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Recognizing an Implied Warranty That Professional Services Will Be Performed in a Good and Workmanlike Manner.

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RECOGNIZING AN IMPLIED WARRANTY THAT "PROFESSIONAL" SERVICES WILL BE PERFORMED IN A GOOD AND WORKMANLIKE MANNER

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I. INTRODUCTION

The Texas Supreme Court has recognized an implied warranty that services will be performed in a good and workmanlike manner. The policy grounds that led to the court's decision would support recognition of the warranty in all service transactions—professional or non-professional. Should "professional" services be exempted from the warranty? If so, how will "professional" services be defined? So far, these questions have not been clearly answered by the Texas Supreme Court, and there has been some apparent equivocation. This article discusses arguments for and against limiting the warranty and concludes that no sound basis exists for excluding professional services.

II. THE GENESIS: *MELODY HOME V. BARNES*

In *Melody Home Manufacturing Co. v. Barnes*,[1] the Texas Supreme

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1. 741 S.W.2d 349 (Tex. 1987).

Court recognized an implied warranty that repairs to a mobile home would be performed in a good and workmanlike manner.[2] In the context of that particular case, the decision should have come as no surprise. Although there were four separate opinions, all justices agreed with the result.[3] It was the extent to which this implied warranty will be applied in other contexts that divided the court and has generated much debate.

As a general principle, an implied warranty that services will be performed in a good and workmanlike manner is fair, makes sense, and is good policy. People are entitled to expect that when they hire someone to perform services those services will be performed with good workmanship. Stated another way, people should not have to assume that services they pay for will be performed in a bad and unworkmanlike manner.[4]

The facts in *Melody Home* practically compelled the result. Lonnie and Donna Barnes bought a modular, pre-fabricated house manufactured by Melody Home.[5] From the beginning the house was damp, and the Barneses found puddles of water.[6] Over two years after moving in, they discovered that a sink had not been connected to the drain in one of the interior walls.[7] The resulting leaks soaked the insulation, caused mold on the walls, crumbled the sheetrock, and rotted the floor.[8] Melody Home sent repairmen out, but they made things even worse.[9] The repairmen cut and tore linoleum in the house and failed to connect the washing machine drain, which caused the house to flood, which in turn damaged the floors, cabinets, and carpets.[10] The repairmen also made obscene gestures at Donna Barnes.[11]

The jury found Melody Home knowingly failed to repair the home

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2. *Id.* at 354.

3. *Id.* at 350. In addition to the opinion written by Justice Spears, Justice Campbell wrote a concurring opinion joined by Justice Wallace, Justice Gonzalez wrote a concurring opinion joined by Chief Justice Hill, and Justice Mauzy also wrote a concurring opinion. *Id.* at 356, 361.

4. *See generally* D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION § 5.04 (2d ed. 1983 & Supp. 1989).

5. Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 351 (Tex. 1987).

6. *Id.*

7. *Id.*

8. *Id.* at 351; *see also* Melody Homes Mfg. Co. v. Barnes, 708 S.W.2d 600, 602 (Tex. App.—Fort Worth 1986), *aff'd*, 741 S.W.2d 349 (Tex. 1987)(discusses facts of case).

9. *Melody Home*, 741 S.W.2d at 351.

10. *Id.*

11. *Melody Homes*, 708 S.W.2d at 602.

in a good and workmanlike manner.[12] The Fort Worth Court of Appeals affirmed this finding and held that breach of this implied warranty was actionable under the Deceptive Trade Practices-Consumer Protection Act.[13]

After losing in the trial court and court of appeals, Melody Home argued to the Texas Supreme Court that its repair services did not carry an implied warranty that they would be performed in a good and workmanlike manner.[14] Detailing numerous public policy considerations supporting its decision, the supreme court adopted an implied warranty requiring that all service providers will perform in a good and workmanlike manner.[15] In so holding, the majority overruled the court's recent decision in *Dennis v. Allison*,[16] which had held that an implied warranty does not arise in "professional" service transactions.[17]

On rehearing, the supreme court restated the issue as "whether an implied warranty applies to repair or modification services of existing tangible goods or property."[18] The court then narrowly held that "an implied warranty to repair or modify existing tangible goods or property in a good and workmanlike manner is available to consumers suing under the DTPA."[19] This limited holding appeared to leave *Dennis v. Allison* intact.

A clear understanding of the importance of the court's equivocation on this point justifies a brief digression to the *Dennis v. Allison* opinion. Myrna Dennis sued her psychiatrist, Dr. T. H. Allison, for beating and sexually assaulting her while she was under his care for psychiatric problems.[20] Her sole theory of recovery was that Dr. Allison breached an implied warranty by violating the ethical canons for psychiatrists.[21] After a jury verdict in favor of Dennis, the Texas

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12. *Id.*

13. *Id.*

14. Melody Home Mfg. Co. v. Barnes, 30 Tex. Sup. Ct. J. 489, 490 (June 17, 1987), *withdrawn*, 741 S.W.2d 349 (Tex. 1987).

15. *Id.* at 491.

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

17. *Id.* at 96.

18. Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 354 (Tex. 1987).

19. *Id.* All references to the "DTPA" are to the Deceptive Trade Practices-Consumer Protection Act. TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon 1987).

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

21. *Id.* at 95.

