measured from the time plaintiff discovers or should have discovered any breach. Tex. Bus. & Com. Code §§ 2.607(c)(1), 2A.516(c)(1). For merchants a commercial standard is used to determine when the plaintiff discovered or should have

discovered any breach. Tex. Bus. & Com. Code § 2.607 cmt. 4. For retail consumers, the UCC specifically does not apply a commercial standard, but no alternative standard is provided. *Id*. Thus, in practice, they are generally given more time than merchants. *See Southerland v. Northeast Datsun*, 659 S.W.2d 889, 892-93 (Tex.App.—El Paso 1983, no writ). When a plaintiff is not the original buyer or lessee, reasonable time to provide notice is not measured from the time the plaintiff discovers or should have discovered any breach. Instead, a plaintiff need only use good faith in providing notice once it has had time to become aware of its legal situation. Tex. Bus. & Com. Code § 2.607 cmt. 5. Finally, if the defendant is a remote seller or manufacturer, the time in which to provide notice may be extended due to difficulty in identifying the defendant. *See U.S. Tire-Tech, Inc. v. Boeran*, 110 S.W.3d 194, 199 (Tex.App.—Houston [1st Dist.] 2003, pet. denied).

The purpose of the UCC notice requirements is to provide a defendant with a reasonable opportunity to cure any defect or breach. No specific time is required, but the defendant must be given a chance to cure. Oftentimes, the number of attempts to cure, if any, will help determine whether sufficient opportunity was given. Unlike the Texas UCC, notice of breach is not a condition precedent to recovery under common-law warranties. However, courts will enforce a provision in the parties' agreement requiring notice of breach. *See Fetzer v. Haralson*, 147 S.W. 290, 294-95 (Tex.Civ.App.—San Antonio 1912, writ ref'd).

## B. Express Warranty for Goods

A plaintiff can recover on a Texas UCC breach of express warranty claim if it can prove that (1) the transaction involved the sale or lease of goods; (2) the defendant made a representation to the plaintiff regarding the quality or characteristics of the goods; (3) the representation was made by affirming a fact, promising, describing, or displaying a sample or model with regard to the goods; (4) the representation formed the "basis of the bargain;" (5) the quality or characteristics of the goods were not as represented; (6) sufficient notice and opportunity to cure were provided; and (7) the plaintiff sustained injury. Tex. Bus. & Com. Code § 2.313, § 2.607(c)(1), § 2.714, § 2.715; *American Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 436 (Tex. 1997).

## C. Implied Warranty of Merchantability

A plaintiff can recover on a Texas UCC breach of implied warranty of merchantability claim if it can prove that (1) the transaction involved the sale or lease of new or used goods; (2) the goods were unmerchantable; (3) sufficient notice and opportunity to cure were provided; and (4) the plaintiff sustained injury. The warranty only applies to used goods when the buyer has no knowledge that they were used or secondhand goods. *Chaq Oil Co. v. Gardner Mach. Corp.*, 500 S.W.2d 877, 878 (Tex.App.—Houston [14th Dist.] 1973, no writ). The warranty only covers goods that were unmerchantable when they left the defendant's possession, it does not cover future or inherent defects. *See Plas-Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 444 (Tex. 1989).

Goods are "merchantable" if they meet all of the following criteria: (1) they would pass without objection in the trade; (2) they are fit for their ordinary purpose; (3) they must meet the requirements of the parties' agreement and be of even kind, quality, and quantity; (4) they must be adequately contained, packaged, and labeled as required by the parties' agreement (5) they must conform to the promises or affirmations of fact on the goods' container or label; and (6) if the goods are fungible they must be of fair, average quality. "Fungible" goods are those of which any unit, by its very nature or usage of trade, is the equivalent of any other like unit, or goods that by agreement are treated as equivalent. Tex. Bus. & Com. Code § 1.201(b)(18)(A), (B).

### D. Implied Warranty of Fitness for a Particular Purpose

A plaintiff can recover on a Texas UCC breach of implied warranty of fitness for a particular purpose claim if it can prove that (1) the transaction involved the sale or lease of goods; (2) the defendant knew the plaintiff was buying the goods for a particular purpose and relying on the defendant's skill or judgment to select goods fit for the particular purpose; (3) the goods were unfit for the particular purpose; (4) sufficient notice and opportunity to cure were provided; and (5) the plaintiff sustained injury. Tex. Bus. & Com. Code §§ 2.314 cmt. 13, 2.315 & cmts., 2.607(c)(1).

## IV. COMMON-LAW WARRANTIES FOR SERVICES – GENERALLY

The relevant common-law warranties generally (excluding those specific to residential construction) are (1) common-law express warranties for services, and (2) common-law implied warranty of good & workmanlike performance of repair or modification services to existing goods or property.

### A. Common-law Warranties for Services

The provision of "services" is generally governed by common-law warranties. *See Southwestern Bell*, 811 S.W. 2d at 574. In the context of common-law warranties, "service" generally refers to an "action or use that furthers some end or purpose; conduct or performance that assists or benefits someone or something; deeds useful or instrumental toward some object." *Van Zandt v. Fort Worth Press*, 359 S.W.2d 893, 895 (Tex. 1962). Likely due to their contractual nature, Texas courts have not limited the scope of services for which an express warranty can be given. *See Sorokolit v. Rhodes*, 889 S.W.2d 239, 242-43 (Tex. 1994)(physician's services); *Southwestern Bell Tel. Co. v. FDP Corp.*, 811 S.W.2d 572, 576 (Tex. 1991)(advertising services); *Arthur's Garage, Inc. v. Racal-Chubb Sec. Sys.*, 997 S.W.2d 803, 812 (Tex.App.—Dallas 1999, no pet.)(security alarm services); *Harrison Cty. Fin. Corp. v. KPMG Peat Marwick*, 948 S.W.2d 941, 947-48 (Tex.App.—Texarkana 1997), *rev'd on other grounds*, 988 S.W.2d 746 (Tex. 1999)(auditing services); *Humble Nat'l Bank v. DCV, Inc.*, 933 S.W.2d 224, 234 (Tex.App.—Houston [14th Dist.] 1996, writ denied)(banking services); *National Bugmobiles, Inc. v. Jobi Props.*, 773 S.W.2d 616, 621-22 (Tex.App.—Corpus Christi 1989, writ denied)(extermination services); *Blackwood v. Tom Benson Chevrolet Co.*, 702 S.W.2d 732, 734 (Tex.App.—San Antonio 1985, no writ)(auto mechanic's services).