Supreme Court held there was no such implied warranty.[22] The majority opinion equated implied warranty liability with strict liability and held it was "not necessary to impose an implied warranty theory as a matter of public policy because the plaintiff patient has adequate remedies to redress wrongs committed during treatment."[23] The other remedies alluded to were causes of action for assault and battery and for medical malpractice.[24]

Three justices dissented.[25] Justice Ray, wrote for the dissenters: "To hold that a psychiatrist does not impliedly warrant to his patients that he will comply with the ethical commandments of his calling defies logic."[26] The illogic was that consumers of services were denied the protections given to consumers of goods who had statutory remedies for breaches of implied warranties.[27] While the dissenters were not willing to make professional service providers guarantors of results, they believed that a professional at least should impliedly warrant that he or she would not breach the ethical commandments of his or her calling.[28] As for the argument that existing remedies provided adequate protection, the dissenting justices responded that the injured plaintiff was entitled to be the architect of her own lawsuit.[29] The dissenters stated, "If the facts give rise to a particular theory of recovery, then a party has the right to assert that theory, regardless of the applicability of other available theories."[30]

The issue that divided the court in *Dennis v. Allison* set the stage for the debate in *Melody Home Manufacturing v. Barnes* less than two years later. In *Melody Home* the Texas Supreme Court cited *Dennis v. Allison* to support the proposition that an implied warranty does not arise in "professional" service transactions. "The policies supporting the recognition of an implied warranty for services such as repairs apply equally to 'professional' services. Consequently, we overrule *Dennis* and hold that all service providers impliedly warrant that their services will be performed in a good and workmanlike man-

22. *Id.* at 96.
23. *Id.*
24. Dennis v. Allison, 698 S.W.2d 94, 95-96 (Tex. 1985).
25. *Id.* at 96 (Ray, J., dissenting).
26. *Id.* (Ray, J., dissenting).
27. TEX. BUS. & COM. CODE ANN. §§ 2.314-.315 (Tex. UCC)(Vernon 1968).
28. Dennis v. Allison, 693 S.W.2d 94, 97 (Tex. 1985)(Ray, J., dissenting).
29. *Id.*
30. *Id.*

ner."[31] Only two justices dissented from this holding.[32]

On rehearing, all hell broke loose. The court received a deluge of amicus curiae briefs, in numbers normally reserved for only the most earth-shaking decisions. In addition to an impassioned motion for rehearing from Melody Home, amicus curiae briefs were filed by the Texas Automobile Dealers Association, Brown & Root, Inc., the Texas Society of Architects, the Texas Association of Defense Counsel, the Texas Association of Realtors, the Texas Society of Certified Public Accountants, the Texas Association of Builders, the Texas Manufactured Housing Association, the Texas Society of Professional Engineers, and the attorneys for the defendant in *Archibald v. Act III Arabians*.[33] The various amici offered differing criticisms, or at least gave differing nuances to the same complaints, with the architects, defense lawyers, realtors, and accountants particularly objecting to having an implied warranty that "professional" services would be performed in a good and workmanlike manner.[34]

Approximately five months after its initial decision, the supreme court issued a revised opinion.[35] The opinion on rehearing left unchanged the outcome between the parties but limited the breadth of the court's holding as to other cases, especially those involving professional services.[36] The majority stated:

> [T]his case presents the question whether an implied warranty applies to repair or modification services of existing tangible goods or property. The question whether an implied warranty applies to services in which the essence of the transaction is the exercise of professional judgment by the service provider is not before us. *Cf. DeBakey v. Staggs*, 612 S.W.2d 924 (Tex. 1981)(attorney's client suing under the DTPA for attorney's "unconscionable" actions are "consumers"). *But see Dennis v. Allison*, 698 S.W.2d 94 (Tex. 1985)(implied warranty not available to doctor's

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31. Melody Home Mfg. Co. v. Barnes, 30 Tex. Sup. Ct. J. 489, 491 (June 17, 1987), *withdrawn*, 741 S.W.2d 349 (Tex. 1987).

32. *Id.* at 494-95 (Gonzalez, J., concurring). Justice Gonzalez, joined by Chief Justice Hill, disagreed with the majority's decision to overrule *Dennis v. Allison*. *Id.* Justice Campbell concurred in the result, but would have made it prospective. *Id.* at 496.

33. 741 S.W.2d 957 (Tex. App.—Houston [14th Dist.] 1987), *rev'd*, 755 S.W.2d 84 (Tex. 1988). As will be discussed, the *Archibald* case also raised the issue of whether professional services carry an implied warranty of good performance. *See id.* 755 S.W.2d at 85.

34. Copies for the briefs are available from the Clerk of the Texas Supreme Court, filed under Cause No. C-5508.

35. Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 351 (Tex. 1987).

36. *Id.* at 354.

patient injured by improper treatment).[37]

By leaving the professional services question for another day, the court also left to conjecture and speculation what its decision will be. Had the initial opinion telegraphed the outcome when the issue is decided, or had the majority changed their minds?[38]

III. SUBSEQUENT DEVELOPMENTS

It seemed the answer would soon be forthcoming once the Texas Supreme Court agreed to hear the appeal in *Archibald v. Act III Arabians*.[39] The case involved a claim against a horse trainer for injuries that made it necessary to destroy a valuable horse.[40] The horse's owner alleged both negligence and breach of an implied warranty that the horse training services would be performed in a good and workmanlike manner.[41] The jury found negligence but failed to find it was a proximate cause of the horse's death.[42] The jury did find, however, that the trainer breached his implied warranty and that the breach was a producing cause of the death of the horse.[43]

The court of appeals stated the issue as "whether Texas law recognizes an implied warranty of good and workmanlike performance of personal services rendered by a professional."[44] The court concluded that by "accepting the horse for training, Act III impliedly promised to train the horse in a good and workmanlike manner," but this implied promise did not rise to the level of a separately actionable warranty.[45] Archibald's only remedies were for breach of contract, which was not alleged, and for negligence, which was found against him.[46]

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37. *Id.*

38. At least two justices who agreed with the substance of the original opinion clearly appeared to have changed views. Justice Campbell, who initially disagreed only with retroactive application of the court's decision, filed a new concurring opinion on rehearing, in which he "oppose[d] the creation of an implied warranty applicable to all services." *Id.* at 356 (Campbell, J., concurring). In this, he was joined by Justice Wallace. *Id.* Of course, their apparent change is no predictor of what the court will do, since both have left the court.