In contrast, the tort nature of implied warranties limits the scope of services to which they apply. Under Texas law, common-law implied warranties for the good & workmanlike performance of services are limited to: (1) the repair and modification of existing tangible goods or property, and (2) the construction of residential property. In light of fact that creation of an implied warranty requires a demonstrated, compelling need and the lack of adequate remedies, Texas courts have declined to recognize an implied warranty of good & workmanlike performance of services in several other transactions. *See Parkway Co. v. Woodruff*, 901 S.W.2d 434, 438-40 (Tex. 1995)(real estate developer's future development services); *Rocky Mountain Helicopters, Inc. v. Lubbock Cty. Hosp. Dist.*, 987 S.W.2d 50, 53 (Tex. 1988)(services incidental to helicopter maintenance rather than direct maintenance of helicopters); *see also Trans-Gulf Corp. v. Performance Aircraft Servs.*, 82 S.W.3d 691, 697 (Tex.App.—Eastland 2002, no pet.); *Nast v. State Farm Fire & Cas. Co.*, 82 S.W.3d 114, 123 (Tex.App.—San Antonio 2002, no pet.)(sale of flood insurance); *MacIntire v. Armed Forces Benefit Ass'n*, 27 S.W.3d 85, 91 (Tex.App.—San Antonio 2000, no pet.)(service provided by life insurance companies); *Arthur's Garage, Inc. v. Racal-Chubb Sec. Sys.*, 997 S.W.2d 803, 813 (Tex.App.—Dallas 1999, no pet.)(installation of goods).

Under the common-law, parties who sell or contract to sell services are subject to warranty liability. There is no requirement that the seller be a "merchant." Under the common-law, parties who buy or contract to buy services are able to bring suit for breach of warranty. Parties who did not actually buy or contract to buy services, including a subsequent buyers and non-buyers, can bring suit for breach of warranty against those sellers, repairmen, and builders with whom they are within a certain level of privity.

### B. Express Warranty for Services

A plaintiff can recover on a common-law express warranty claim for services if it can prove that (1) the transaction involved the sale of services; (2) the defendant made a representation to the plaintiff regarding the quality or characteristics of the services; (3) the representation was made by affirming a fact about, promising, or describing the services; (4) the representation formed the "basis of the bargain;" (5) the quality or characteristics of the services were not as represented; (6) the plaintiff complied with any notice provisions set forth in the parties' agreement; and (7) the plaintiff sustained injury. *Southwestern Bell Tel. Co. v. FDP Corp.*, 811 S.W.2d 572, 576-77 & n.3 (Tex. 1991).

### C. Implied Warranty of Good & Workmanlike Performance of Repair or Modification Services

A plaintiff can recover on a common-law implied warranty of good & workmanlike performance of services claim if it can prove that (1) the transaction involved the sale of services; (2) the defendant performed repair or modification services; (3) the repair or modification was to the plaintiff's existing tangible goods or property; (4) the defendant did not perform in a good & workmanlike manner; and (5) the plaintiff sustained injury. *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 439 & n.3 (Tex. 1995); *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 354 (Tex. 1987); *see Hyundai Motor Co. v. Rodriguez*, 995 S.W.2d 661, 667-68 (Tex. 1999).

A "repair" is any service that puts back in good condition any item after decay or damage (i.e., a service that renews, restores, amends, or revives). *Webster's New Universal Unabridged Dictionary* 1632 (1st ed. 1996). A "modification" includes any change or alteration that introduces new elements into the details of the subject matter or cancels some of them, but that leaves the general purpose and effect of the subject matter intact. *See Archibald v. Act III Arabians*, 755 S.W.2d 84, 86 (Tex. 1988). "Existing tangible goods or property" means all moveable personal property other than money. *Id*. at 85. "Good & workmanlike manner" means the 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 the work. *Melody Home*, 741 S.W.2d at 354; *Coulson & Cae, Inc. v. Lake L.B.J. MUD*, 734 S.W.2d 649, 651 (Tex. 1987). A claim for breach of the implied warranty of good & workmanlike performance of repair or modification services focuses on the manner in which the work was done, not the results. *Melody Home*, 741 S.W.2d at 355.

### D. Professional Services

Whether professional services can be protected by warranties depends in part upon whether the warranty is express or implied. Likely due to their contractual nature, Texas courts have not limited the scope of services for which an express warranty can be given. Professional service providers can even be subject to express warranty liability if they promise a specific outcome. *See Sorokolit v. Rhodes*, 889 S.W.2d 239, 242-43 (Tex. 1994).

Implied warranties do not apply to professional services. *See Dennis v. Allison*, 698 S.W.2d 94, 95-96 (Tex. 1985). In *Dennis*, the Texas Supreme Court rejected application of implied warranties to professional services. However, when the good & workmanlike performance of services warranty was created by the Texas

Supreme Court in *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349 (Tex. 1987), the Court expressly refused to consider whether the warranty applied to services in which the essence of the transaction was the exercise of professional judgment by the service provider. *Id*. at 354. Subsequently, some courts interpreted this refusal as maintaining the rule in *Dennis*, which held that implied warranties do not apply to professional services. *See Forestpark Enter. v. Culpepper*, 754 S.W.2d 775, 779 (Tex.App.—Fort Worth 1988, writ denied). However, in 1990, the Beaumont Court of Appeals interpreted the *Melody* refusal differently, applying the implied warranty of good & workmanlike performance to professional services. *See White Budd Van Ness P'Ship v. Major-Gladys Drive Joint Venture*, 798 S.W.2d 805, 813 (Tex.App.—Beaumont 1990, writ dism'd)(applying to architectural services). The Beaumont court pointed to the "paramount reasoning, rationale, and judicial philosophy" of the *Melody* decision as support for their interpretation, and specifically requested that the Texas Supreme Court decide the issue. *Id*. Writ of error was filed with the Texas Supreme Court, but was dismissed without consideration of the merits due to repeated failures to comply with the court's briefing requirements. *See White Budd Van Ness P'Ship v. Major-Gladys Drive Joint Venture*, 811 S.W.2d 541 (Tex. 1991). Subsequently, the Texas Supreme Court once again explicitly rejected application of implied warranties to professional services. *See Murphy v. Campbell*, 964 S.W.2d 265, 269 (Tex. 1997). Thus, the continued viability of the Beaumont Court of Appeals decision in *White Budd* is highly questionable at best. However, one lingering question that might present itself on a case-by-case basis is what exactly qualifies as "professional services?"

### E. Transactions involving more than one subject matter

There are certain rules used to determine whether particular statutory or common-law warranties apply when a transaction involves both goods and services. If the dominant factor of the transaction is the sale of goods, then the Texas UCC applies. *See G-W-L, Inc. v. Robichaux*, 643 S.W.2d 392, 394 (Tex. 1982), *overruled on other grounds*, 741 S.W.2d 349 (Tex. 1987). In contrast, common-law warranties apply if the dominant factor is the sale of services. *Id*. In Texas, courts look to the nature of the contract to determine the dominant factor or essence of the transaction. With regard to building contracts, the essence of the transaction is the furnishing of labor and performance of work, not the sale of building materials; thus, the Texas UCC does not apply. *G-W-L*, 643 S.W.2d at 394.