39. 755 S.W.2d 84 (Tex. 1988).

40. *Id.* at 85.

41. *Id.*

42. *Id.*

43. Archibald v. Act III Arabians, 755 S.W.2d 84, 85 (Tex. 1988).

44. Archibald v. Act III Arabians, 741 S.W.2d 957, 958 (Tex. App.—Houston [14th Dist.] 1987), *rev'd*, 755 S.W.2d 84 (Tex. 1988).

45. *Id.* at 959.

46. *Id.*

The court did not discuss whether horse training was properly considered a "professional" service or what definition applied to distinguish between "non-professional" and "professional" services if the latter were to be excluded from the implied warranty.[47]

The supreme court decided the case on a basis that scrupulously avoided any mention of the "professional" versus "non-professional" issue.[48] The court narrowly held that a horse is a good, and that horse training, therefore, involved the modification of an existing tangible good.[49] So characterized, the transaction fit squarely within the scope of the implied warranty of good and workmanlike performance recognized in *Melody Home*.[50]

In his dissent, Justice Gonzalez appeared interested in deciding whether the implied warranty extended to "professionals."[51] He would have held that horse training was a professional service and, therefore, was not subject to the *Melody Home* implied warranty.[52] Because Justice Gonzalez believed the horse owner had judicially admitted that horse training was a "professional" service,[53] his opinion offers little help for deciding in future cases whether other services are or are not "professional." Justice Gonzalez noted that the majority "arguably" had nullified the professional/non-professional distinction by focusing on whether the service provider was engaged in the modification or repair of an existing good.[54] If this view is correct, even "professional" services would be subject to the *Melody Home* implied warranty when modification or repair of an existing tangible good is involved.[55] However, the court's pointed silence on the issue of

47. *Id.* at 959-60.

48. Archibald v. Act III Arabians, 755 S.W.2d 84, 85-86 (Tex. 1988).

49. *Id.* at 86.

50. *Id.* Two roof repair cases also fit squarely within the implied warranty as limited to the repair or modification of existing goods. McCrea v. Cubilla Condominium Corp., 769 S.W.2d 261, 263-64 (Tex. App.—Houston [1st Dist.] 1988, no writ); Walker v. Sears, Roebuck & Co., 853 F.2d 355, 360-61 (5th Cir. 1988).

51. *Archibald*, 755 S.W.2d at 87 (Gonzalez, J., dissenting).

52. *Id.* at 87-88 (Gonzalez, J., dissenting).

53. Archibald v. Act III Arabians, 755 S.W.2d 84, 87 (Tex. 1988)(Gonzalez, J., dissenting). Justices Wallace and Culver also dissented, but they argued that the majority should not have extended the Melody Home warranty to cover horse training. They agreed with the position of the court of appeals that existing contract and negligence remedies were enough. Like the court of appeals, they did not discuss the professional/non-professional distinction. *Id.* at 86-87 (Wallace, J., dissenting).

54. *Id.* at 88 (Gonzalez, J., dissenting).

55. Comment, *The Implied Warranty of Good and Workmanlike Performance Extends to*

whether horse training was a "professional" service makes reliance on this argument precarious.

The few cases decided since *Melody Home* have not done much to define the extent to which professional services are subject to the implied warranty, if in fact the warranty has any application in professional service transactions. In *Coulson v. Lake L.B.J. Municipal Utility District*,[56] the supreme court apparently assumed that the implied warranty of good and workmanlike performance would apply to a professional engineer's services in preparing plans.[57] The disagreement between the majority and the two concurring justices was whether there was any substantive difference between negligence and breach of the implied warranty.[58] The reliability of *Coulson* as an indicator of the court's direction is questionable because the case was decided on July 1, 1987, after the first *Melody Home* opinion but before the opinion on rehearing in *Melody Home* and before the narrow opinion in *Archibald*.

The supreme court continued the uncertainty with its 1988 decision in *Willis v. Maverick*,[59] a legal malpractice case. The majority opinion, authored by Justice Kilgarlin, treated *Dennis v. Allison* as still excluding professional conduct from implied warranties, which would be actionable under the DTPA.[60] Despite this apparent foreclosing of an implied warranty cause of action for legal malpractice, Justice Kilgarlin ended the majority opinion with the cryptic statement, "Our determination of whether a lawyer's professional conduct is actionable under the DTPA must await another day."[61] Justice Mauzy wrote a concurring and dissenting opinion in which he took the position that the "court has not expressly rejected the notion that an im-

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Professional Services That Involve the Modification of an Existing Tangible Good: Archibald v. Act III Arabians, 755 S.W.2d 84 (Tex. 1988), 30 S. TEX. L. REV. 491, 492-93 (1989); *see also* Recent Development, 20 ST. MARY'S L.J. 731, 732 (1989)(court held horse training modification of existing good).

56. 734 S.W.2d 649 (Tex. 1987).

57. *Id.* at 651-52.

58. The majority stated that negligence encompassed breach of implied warranty. *Id.* at 651. The concurring justice, however, stated that negligence does not necessarily include a breach of an implied warranty. *Id.* at 652-53 (Spears, J., concurring). Justice Spears, who authored the majority opinion in *Melody Home*, wrote his concurring opinion in *Coulson* specifically to point out his disagreement with the majority's treatment of negligence and breach of the implied warranty as being synonymous. *Id.* at 652-53 (Spears, J., concurring).