## V. COMMON-LAW & STATUTORY WARRANTIES – RESIDENTIAL CONSTRUCTION

The relevant common-law and statutory warranties pertaining to residential construction are: (1) Common-law Implied Warranty of Good & Workmanlike Performance of Services in the construction of residential property, and (2) the implied warranty of habitability. The applicable statutory sources of warranty law are: (1) the Texas Residential Construction Commission Act set forth in the Texas Property Code, (2) the Texas Residential Construction Commission standards and warranties set forth in the Texas Administrative Code, and (3) the Residential Construction Liability Act set forth in the Texas Property Code.

### A. TRCCA, TRCC, RCLA, and SIRP

1. <u>General Background & Coverage</u>

In light of the Texas Residential Construction Commission Act ("TRCCA") and the Residential Construction Liability Act ("RCLA"), differences in residential construction defect cases arise depending upon the date construction commenced and the date the defect was discovered. In 1989, the Texas legislature enacted the Residential Construction Liability Act ("RCLA"). Among other things, the RCLA requires the plaintiff to provide notice of suit, and provides the builder inspection rights and the

right to make an offer of compromise. *See* Tex. Prop. Code §§ 27.004(a), (b), 27.0041(a). In 2003, minimum building standards and warranties for residential construction were addressed when the Texas legislature enacted the Texas Residential Construction Commission Act ("TRCCA"). The TRCCA created the Texas Residential Construction Commission ("TRCC") and required that the TRCC establish building and performance standards and statutory warranties. Tex. Prop. Code § 430.001.

The TRCCA only applies to single-family dwellings, including townhomes, and duplexes. Tex. Prop. Code § 401.002(6). It does not apply to triplexes, condominium units, and other multiunit residential structures. *See* Tex. Prop. Code § 401.002(6). In contrast, the RCLA applies to single-family houses, duplexes, triplexes, quadruplexes, or units in a multiunit residential structure in which title to the individual units is transferred to the owners under a condominium or cooperative system. Tex. Prop. Code § 27.001(7). Commercial residential structures such as apartment complexes are not subject to the RCLA. *See* McQuality, *Residential Construction Liability Act*, Advanced DTPA/Insurance/Consumer Law Course, State Bar of Texas, ch. D (1996).

2. Statutory Warranties & Standards

The TRCCA required that the Texas Residential Construction Commission ("TRCC") establish limited statutory warranties and building and performance standards for single-family dwellings, including townhomes, and duplexes. *See* Tex. Prop. Code §§ 401.002(6), 408.001(2), 430.001; 10 Tex. Admin. Code § 301.1 (12), (20), & (25). The TRCC adopted warranties and standards became effective June 1, 2005. 10 Tex. Admin. Code § 304.1(b). The TRCC limited statutory warranties include (1) a statutory warranty of habitability, and (2) three other statutory warranties broken up by subject matter and how long the warranty lasts. The TRCC's building and performance standards and limited statutory warranties apply to construction that commences on or after June 1, 2005. Construction "commences" on the date of the agreement for the construction or the date actual work begins, whichever is earlier. 10 Tex. Admin. Code § 304.1(b). When applicable, these warranties and standards supersede common-law implied warranties. *See* Tex. Prop. Code § 430.006. However, disputes in which construction "commenced" before June 1, 2005 are subject to the substantive law in place prior to the enactment of the statutory warranties and standards. 10 Tex. Admin. Code § 304.1(b).

3. SIRP

The TRCCA also created the State-Sponsored Inspection and Dispute Resolution Process ("SIRP"), which is likewise regulated by the TRCC. The SIRP imposes upon a homeowner certain obligations prior to filing suit under the RCLA. The SIRP contains notice provisions, and inspection rights and settlement provisions similar to the RCLA. However, a homeowner is not required to comply with the notice provisions of both the RCLA and the SIRP prior to filing suit; compliance with either will suffice.

The SIRP is mandatory for all claims arising from defects discovered on or after September 1, 2003. 10 Tex. Admin. Code § 313.1(a)(3); *see* Tex. Prop. Code § 426.005(a). The TRCCA became effective September 1, 2003 and applies to residential construction defect disputes in which the defect was discovered on or after the effective date of the Act. 10 Tex. Admin. Code § 313.1(a). The TRCC was not required to implement certain requirements of the TRCCA on September 1, 2003. In particular, the registration of builders began March 1, 2004, and the minimum building and performance standards and limited statutory warranties promulgated by the TRCC became effective June 1, 2005. In contrast, the requirement of submitting a dispute to the SIRP applies to disputes over residential construction defects in which the defect was discovered on or after September 1, 2003. The SIRP requires a third-party inspection, but the standards applied by the

inspectors depend on the construction date. For construction that began before June 1, 2005, the inspector applies the express and implied warranties and standards in place at the time of construction. *See* 10 Tex. Admin. Code § 304.1(b). For construction that began on or after June 1, 2005, the inspector applies the new warranties and standards; however, the inspector will apply stricter written warranties provided by the builder. *Id.* §§ 304.1(b), 304.3(h), (i).

The SIRP applies *to* claims for breach of the common-law implied warranty of good & workmanlike performance of construction services if (1) the plaintiff is the homeowner; (2) the defendant is the builder; (3) the claim concerns a construction defect; (4) the defect was discovered on or after September 1, 2003; (5) the plaintiff seeks economic damages; and (6) the claim is not exempt from the TRCCA. Subsequent homeowners qualify as plaintiffs. *See* Tex. Prop. Code § 426.001(a)(1). A "home" includes real property, improvements, and appurtenances for single-family dwelling, including townhomes, or duplexes. *See* Tex. Prop. Code § 401.002(6); 10 Tex. Admin. Code § 301.1 (12), (20), & (25).

## B. Implied Warranty of Good & Workmanlike Performance of Residential Construction Services

For residential construction commencing on or after June 1, 2005, all warranty claims must be brought under the new statutory provisions of the TRCCA. Traditionally a plaintiff can recover on a common-law implied warranty of good & workmanlike performance of services claim if it can prove that (1) the defendant was a builder; (2) the defendant built residential property; (3) the plaintiff purchased the residential property; (4) the defendant did not perform the construction in a good & workmanlike manner; and (5) the plaintiff sustained injury. *Centex Homes v. Buecher*, 95 S.W.3d 266, 273 (Tex. 2002); *Evans v. J. Stiles, Inc.*, 689 S.W.2d 399, 400 (Tex. 1985); *Gupta v. Ritter Homes*, 646 S.W.2d 168, 169 (Tex. 1983); *Humber v. Morton*, 426 S.W.2d 554, 559-61 (Tex. 1968)(seminal case in Texas); *Cocke v. White*, 697 S.W.2d 739, 743 (Tex.App.—Corpus Christi 1985, writ ref'd n.r.e.).