59. 760 S.W.2d 642 (Tex. 1988).

60. *Id.* at 647-48.

61. *Id.* at 648.

plied warranty of good and workmanlike performance may apply to the provision of legal services."[62]

The opinion in *Kennemore v. Bennett*[63] did not give the supreme court any occasion to plow new ground on the scope of the warranty of good workmanship. At issue was a homebuilder's breach of the implied warranty by building a defective house.[64] This conduct would have been actionable even prior to *Melody Home*, under *Humber v. Morton*.[65]

The more recent decision in *Cosgrove v. Grimes*[66] perpetuated the mixed signals of *Coulson* and *Willis*. Like *Willis*, *Cosgrove* also involved the potential application of the implied warranty to legal malpractice.[67] Like *Coulson*, *Cosgrove* raised the issue of the difference, if any, between negligence and breach of the implied warranty.[68] The jury was asked the following question: "Do you find that Defendant Walter Grimes failed to exercise reasonable and ordinary care and diligence in applying the skill and knowledge at hand in the prosecution of the lawsuit arising from the July 15, 1976 collision?" [69] The court viewed the jury's affirmative answer as a finding of negligence.[70]

Justice Spears, writing for a unanimous court, assumed for the sake of argument that an implied warranty cause of action could exist against an attorney, but held that the negligence issue did not submit an implied warranty claim.[71] Underscoring the point made in his concurrence in *Coulson*, Justice Spears now wrote for the entire court: "At best the language of the submission vaguely alluded to a standard of care, not to an implied warranty. Because the issue did not inquire whether Grimes breached an implied warranty, Cosgrove may not recover on such a claim."[72] The *Cosgrove* opinion thus left undecided

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62. *Id.* at 648 (Mauzy, J., concurring and dissenting). Justice Mauzy was joined by Justice Robertson. *Id.*

63. 755 S.W.2d 89 (Tex. 1988).

64. *Id.* at 90.

65. 426 S.W.2d 554, 555 (Tex. 1968)(court held home builder liable for breach of implied warranty of good and workmanlike manner); *see also* Western Steel Co. v. Coast Inv. Corp., 760 S.W.2d 725, 727 (Tex. App.—Corpus Christi 1988, no writ)(complaint that work not performed in good and workmanlike manner).

66. 774 S.W.2d 662 (Tex. 1989).

67. *Id.* at 663.

68. *Id.* at 662-66.

69. *Id.* at 665 n.3.

70. *Id.* at 665.

71. Cosgrove v. Grimes, 774 S.W.2d 662, 666 (Tex. 1989).

72. *Id.*

both issues—whether professional services are covered by the implied warranty, and what the difference is between negligence and breach of the warranty. *Cosgrove* also causes additional uncertainty on the latter point by appearing to mark an abandonment of the majority position in *Coulson*.

One court of appeals opinion, *Forestpark Enterprises, Inc. v. Culpepper*,[73] squarely addressed the issue of whether the implied warranty of good and workmanlike performance applies to professional services.[74] The court held it did not.[75] Forestpark Enterprises was a sublessee of space in a shopping center where Anrem Corporation was the property manager.[76] Forestpark's suit alleged that Anrem breached an implied warranty of good and workmanlike performance by failing to evict another tenant whose patrons were causing Forestpark to lose business.[77] Relying on *Dennis v. Allison*, the court of appeals held that the *Melody Home* implied warranty of good and workmanlike performance did not apply, because no modification or repair of existing goods was involved and "Anrem's services involved the exercise of professional judgment by the service provider."[78] The opinion did not offer any guidance on how to distinguish "professional judgment" from the common run of judgments that would carry an implied warranty of good and workmanlike performance.[79]

The development of the law thus far has not answered whether professional services should be excluded from the *Melody Home* implied warranty of good and workmanlike performance, nor has it shown how we are to distinguish "professional" services if they are exempted. Lurking behind these issues is the question of what standard professionals will be judged by if their services are held to carry an implied guarantee of good workmanship. Perhaps this last question, more than any other factor, drives the debate over including or excluding professional services.

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73. 754 S.W.2d 775 (Tex. App.—Fort Worth 1988, no writ).

74. *Id.* at 779.

75. *Id.*

76. *Id.* at 777.

77. Forestpark Enters. v. Culpepper, 754 S.W.2d 775, 777 (Tex. App.—Fort Worth 1988, no writ).

78. *Id.* at 779.

79. *See id.* (court stated professional judgment required). One other court of appeals decision suggested that the supreme court may be slow in expanding the implied warranty to cover professional services. Thomas C. Cook, Inc. v. Rowhanian, 774 S.W.2d 679, 684 (Tex. App.—El Paso 1989, no writ).

IV. ARGUMENTS PRO AND CON

A. *What is a "Professional"?*

By now, the recurrent appearance of quotation marks with "professional" has no doubt signalled the uncertainy attending the use of the word. What is a "professional"? If we are going to exclude them from the implied warranty, we should at least come up with a credible test for spotting them.