A "builder" is "[o]ne whose occupation is the building or erection of structures, the controlling and directing of construction, or the planning, constructing, remodeling and adapting to particular uses buildings and other structures. *Wiggins v. Overstreet*, 962 S.W.2d 198, 202 (Tex.App.—Houston [14th Dist.] 1998, pet. denied). The term does not include: (1) a person who merely contracts with another to build a structure, or (2) a subcontractor. *See Wiggins*, 962 S.W.2d at 202-03 (person who contracted); *Codner v. Arellano*, 40 S.W.3d 666, 672-73 (Tex.App.—Austin 2001, no pet.)(subcontractor). A homeowner who was not also the builder is likewise excluded. *See Gupta*, 646 S.W.2d at 169 (homeowner not the builder); *March v. Thiery*, 729 S.W.2d 889, 892 (Tex.App.—Corpus Christi 1987, no writ)(homeowner was builder of house). The property must be residential property as opposed to commercial property. *Humber*, 426 S.W.2d at 555. This includes new homes, used homes, townhomes, and condominiums. *See Humber*, 426 S.W.2d at 555 (new homes); *Gupta*, 646 S.W.2d at 169 (used homes); *Wiggins*, 962 S.W.2d at 200 (townhomes); *McCrea v. Cubilla Condo. Corp.*, 685 S.W.2d 755, 758 (Tex.App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.)(condominiums).

"Good & workmanlike manner" means the builder must construct the home in the same manner as would a generally proficient builder engaged in similar work and performing under similar circumstances. *Centex Homes*, 95 S.W.3d at 273. The standard is similar to negligence. *See Coulson & Cae*, 734 S.W.2d at 651. The warranty applies to partial construction, and only to latent defects. *March*, 729 S.W.2d at 893 (partial construction); *Gupta*, 646 S.W.2d at 169 (latent defects). "Latent defects" include defective slabs, defective plumbing, electrical wiring, and foundations, defective fireplaces and chimneys. *Gupta*, 646 S.W.2d at 169 (slab), *Kamarath v. Bennett*, 568 S.W.2d 658, 659 (Tex.

1978)(plumbing, wiring, foundation); *Humber*, 426 S.W.2d at 554 (fireplace, chimney). The term does not include inadequate fire extinguishers, holes in walls, improper banisters on stairways. *See B&H Aircraft Sales, Inc. v. Engine Components, Inc.*, 933 S.W.2d 653, 656 (Tex.App.—San Antonio 1996, no writ).

### C. Statutory Warranties and Standards

The full scope of the TRCC statutory warranties and standards is set forth in Title 10, Part 7, Chapter 304 of the Texas Administrative Code. The warranties are generally broken up into the following categories: (1) a one-year statutory warranty for workmanship and materials, (2) two-year warranty for plumbing, electrical, heating, and air-conditioning delivery systems, and (3) a ten-year period for major structural components. *See* 10 Tex. Admin. Code § 304.3(a)(1)-(3).

### D. Implied Warranty of Habitability

A plaintiff can recover on a claim for breach of a common-law implied warranty of habitability if it can prove that (1) the defendant was a builder; (2) the defendant built residential property; (3) the plaintiff purchased the residential property; (4) the defendant created a defect in the property; (5) the defect was latent; (6) the defect made the property uninhabitable; and (7) the plaintiff sustained injury. *Centex Homes*, 95 S.W.3d at 273; *Evans*, 689 S.W.2d at 400; *Gupta*, 646 S.W.2d at 169; *Humber*, 426 S.W.2d at 559-61 (seminal case in Texas).

A latent defect must be created by the defendant's act or omission. *See Doyle Wilson Homebuilder v. Pickens*, 996 S.W.2d 387, 396 (Tex.App.—Austin 1999, pet. dism'd). A plaintiff *must* prove causation by establishing the defendant's act or omission. *Id*. A defect makes the property uninhabitable if it is not safe, sanitary, and otherwise fit for human habitation. *Centex Homes*, 95 S.W.3d at 273. The defect must be to the habitable areas of the home. *See Evans*, 689 S.W.2d at 400. Thus, defects to a patio or driveway are not subject to the warranty. *Id*.

### E. Statutory Warranty of Habitability

Under the TRCCA, the construction of new homes or improvements to homes must include the warranty of habitability. Tex. Prop. Code § 430.002(a). The statutory warranty of habitability requires construction to be (1) in compliance with the building and performance standards and limited statutory warranties established by the TRCC, and (2) to be safe, sanitary, and fit for humans to inhabit. *Id*. § 401.002(16). The statutory warranty of habitability is a ten year warranty. 10 Tex. Admin. Code § 304.3(a)(4). To establish a breach of the statutory warranty of habitability, the plaintiff must show (1) that the defect has a direct adverse effect on the habitable areas of the home, and (2) must not have been discoverable by a reasonably prudent inspection or examination of the home or home improvements within the applicable warranty periods adopted by the TRCC. Tex. Prop. Code § 430.002(b).

### F. The Impact of the New Warranties & Standards on the Common-law Warranties

Generally, the statutory warranties and standards supersede the common-law implied warranties related to residential construction. In effect, the limited one-year, two-year, and ten-year statutory warranties replace the common-law implied warranty of good & workmanlike construction of residential property, and the statutory warranty of habitability replaces its common-law counterpart. The warranty of habitability is essentially the same, but provides for a set time period to which it applies. The three other statutory warranties and periods set forth more definite rules for what constitutes minimum performance of services in the construction of residential property. Notably, in contrast to the common-law warranties, the statutory warranties cannot be waived or disclaimed. Further, if either the TRCCA or the RCLA applies, the remedies available are

limited to the RCLA remedies. Tex. Prop. Code §§ 27.004, 430.011(b). The RCLA specifically sets forth the types of economic damages a plaintiff can recover. Tex. Prop. Code § 27.004(e), (g).

# VI. OTHER CONSIDERATIONS

## A. Privity (Who can sue & Who can be sued)

Privity can be generally defined as a relation between parties that is held to be sufficiently close and direct to support a legal claim on behalf of or against another person with whom this relation exists, such as a direct contractual relationship. Privity is an issue of standing in breach of contract actions. A party has standing to sue if it is: (1) in privity with the defendant; (2) a third-party beneficiary to the contract; or (3) an agent entitled to sue on its principal's contract. *See Perry v. Breland*, 16 S.W. 3d 182, 187 (Tex.App. – Eastland 2000, pet. Denied); *Mandell v. Hamman Oil & Ref. Co.*, 822 S.W. 2d 153, 161 (Tex.App. – Houston [1st Dist.] 1991, writ denied). Privity is established by proving that the defendant was a party to an enforceable contract with either the plaintiff or a party who assigned its cause of action to the plaintiff. *See Conquest Drilling Fluids, Inc. v. Tri-Flo Int'l*, 137 S.W. 3d 299, 308 (Tex.App. – Beaumont 2004, no pet.).

When Texas adopted the UCC, the legislature did not adopt any of the uniform act's three alternatives governing privity of contract in breach of warranty actions. Instead, the question was specifically left open. *See* Tex. Bus. & Com. Code § 2.318. Thus, the question has been left to the Texas courts. Different rules apply depending on whether the warranty at issue is express or implied, and whether the alleged injuries are purely economic or personal injury.

With regard to cases in which purely economic injury is alleged, vertical privity is required in breach of implied warranty actions. Thus, a plaintiff can bring suit for breach of implied warranty only against those parties in vertical privity with the seller. *PPG Industrial v. JMB/Houston Ctrs. Partners*, 146 S.W. 3d 79, 88-89 (Tex. 2004).. This includes all parties in the distribution chain from initial supplier to the ultimate buyer. *Garcia*. In breach of express warranty cases where only economic injury is alleged, the Texas Supreme has specifically left open the question of whether privity is required. *See Nobility*. Further, the Texas Courts of Appeals are split on this issue. Some older decisions have held that privity of contract is required. *See Texas Processed Plastics, Inc. v. Gray Enters.*, 592 S.W.2d 412, 415 (Tex.App.—Tyler 1979, no writ); *Henderson v. Ford Motor Co.*, 547 S.W.2d 663, 667 (Tex.App.—Amarillo 1977, no writ); *Eli Lilly & Co. v. Casey*, 472 S.W.2d 598, 600 (Tex.App.—Eastland 1971, writ dism'd). More recent decisions have not required privity. *U.S. Tire-Tech, Inc. v. Boeran*, 110 S.W.3d 194, 198 (Tex.App.—Houston [1st Dist.] 2003, pet. denied); *Edwards v. Schuh*, 5 S.W.3d 829, 833 (Tex.App.—Austin 1999, no pet.); *Church & Dwight Co. v. Huey*, 961 S.W.2d 560, 568 (Tex.App.—San Antonio 1997, pet. denied); *National Bugmobiles, Inc. v. Jobi Props.*, 773 S.W.2d 616, 622 (Tex.App.—Corpus Christi 1989, writ denied); *Indust-Ri-Chem Lab., Inc. v. Par Pak Co.*, 602 S.W.2d 282, 287-88 (Tex.App.—Dallas 1980, no writ).

One commentator has suggested that the split in the Courts of Appeals decisions can be reconciled by looking to the factual circumstances involved in each case *O'Connor's Texas Causes of Action* 863 (2006). In the cases requiring privity, there was no contact between the manufacturer and buyer. *See, e.g., Texas Processed Plastics*, 592 S.W.2d at 417; *Henderson*, 547 S.W.2d at 667. In the decisions not requiring privity, there was either (1) some evidence the manufacturer made representations to induce the buyer, whether in writing, orally, by advertisement, sample, or model, or (2) a freely transferable express warranty. *See, e.g., Edwards*, 5 S.W.3d at 833 (warranty explicitly transferable to future owner); *Church & Dwight*, 961 S.W.2d at 568 (representations in pamphlet); *National Bugmobiles*, 773 S.W.2d at 662 (perpetual and freely transferable warranty); *Indust-Ri-*

*Chem Lab.*, 602 S.W.2d at 287-88 (provided samples).

## B. Enforcement under DTPA

Breach of warranty claims can be brought under the Texas Deceptive Trade Practices Act ("DTPA"). Tex. Bus. & Com. Code § 17.50(a)(2). The DTPA is simply a vehicle in which a breach of warranty claim can be brought, it does not create any warranties. *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 438 (Tex. 1995). A plaintiff can recover on a breach of warranty claim brought under the DTPA if it proves: (1) the plaintiff is a consumer; (2) the existence of an express or implied warranty created by another statute or under the common-law; (3) a breach of the warranty; and (4) the breach was a producing cause of the plaintiff's damages. *See U.S. Tire-Tech v. Boeran*, 110 S.W.3d 194, 197 (Tex.App.—Houston [1st Dist.] 2003, pet. denied).

The primary advantage to a plaintiff bringing a breach of warranty suit under the DTPA is the potential to recover treble damages. See Tex. Bus. & Com. Code § 17.50(b)(1). The DTPA also provides for recovery of attorney's fees. Id. § 17.50(d). However, in addition to the requirements of establishing consumer status and the heightened "producing cause" requirement, the statute of limitations period for DTPA actions is two years. Id. § 17.565. Further, professionals generally cannot be sued under the DTPA. Tex. Bus. & Com. Code § 17.49(c)(d); *Underkofler v. Vanasek*, 53 S.W.3d 343, 346 n.1 (Tex. 2001).

## C. Statutes of Limitation

### 1. <u>Period</u>

The applicable limitations period for breach of an express warranty under the Texas UCC is four years. Tex. Bus. & Com. Code § 2.725(a). By agreement, parties to a transaction can reduce the limitations period to no less than one year, but they cannot extend the period. *Id*. The four year period applies to all implied Texas UCC warranties as well. *American Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 435 (Tex. 1997). Attempts at cure do not toll the statute of limitations. *Pako Corp. v. Thomas*, 855 S.W.2d 215, 219-20 (Tex.App.—Tyler 1993, no writ). The limitations period for common-law express warranty actions is four years. *Certain-Teed Prods. Corp. v. Bell*, 422 S.W.2d 719, 721 (Tex. 1968). The parties can agree to limit the period, but cannot reduce it to a period less than two years. Tex. Civ. Prac. & Rem. Code § 16.070. This two-year limitation is strictly enforced, and attempts to reduce it to a period less than two years may be deemed void, rendering the four-year period applicable. *See USF&G v. Eastern Hills Methodist Church*, 609 S.W.2d 298 (Tex.Civ.App.—Fort Worth 1980, writ ref'd n.r.e.).