General definitions are not much use. True, *Websters* recognizes the highbrow meaning of "professional" as "one who belongs to one of the learned professions requiring a high level of training and proficiency" and, perhaps a step down, "characterized by or conforming to the technical or ethical standards of a profession or an occupation."[80] But we are also given the journeymen's versions—"manifesting fine artistry or workmanship based on sound knowledge and conscientiousness" and "reflecting the results of education, training, and experience."[81] Finally, we are left with the crassly commercial "engaged or participated in by persons receiving financial return" and "one that engages in a particular pursuit, study, or science for gain or livelihood."[82]

Using the monetary yardstick, anyone who customarily performs services for pay, rather than for free, qualifies as a "professional." Presumably, even the repairmen who started all this trouble in *Melody Home* would be professionals under this test. If paying for the services excludes the transaction as "professional," the exception will exclude all consumer transactions. A "consumer" is one who seeks or acquires goods or services by purchase or lease,[83] yet by the act of purchasing or leasing, the consumer would convert the service pro-

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80. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1811 (1976). The same source offers a similarly noble companion definition of "profession" as:

> [A] calling requiring specialized knowledge and often long and intensive preparation including instruction in skills and methods as well as in the scientific, historical, or scholarly principles underlying such skills and methods, maintaining by force of organization or concerted opinion high standards of achievement and conduct, and committing its members to continued study and to a kind of work which has for its prime purpose the rendering of a public service.

Id.

81. *Id.*

82. *Id.* "Profession" has a similar definition as "a principal calling, vocation, or employment." *Id.*

83. TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon 1987).

vider into a "professional" who owed no implied warranty of good workmanship.

The middle definition does begin to split out some occupations, but without very satisfying results. For example, the horse trainer in *Archibald* might qualify as a professional, but the property manager in *Forestpark* most likely would not.

The highest definition comes closest to describing what might be called the "professionals by acclamation," those groups everyone would consider "professional." Doctors and lawyers, to their relief, would benefit from the exemption. The narrowness of this definition, however, would certainly give the appearance of favoritism by shielding only a select group from warranty liability for shoddy services.

Another approach that has been suggested is to label as "professionals" those who are licensed and regulated by the state. This approach would exempt accountants,[84] air conditioning contractors,[85] architects,[86] auctioneers,[87] barbers,[88] boxing and wrestling promoters,[89] chiropractors,[90] cosmetologists,[91] day care center operators,[92] dentists,[93] dietitians,[94] doctors,[95] employment agency operators,[96] engineers,[97] funeral directors,[98] health spa operators,[99] hearing aid fitters and dispensers,[100] insurance agents,[101] lawyers,[102] massage therapists,[103] nurses,[104] nursing home administrators,[105] optometrists,[106]

84. TEX. REV. CIV. STAT. ANN. art. 41a-1 (Vernon Supp. 1990).
85. *Id.* art. 8861.
86. *Id.* art. 249a (Vernon 1973).
87. *Id.* art. 8700 (Vernon Supp. 1990).
88. *Id.* art. 8407a.
89. TEX. REV. CIV. STAT. ANN. art. 8501-1 (Vernon Supp. 1990).
90. *Id.* art. 4512b.
91. *Id.* art. 8451a.
92. TEX. HUM. RES. CODE ANN. § 44.031 (Vernon Supp. 1990).
93. TEX. REV. CIV. STAT. ANN. art. 4548 (Vernon 1976).
94. *Id.* art. 4512h (Vernon Supp. 1990).
95. *Id.* art. 4495b.
96. *Id.* art. 5221a-7 (Vernon 1987).
97. *Id.* art. 3271a (Vernon 1968 & Supp. 1990).
98. TEX. REV. CIV. STAT. ANN. art 4582b (Vernon 1976 & Supp. 1990).
99. *Id.* art. 5221(1) (Vernon 1987 & Supp. 1990).
100. *Id.* art. 4566 (Vernon 1976 & Supp. 1990).
101. TEX. INS. CODE ANN. § 21.07 (Vernon 1981 & Supp. 1990).
102. TEX. GOV'T CODE ANN. § 82 (Vernon 1988).
103. TEX. REV. CIV. STAT. ANN. art. 4512e (Vernon 1976 & Supp. 1990).
104. *Id.* art. 4518.
105. *Id.* art. 4442d.

pest exterminators,[107] pharmacists,[108] physical therapists,[109] physicians and surgeons,[110] plumbers,[111] podiatrists,[112] polygraph examiners,[113] private investigators,[114] psychologists,[115] real estate agents, brokers, and real estate inspectors,[116] social workers,[117] speech pathologists,[118] surveyors,[119] and veterinarians.[120] As this list shows, there is no unifying theme to explain why state licensing should substitute for common law relief. It could be argued that in fact the legislature has determined that the public are particularly at risk when dealing with these groups.

The fallacy of using state licensing as the basis for an exemption from statutory liability was eloquently stated in 1973 when the Deceptive Trade Practices-Consumer Protection Act was first being debated. A last-minute effort was made wholly to exempt from the DTPA licensed "professionals." Senator Carl Parker, then a representative, stated, "Mr. Speaker and members. I have heard of a license to steal, but this is the first time I have ever seen it offered as an amendment to a bill." The amendment was rejected.[121] If the public policy implications of including professional service transaction within the scope of common law remedies concern the court, that concern should be laid to rest by the legislative history showing that when faced with a similar attempt to limit statutory protections for Texas consumers, the legislature came down on the side of inclusiveness.[122]