### 2. <u>Accrual & Discovery Rule</u>

An action for breach of express warranty under the Texas UCC accrues on the date the goods are tendered for delivery. Tex. Bus. & Com. Code § 2.725(b); *Safeway Stores v. Certainteed Corp.*, 710 S.W.2d 544, 546 (Tex. 1986). This accrual date runs from the original delivery even in suits brought by buyers subsequent to the original buyer. *American Alloy Steel v. Armco, Inc.*, 777 S.W.2d 173, 177 (Tex.App.—Houston [14th Dist.] 1989, no writ). However, if the express warranty applies to future performance of goods, accrual is based on when the breach is or should have been discovered. Tex. Bus. & Com. Code § 2.725(b). A warranty will apply to future performance of goods only if it assures a good's performance for a set time period. Thus, a warranty that a good would be free of defects for five years applied to future performance. *PPG Indus. v. JMB/Houston Ctrs. Partners*, 146 S.W.3d 79, 92-93 (Tex. 2004). In contrast, a warranty providing for repair or replacement of a good for a specific time period, but unconnected to any assurance of the life of the good, did not apply to future performance. *See Kline v. U.S. Mar. Corp.*, 882 S.W.2d 597, 599-600 (Tex.App.—Houston [1st Dist.] 1994, writ denied).

The limitations period for common-law breach of express warranty actions

begins to run from the time the services are rendered. *See Harrison Cty. Fin. Corp. v. KPMG Peat Marwick*, 948 S.W.2d 941, 948 (Tex.App.—Texarkana, 1997), *rev'd on other grounds*, 988 S.W.2d 746 (Tex. 1999). Because there is not statutory accrual period for breach of common-law implied warranty actions, the issue is determined by the courts. *S.V. v. R.V.*, 933 S.W.2d 1, 4 (Tex. 1996). The general rule is the legal injury rule. *Id.*

Although the discovery rule generally does not apply to Texas UCC express warranty actions, it does apply to warranties relating to future performance of goods. *See Safeway*, 710 S.W.2d at 547-48. The discovery rule does not apply to Texas UCC implied warranty actions. *American Tobacco*, 951 S.W.2d at 435.

In large part due to the fact that most common-law warranty actions are brought under the DTPA (2 year statute of limitations), there are no cases addressing whether the discovery rule applies to common-law express warranty actions. Thus, it is unclear if the *Safeway* analysis would apply to common-law express warranty actions. Similarly, application of the discovery rule to common-law implied warranty actions has not been addressed by the courts since the adoption of the Texas UCC. Prior to adoption of the Texas UCC, the discovery rule applied to breach of implied warranty actions. *See Richman v. Watel*, 565 S.W.2d 101, 102 (Tex.App.—Waco 1978), *writ ref'd n.r.e.*, 576 S.W.2d 779 (Tex. 1978). Thus, the *American Tobacco* analysis may or may not apply to common-law breach of implied warranty actions.

3. TRCCA

The statute of limitations under the TRCCA depends upon the type of work. The period for bringing a suit for breach of warranty for workmanship and materials is one year. 10 Tex. Admin. Code § 304.3(a)(1). The period for bringing a suit for breach of warranty for plumbing, electrical, heating, and air-conditioning delivery systems is two years. 10 Tex. Admin. Code § 304.3(a)(2). The period for bringing a suit for breach of warranty for major structural improvements is ten years. 10 Tex. Admin. Code § 304.3(a)(3). The period for bringing suit for breach of the statutory warranty of habitability is ten years. 10 Tex. Admin. Code § 304.3(a)(4)

## D. Damages

1. Generally

In breach of warranty *a*ctions, a plaintiff can recover direct, consequential, and incidental damages, court costs, and prejudgment and postjudgment interest. A plaintiff cannot recover exemplary damages. *Henderson v. Ford Motor Co.*, 547 S.W.2d 663, 669 (Tex.App.—Amarillo 1977, no writ); *Superior Trucks, Inc. v. Allen*, 664 S.W.2d 136, 141-42 (Tex.App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.). A plaintiff cannot recover attorney's fees. *Hyundai Motor Co. v. Rodriguez*, 995 S.W.2d 661, 668 (Tex. 1999); *JHC Ventures, L.P. v. Fast Trucking, Inc.*, 94 S.W.3d 762, 767 (Tex.App.—San Antonio 2002, no pet.); *Harris Packaging Corp. v. Baker Concrete Constr. Co.*, 982 S.W.2d 62, 69 (Tex.App.—Houston [1st Dist.] 1998, pet. denied). A plaintiff can also recover damages for both economic loss and personal injury. Tex. Bus. & Com. Code §§ 2.714, 2.715; *Garcia v. Texas Instr., Inc.*, 610 S.W.2d 456, 462 (Tex. 1980). However, with regard to the implied warranty of habitability in the context of leased residential property, personal injury damages are not available. *See Morris v. Kaylor Eng'g Co.*, 565 S.W.2d 334, 334-35 (Tex.App.—Houston [14th Dist.] 1978, writ ref'd n.r.e.).

2. Measure of Actual Damages

Under the Texas UCC, the measure of direct damages is calculated at the time of acceptance, and is generally the difference between the value of the goods accepted and the value as warranted. Tex. Bus. & Com. Code § 2.714(b); *Signal Oil & Gas Co. v. Universal Oil Prods.*, 572 S.W.2d 320, 328 (Tex. 1978). Value is determined by market value not contractual value. *Melody Home Mfg. Co. v. Morrison*, 502 S.W.2d 196, 202-

03 (Tex.App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.). In the absence of market value, purchase price can provide evidence of value. *JHC Ventures, L.P. v. Fast Trucking, Inc.*, 94 S.W.3d 762, 767 (Tex.App.—San Antonio 2002, no pet.). Further, other reasonable means of measuring damages are specifically available if special circumstances warrant. Tex. Bus. & Com. Code § 2.714(a), (b).

Damages for beach of common-law warranties are likewise measured by the benefit of the bargain. *Smith v. Kinslow*, 598 S.W.2d 910, 914 (Tex.App.—Dallas 1980, no writ); *see Signal Oil & Gas Co. v. Universal Oil Prods.*, 572 S.W.2d 320, 327 (Tex. 1978). Benefit of the bargain damages are designed to place the plaintiff in the same economic position it would have been if the defendant had performed. *American Nat'l Pet. Co. v. Transcontinental Gas Pipe Line Corp.*, 798 S.W.2d 274, 278 (Tex. 1990). Generally, the measure of benefit of the bargain damages is the difference between the value represented to plaintiff and the value actually received. *Fortune Prod. Co. v. Conoco, Inc.*, 52 S.W.3d 671, 681 (Tex. 2000). Thus, with regard to services, the measure is the difference between the value of the services as represented and the value as received. Similarly, the implied warranty of good & workmanlike performance of residential construction is measured by the difference between the value of the house as represented and the value of the house as received. *March v. Thiery*, 729 S.W.2d 889, 895 (Tex.App.—Corpus Christi 1987, no writ).