Few useful definitional tools can be gleaned from Texas cases. In

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106. *Id.* art. 4552-3.07 (Vernon 1976).
107. TEX. AGRIC. CODE ANN. § 76.105 (Vernon 1982).
108. TEX. REV. CIV. STAT. ANN. art. 4542a (Vernon 1976 & Supp. 1990).
109. *Id.* art. 4512e.
110. *Id.* art. 4495b (Vernon Supp. 1990).
111. *Id.* art. 6243-101 (Vernon 1970 & Supp. 1990).
112. *Id.* art. 4570 (Vernon 1976 & Supp. 1990).
113. TEX. REV. CIV. STAT. ANN. art. 4413(29cc) (Vernon 1976 & Supp. 1990).
114. *Id.* art. 4413(29bb).
115. *Id.* art. 4512c.
116. *Id.* art. 6573a (Vernon 1969 & Supp. 1990).
117. TEX. HUM. RES. CODE ANN. § 50.015 (Vernon Supp. 1990).
118. TEX. REV. CIV. STAT. ANN. art. 4512j (Vernon Supp. 1990).
119. *Id.* art. 5282c.
120. *Id.* art. 7465a (Vernon 1960 & Supp. 1990).
121. Debate on Tex. H.B. 417 on the Floor of the House of Representatives, 63rd Leg. 2 (April 10, 1973)(transcript available from Senate Staff Services Office).
122. The legislative intent that the DTPA be all-encompassing was noted by the court in *Melody Home.* Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 354 n.7 (Tex. 1987); *see*

Dennis v. Allison, the court did not seriously consider whether the psychiatrist was a "professional."[123] Under any standard he would be. The one potentially distinguishing factor mentioned in the opinion was the existence of a code of ethics the doctor had violated.[124] The court also mentioned that in a professional service transaction the consumer could identify the responsible party and pinpoint the specific wrong committed.[125] This latter point was made, however, to distinguish the professional service transaction from a sale of mass-produced goods, not to distinguish between professional and non-professional services. The court's statement would apply equally in either type of service transaction. For example, the facts in *Melody Home* show that the consumers were able to determine who was responsible and could pinpoint the specific wrong.[126]

Even if one succeeds in effectively defining who will be called "professionals," there is still the question of what constitutes "professional services." The court in *Melody Home* left the question open as to "services in which the essence of the transaction is the exercise of *professional* judgment by the service provider."[127] It is not enough that the services call for the exercise of judgment, the exercise of "professional" judgment is required.[128]

Every act by a "professional" does not necessarily require the exercise of judgment. For example, a lawyer may miss a filing deadline. Conversely, services performed by those labelled "non-professional" may require a great degree of skill and training, and the exercise of judgment. A common example is the mechanic who is capable of diagnosing and repairing a modern, computer-controlled car.[129]

In the case of *Barbee v. Rogers*,[130] the Texas Supreme Court did try

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also Birchfield v. Texarkana Memorial Hosp., 747 S.W.2d 361, 368 (Tex. 1987)(holding no implied exclusion of physicians and other health care providers from 1973 version of DTPA).

123. Dennis v. Allison, 698 S.W.2d 94, 94-96 (Tex. 1985).

124. *Id.* at 94.

125. *Id.* at 96.

126. *Melody Home*, 741 S.W.2d at 351.

127. Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 354 (Tex. 1987)(emphasis added). The court of appeals purported to apply this standard without further definition in *Forestpark Enterprises*. Forestpark Enters. v. Culpepper, 754 S.W.2d 775, 779 (Tex. App.—Fort Worth 1988, no writ).

128. *Melody Home*, 741 S.W.2d at 354.

129. *See* Curry, *Common Law Warranties*, 1989 UNIV. TEX., DTPA: FROM THE BASICS TO BAD FAITH LITIGATION 12-13.

130. 425 S.W.2d 342 (Tex. 1968).

to define what it was that made the services of optometrists "professional."[131] The court noted that optometrists were licensed by the state and had statutorily defined duties.[132] The shakiness of licensing as a definitional foundation, however, has already been noted. In addition, the court pointed out that optometrists had special training to use special instruments, and their acts "are described as an art with many variables and call for an exercise of judgment by the practitioner."[133] While these characteristics undoubtedly apply to an optometrist, the same can be said of a carpenter.

All one can say for sure after a century and a half of Texas common law development is that a "tubber" is not considered to be engaged in the performance of a professional service. In *Maryland Casualty Co. v. Crazy Water Co.*[134] we learn that a "tubber" was one whose duties were "to assist a bather in preparing to take a bath, running the water, testing the temperature and assisting the bather, when necessary, into and out of the bath tub, etc."[135] In contrast, the court defined a "profession" by explaining:

> In some sense, of course, a profession involves labor, skill, education, special knowledge and compensation or profit. The labor, as well as the skill, however, involved is predominantly mental or intellectual, rather than physical or manual. The education or special knowledge involved is characterized by its use for others as distinguished from self, or as sometimes said 'a practical dealing with affairs as distinguished from mere study or investigation.' . . . As to the compensation or profits[,] 'It is of the essence of a profession that the profits should be dependent mainly upon the personal qualification of the person by whom it is carried on.' . . .[136]

Any failure of this definition to conclusively delimit the terms at issue was foreshadowed by the court's early admission that:

> The words 'profession' and 'professional' are used in many different senses. We may be sure in any case that the words 'rendering professional services' refer to services pertaining to some profession rendered by one in the pursuit of such profession. There would be no doubt that the services thus referred to would not be menial services, or the serv-

131. *Id.* at 345.
132. *Id.*
133. *Id.* at 345-46.
134. 160 S.W.2d 102 (Tex. Civ. App.—Eastland 1942, no writ).
135. *Id.* at 104.
136. *Id.* at 104-05 (citations omitted).

> ices of a common laborer. But, if we exclude such meaning of the terms, the words may still mean one thing in a particular writing or in reference to a particular subject-matter, and a very different thing in another writing or in reference to another subject-matter.[137]

The court concluded that "tubbers" were not engaged in rendering professional services.[138]

The problem with attempting to define "professionals" is that the inclusive definitions effectively render the term meaningless, while the exclusive definitions make it elitist. To say members of a particular trade or occupation are not professionals demeans them. To say everyone is a professional demeans the word.