### 3. Proximate Cause

To recover direct damages in a breach of warranty action under the Texas UCC or the common-law, a plaintiff is not required to prove proximate cause.. *See Chrysler-Plymouth City, Inc. v. Guerrero*, 620 S.W.2d 700, 706 (Tex.App.—San Antonio 1981, no writ). However, to recover consequential and/or incidental damages, a plaintiff must show proximate cause. In Texas UCC breach of warranty actions, the incidental damages that are recoverable include expenses reasonably incurred in inspection, receipt, transportation, care, and custody of goods rightfully rejected; any commercially reasonable charges, expenses, or commissions in connection with effecting cover; and any other reasonable expenses incident to the delay or other breach. Tex. Bus. & Com. Code § 2.715(a). The consequential damages recoverable include any loss resulting from general or particular requirements the seller, at the time of contracting, had reason to know about and that could not reasonably be prevented by cover or otherwise, and any inury to person or property proximately resulting from the breach. *Id.* § 2.715(b). However, a plaintiff's recovery may be limited depending on the type of defect in the goods. A plaintiff can recover for manifest defects, which means goods that have malfunctioned. *See Redman Homes, Inc. v. Ivy*, 920 S.W.2d 664, 668 (Tex. 1996). However, it is unclear if recovery is available for unmanifested defects, or goods that have not malfunctioned. *See Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657, 679-80 (Tex. 2004).

To recover consequential and incidental damages, the plaintiff must prove proximate cause ("but for" causation and foreseeability). *See* Tex. Bus. & Com. Code § 2.715(b); *Hyundai Motor Co. v. Rodriguez*, 995 S.W.2d 661, 667 (Tex. 1999). The issue of proximate cause centers on the plaintiff's efforts to uncover any defects. If a plaintiff did not act reasonably in inspecting the goods for defects, or did in fact discover a defect, then the proximate cause of any consequential damages is the plaintiff's own negligence or fault. Additionally, the plaintiff's negligence or fault in proximately causing consequential damages is not a bar to recovery, even if it amounts to over 51% of the fault. Of course, it can be a complete bar to recovery if it was the sole proximate cause.

## E. Defenses

### 1. Statute of Limitations

In Texas UCC *and* common-law breach of warranty actions, the defendant can assert that the statute of limitations bars the action.

2. Notice, Cure

In a Texas UCC breach of warranty action, a defendant can assert that (1) plaintiff's suit is barred because no notice was provided, and/or (2) no reasonable opportunity to cure was given. *See* Tex. Bus. & Com. Code § 2.607(c); *Wilcox v. Hillcrest Mem'l Park*, 696 S.W.2d 423, 424-25 (Tex.App.—Dallas 1985), *writ ref'd n.r.e.*, 701 S.W.2d 842 (Tex. 1986)(no notice); *Miller v. Spencer*, 732 S.W.2d 758, 761 (Tex.App.—Dallas 1987, no writ).

3. Disclaimer

A Texas UCC express warranty can be disclaimed. Tex. Bus. & Com. Code § 2.316. The disclaimer can be communicated by oral or written words, or conduct tending to negate or limit the warranty. *Id*. The disclaimer must be made before a contract for sale has been completed, or if after completion, qualifies as a modification to the contract. *Womco, Inc. v. Navistar Int'l Corp.*, 84 S.W.3d 272, 279-80 (Tex.App.—Tyler 2002, no pet.). However, any conflict between the disclaimer and express warranty will be resolved in favor of the warranty. Tex. Bus. & Com. Code § 2.316(a); *see id.* cmt. 1. Further, such conflict is subject to the Texas UCC parol or extrinsic evidence rules, which provide that the terms of a written agreement, intended by the parties as a final expression of their agreement, may not be contradicted by evidence of an earlier agreement or a contemporaneous oral agreement, but may be explained or supplemented by (1) course of performance, course of dealing, or usage of trade, or (2) evidence of consistent additional terms, unless the court finds the writing was intended as a complete and exclusive statement of the terms of the agreement. *Id.* § 2.202.

4. Contractual provisions limiting damages

In Texas UCC express warranties, as long as the modifications are not unconscionable, parties can modify the statutory remedies by addition, limitation, or substitution. Tex. Bus. & Com. Code § 2.719(a)(1). Thus, the parties can provide for limited remedy clauses or liquidated damages clauses in their agreement. *Id*. §§ 2.316(d), 2.718, 2.719. A limited remedy clause is exclusive only if expressly stated by the parties. *Id*. § 2.719(a)(2). A limited remedy clause pertaining to consequential damages for economic loss is subject only to the unconscionable standard. *Id*. § 2.719(c). However, a limited remedy pertaining to direct damages for economic loss must be reasonable and not deprive the plaintiff of the "benefit of the bargain." *Id*. §§ 2.316(d), 2.718, 2.719. Similarly, parties to a common-law express warranty for services can provide for the amount of damages, type of damages, and limitations on damages, in their agreement. *See Arthur's Garage, Inc. v. Racal-Chubb Sec. Sys.*, 997 S.W.2d 803, 812 (Tex.App.—Dallas 1999, no pet.). Such limitations are valid unless unconscionable or against public policy. *Southwestern Bell Tel. Co. v. FDP Corp.*, 811 S.W.2d 572, 576-77 (Tex. 1991).

5. Contractual Defenses

In common-law breach of express warranty for services actions, a defendant can assert contractual defenses. *See Sorokolit v. Rhodes*, 889 S.W.2d 239, 243 n.5 (Tex. 1994). Some of the generally recognized contract defenses include statute of limitations, lack of standing, repudiation, revocation, lack of capacity, illegality, void as against public policy, failure of consideration, duress, mistake, statute of frauds, failure to perform conditions precedent, impossibility of performance, accord & satisfaction, novation, unconscionability, ratification, waiver, mitigation of damages, penalty, limitation of liability provisions, immunity, discharge (plaintiff's repudiation or material breach), and the parol evidence rule.

6. Professional Services

In common-law implied warranty actions, the defendant can assert that it was a provider of professional services. *See Murphy*, 946 S.W.2d at 269.

### F. Proportionate Responsibility

Texas UCC breach of warranty actions are considered contract rather than tort actions; thus, they are not subject to the proportionate responsibility scheme set forth in Chapter 33 of the Texas Civil Practice & Remedies Code. *JHC Ventures, L.P. v. Fast Trucking, Inc.*, 94 S.W.3d 762, 772-73 (Tex.App.—San Antonio 2002, no pet.). Thus, the plaintiff's conduct is not a defense to a breach of warranty suit. Nonetheless, the plaintiff's actions may help to mitigate damages in connection with the proximate cause requirement for recovery of consequential damages.