Tackling this definitional task would make the courts look bad. Imagine trying to justify to a layman unschooled in legal subtleties why it is that the state's highest civil court, all lawyers, has defined a group of "professionals," which of course includes lawyers, who are entitled to perform services for hire without being subject to the same implied warranty of good and workmanlike performance owed by an auto mechanic. The common law, being law that develops on a case-by-case basis as the needs of society and the litigants dictate, should make sense to the common man. An exclusion for "professionals," by appearing to favor already privileged groups, would deservedly engender cynicism.

Exempting "professionals" from any implied warranty of good and workmanlike performance would also create the same type of illogical disparity that led to the decision in *Humber v. Morton*[139] where the supreme court first recognized an implied warranty that a home would be built in a good and workmanlike manner.[140] In casting aside as outdated the doctrine of caveat emptor as applied to homebuilding, Justice Norvell scoffed at a legal rule by which "the law seemingly concerns itself little with a transaction which may and often does involve a purchaser's life savings, yet may afford relief by raising an implied warranty of fitness when one is swindled in the purchase of a two dollar fountain pen."[141] It makes no sense to allow a distinction in service transactions that grants protections from leaky

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137. *Id.* at 104.
138. *Id.* at 105.
139. 426 S.W.2d 554 (Tex. 1968).
140. *Id.* at 555.
141. *Id.* at 561 n.7.

washing machine connections but denies relief when the services affect someone's life, in the case of doctors, or their personal liberty or property rights, in the case of lawyers. The better argument is that if anyone should be held liable for failing to perform at the level expected of skilled member of their trade, professionals should be. They have voluntarily entered into occupations involving greater responsibility and are often in a position to do greater harm through bad work.

B. *What Is The Standard Of Care?*

The fear that seems to motivate arguments for shielding professionals from the implied warranty of good and workmanlike performance is that the standard of care will be strict liability. Such a standard would make all service providers guarantors of good results even though the nature of some professions makes such a burden inappropriate. For example, a surgeon may perform skillfully, yet still lose the patient. An attorney can lose a trial despite good and workmanlike lawyering. In these instances bad results do not prove bad conduct. A number of courts have refused to recognize implied warranties for professional services precisely because they perceived strict liability to be unfair when applied in that context, although liability based on negligence or some other concept of failure to meet an accepted standard is allowed.[142]

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142. *See, e.g.,* La Rossa v. Scientific Design Co., 402 F.2d 937, 943 (3d Cir. 1968)(applying law of New Jersey and holding that no matter how it is described, basis of liability for professional services is negligence); Gagne v. Bertran, 275 P.2d 15, 21 (Cal. 1954)(test driller not strictly liable for improper assertions as to amount of fill needed in residential lot); Stuart v. Crestview Mut. Water Co., 110 Cal. Rptr. 543, 549 (Ct. App. 1973)(engineer not strictly liable for defective design of water system); Samuelson v. Chutich, 529 P.2d 631, 633 (Colo. 1974)(engineers do not impliedly warranty fitness of plans and specifications for intended use; liability must be based on negligence); Rosos Litho Supply Corp. v. Hansen, 462 N.E.2d 566, 571 (Ill. 1984)(architect does not imply or guarantee perfect plan or satisfactory result, but could be liable for negligence); Corceller v. Brooks, 347 So. 2d 274, 277-78 (La. Ct. App. 1977)(lawyer could not be liable for implied warranty of favorable result, but could be found negligent); Barrios v. Sara Mayo Hosp., 264 So. 2d 792, 794 (La. Ct. App. 1972)(implied warranty cause of action allowed against doctor who failed to perform in conformity with community standards); Jenson v. Touche Ross & Co., 335 N.W.2d 720, 728 (Minn. 1983)(strict liability standard not applied to "second-guess" professional judgment of architects); City of Mounds View v. Walijarvi, 263 N.W.2d 420, 424 (Minn. 1978)(implied warranty/strict liability not applicable to judgmental work of architects and other vendors of professional services); Board of Trustees of Union College v. Kennerly, Slomanson & Smith, 400 A.2d 850, 854 (N.J. Super. Ct. Law Div. 1979)(no strict liability based on breach of implied warranty by engineer); Toppino v. Herhahn, 673 P.2d 1297, 1300-01 (N.M. 1983)(im-

If the *Melody Home* opinion had adopted an implied warranty of *results*, the concern would be understandable and could justify the unpleasant and difficult task of trying to distinguish between professionals and non-professionals. But the plain language of the *Melody Home* opinion on rehearing makes clear that the implied warranty is one of *performance*, not *results*.[143] The court expressly held: "We do not require repairmen to guarantee the *results* of their work; we only require those who repair or modify existing tangible goods or property to *perform* those services in a good and workmanlike manner."[144] The majority explicitly distinguished the new warranty of good workmanship from the strict liability imposed by other implied warranties, saying: "In strict liability cases, the focus is on the *product* and not on the conduct of the producer. By contrast, the inquiry in a breach of warranty case concerns the *performance* of the service provider."[145]

The court defined "good and workmanlike performance" as "that quality of work performed by one who has the knowledge, training, or experience necessary for the successful practice of a trade or occupation and performed in a manner generally considered proficient by those capable of judging such work."[146] Although the court has equivocated on whether, and how, this standard differs from simple negligence, the implied warranty standard scarcely seems more onerous.