The proportionate responsibility scheme may apply to actions involving breach of common-law implied warranties for services. Breaches of common-law implied warranties are considered tort rather than contract actions. *Humber v. Morton*, 426 S.W.2d 554, 556 (Tex. 1968). However, this may not apply to the common-law implied warranties of habitability or suitability in a commercial lease. *See Kerrville HRH, Inc. v. City of Kerrville*, 803 S.W.2d 377, 386 (Tex.App.—San Antonio 1990, writ denied)(buyer cannot be contributorily negligent because under no duty to discover latent defects).

### G. Establishing Breach

Another distinction between warranties recognized in Texas relates to how to establish a breach. The Texas UCC warranties and the Implied Warranty of Habitability focus on the results or the state of the goods or structure. In this regard, and particularly with regard to the Implied Warranty of Habitability, they are somewhat similar to strict liability actions in which the defendant's conduct is less important or irrelevant. In contrast, Common-law warranties focus on the defendant's efforts, not the ultimate results. The Express Warranty for Services, Implied Warranty of Good & Workmanlike Performance of Repair or Modification Services, and the Implied Warranty of Good & Workmanlike Performance in Residential Construction, focus on the defendant's conduct or manner of performance.

## VII. WARRANTY CREATION & AFFILIATION WITH TORT VS. CONTRACT

### A. Creation of Express Warranties

One important aspect of warranty law to keep in mind in the construction setting is the ability to create express warranties via oral representations. While contractors, subcontractors, and builders may take due care to define the express warranties created in writing via contract or otherwise, they should also be mindful not to inadvertently make an oral representation about the quality or characteristics of goods or services that could give rise to an express warranty.

### B. Express or Implied – Grounded in Contract or Tort

Whether a warranty is considered to be grounded in contract law (express warranties) or in tort law (implied warranties) can have a bearing on construction defect cases in two important ways. First, the proportionate responsibility scheme in Chapter 33 of the Texas Civil Practice & Remedies Code applies to tort actions, but not contract actions. *See* Tex. Civ. Prac. & Rem. Code § 33.002(a)(chapter 33 applies to tort actions); *CBI NA-CON, Inc. v. UOP, Inc.*, 961 S.W.2d 336, 340 (Tex.App.—Houston [1st Dist.] 1997, writ denied)(does not apply to breach of contract actions). Thus, application of the proportionate responsibility statute may turn on whether the warranty is express or implied. Likewise, the availability of numerous breach of contract defenses may only be available in breach of express warranty actions.

# VIII. TEXAS UCC APPLICATION

## A. Entities to which Texas UCC Applies

In light of the fact that the Texas UCC applies only transactions involving "goods," application to construction is generally limited to material suppliers, or purchase orders and supply contracts. It could also apply to assemblers of completed products such as industrial heating units.

## B. Transactions involving more than one subject matter

Applying the dominant factor or essence of the transaction test, building contracts involving provision of both goods and services are generally considered service transactions. Thus, contractors and subcontractors providing primarily labor will not be subject to the Texas UCC provisions if they also provide some building materials (or goods) as part of their work on the construction project.

# IX. RESIDENTIAL VS. COMMERCIAL CONSTRUCTION

Some differences in the application of warranty law to the construction setting can be seen in significant regard depending on whether the construction is residential or commercial.

## A. Applicable Warranties (Express or Implied)

The primary warranties involved in the commercial construction context are express warranties. In contrast, implied warranties are generally limited to residential construction. Some of the more common express warranties in commercial construction are set forth in the AIA forms. Although implied warranties are generally limited to residential construction, a recent case from the Dallas Court of Appeals arguably extends the implied warranty of good and workmanlike performance to commercial construction. *See Barnett v. Coppell North Texas Court Ltd.*, 123 S.W.3d 804, 823 (Tex.App.—Dallas 2003, pet. denied).

## B. Contract vs. Operation of Law

In light of the fact that commercial construction projects often address a substantial number of issues via contract, determination of issues such as standards of performance, materials to be used, manner of performance, and others vary depending on whether the construction is commercial or residential. In particular, commercial construction contracts will typically include the following express warranties: (1) materials and equipment furnished under the contract will be of good quality and new unless otherwise required or permitted by the contract documents, (2) that the work will be free from defects not inherent in the quality required or permitted, (3) the work will conform to the requirements of the contract documents. However, there is some authority that, absent contractual provisions addressing the issue, compliance with building codes is an implied covenant in a construction contract. *See Tips v. Hartland Developers, Inc.*, 961 S.W.2d 618 (Tex.App.—San Antonio 1998, no writ). In contrast, residential construction is often governed by common-law or statutory rules. In particular, the standard of "good and workmanlike performance" is defined by the common-law or the statutes dealing with residential construction. Additionally, issues of privity (who can sue and who can be sued) in the residential construction setting are determined by the courts or applicable statutes. *See PPG*, 146 S.W.3d at 88-90. In contrast, many commercial construction contrasts specifically address assignment of warranties.

# X. PROFESSIONAL SERVICES

The impact of warranty law can also be seen with regard to professional services. Construction projects often involve various design professionals such as architects and engineers, including various specialized professionals such as Landscape Architects, Civil/Site Engineers, Geotechnical Engineers, Structural Engineers,

Environmental Engineers, Mechanical Engineers, and Electrical Engineers. With regard to implied warranties, the generally accepted rule that implied warranties do not extend to professional service providers affords a large measure of protection to these design professionals. However, such professionals can still be subject to express warranty liability for qualifying oral or written representations.

## XI. PRIVITY

Of particular impact to the construction setting are the warranty rules related to privity of contract as they relate to subcontractors. With regard to implied warranties, the work of a subcontractor is subject to the implied warranties that run from the general or prime contractor to the owner. However, these warranties can be enforced by the owner only against the general contractor, not the subcontractors. Because a warranty is part of a construction contract, a direct contractual relationship between the parties is essential, so that a subcontractor who has no direct contractual relationship with an owner does not make any warranties that may be enforced by the owner. *Codner v. Arellano*, 40 S.W.3d 666, 672-74 (Tex.App.—Austin 2001, no pet.)(no implied warranty of good & workmanlike performance runs from subcontractor directly to owner); *J.M. Krupar Constr. Co., Inc. v. Rosenberg*, 95 S.W.3d 322, 331-32(Tex.App.—Houston [1st Dist.] 2002, no pet.); *Raymond v. Rahme*, 78 S.W.3d 552, 563 (Tex.App.—Austin 2002, no pet.). However, even in the absence of a direct contractual relationship, a subcontractor may make an express warranty directly to the owner if the subcontractor's promise modifies the pre-existing contracts. *See Raymond*, 78 S.W.3d at 563.