There is no reason to suspect the court would impose liability that

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plied warranty of results inapplicable to professional services of plastic surgeon); State v. Gathman-Matotan Architects & Planners, Inc., 653 P.2d 166, 169 (N.M. Ct. App. 1982)(architects and other professionals do not warrant results but do "warranty" work performed with skill customarily demanded of profession); Queensbury Union Free School Dist. v. Jim Walter Corp., 398 N.Y.S.2d 832, 833 (Sup. Ct. 1977)(no strict liability claim against architect); Nevauex v. Park Place Hosp., Inc., 656 S.W.2d 923, 926 (Tex. App.—Beaumont 1983, writ ref'd n.r.e.)(strict products liability theories not applicable to radiation therapy by hospital); Foster v. Memorial Hosp. Ass'n of Charleston, 219 S.E.2d 916, 918 (W. Va. 1975)(hospital not liable under strict products liability/implied warranty theories for supplying tainted blood); Hoven v. Kelble, 256 N.W.2d 379, 388 (Wis. 1977)(court requires showing of negligence to impose liability on physician for professional services).

143. Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 355 (Tex. 1987).

144. *Id.*

145. *Id.* at 355 n.8. The focus on performance is further highlighted by two Fifth Circuit cases that hold a complete failure to perform does not breach this implied warranty. *See* Dallas Power & Light Co. v. Westinghouse Elec. Corp., 855 F.2d 203, 208 (5th Cir. 1988)(failure to repair steam turbine generator used to produce electricity); Brooks, Tarlton, Gilbert, Douglas & Kressler v. United States Fire Ins. Co., 832 F.2d 1358, 1377 n.16 (5th Cir.), *opinion clarified*, 832 F.2d 1378, 1379 (5th Cir. 1987)(warranty arises upon performance).

146. *Melody Home*, 741 S.W.2d at 354.

was any more "strict" if it were to extend the warranty to professional services. Even the three justices who dissented in *Dennis v. Allison* never advocated that professionals be held to guarantee favorable results.[147] Instead, they urged that at a minimum a professional should "impliedly warrant that he will not breach the ethical commandments of his calling in providing his services."[148] Presumably, if a professional were to breach the ethical commandments of his or her profession, such conduct would not constitute performance generally considered proficient by those capable of judging such work.

Complaining about the burdens of an implied warranty of good and workmanlike performance is especially inappropriate for lawyers. Lawyers already owe their clients a duty of utmost good faith and fair dealing, and their dealings are already subject to the strict scrutiny of a fiduciary relationship.[149] Lawyers already are ethically bound to represent their clients "zealously."[150] Lawyers already impliedly represent that they possess the learning, skill, and ability necessary to practice law, that they will exert their best judgment in matters entrusted to them, and that they will exercise reasonable care in using their skill and in applying their knowledge.[151] Holding that lawyers impliedly warrant they will perform "that quality of work performed by one who has the knowledge, training, or experience necessary for the successful practice of a trade or occupation and performed in a manner generally considered proficient by those capable of judging such work" adds no burden not already borne.

Moreover, it has long been the law in Texas that "Accompanying every contract is a common-law duty to perform with care, skill, reasonable expedience and faithfulness the thing agreed to be done, and a negligent failure to observe any of these conditions is a tort, as well as a breach of contract."[152] Whatever the differences between the standards of care imposed by negligence and the implied warranty of good

147. Dennis v. Allison, 698 S.W.2d 94, 97 (Tex. 1985)(Ray, J., dissenting).

148. *Id.* (Ray, J., dissenting).

149. Archer v. Griffith, 390 S.W.2d 735, 739 (Tex. 1964); State v. Baker, 539 S.W.2d 367, 374 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.); Smith v. Dean, 240 S.W.2d 789, 791 (Tex. Civ. App.—Waco 1951, no writ).

150. SUPREME COURT OF TEXAS, RULES GOVERNING THE STATE BAR OF TEXAS art. X, § 9 (Rules of Professional Conduct) Rule 1.01 (1990). A lawyer must represent a client with zeal. *Id.* (comment 6).

151. Cook v. Irion, 409 S.W.2d 475, 477 (Tex. Civ. App.—San Antonio 1966, no writ).

152. Montgomery Ward & Co. v. Scharrenbeck, 204 S.W.2d 508, 510 (Tex. 1947).

and workmanlike performance, it is difficult to see how the latter results in any substantial increases in the existing common law duties.

C. *Difficulty of Proof*

In *Melody Home v. Barnes*, the Texas Supreme Court approvingly cited a number of court of appeals decisions that had recognized, either explicitly or implicitly, implied warranties of good workmanship for brick patio construction, employment services, book printing, house repairs, car repairs, swimming pool installation, printing, and airplane repairs.[153] It could be argued that in many of these cases judging the quality of the services was easier than it would be in a professional service transaction. In most of these cases, as with the repairs in *Melody Home*, there was a tangible result that did not look right or did not work right. In some "professional" contexts, judging the performance by the outcome is not so easy, and the results may be unreliable indicators of the quality of the services.

However, difficulty in proving that a professional failed to perform properly is not a sufficient justification for refusing to let claimants try. If it were, courts would refuse to allow suits for professional negligence. Although proving negligence in these cases may be harder and may require expert testimony to ferret out and demonstrate the substandard performance, negligence can be shown, and recovery is available. Infrequently, a case may also arise where the result is so blatantly bad that the outcome itself is proof of substandard performance, such as cases where the doctrine of res ipsa loquitur would apply.

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153. Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 352 & n.2 (Tex. 1987). The *Melody Home* court cited the following cases: Thrall v. Renno, 695 S.W.2d 84, 87 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.)(brick patio construction); Diversified Human Resources Group, Inc. v. PB-KBB, Inc., 671 S.W.2d 634, 636 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.)(employment services); Griffin v. Eakin, 656 S.W.2d 187, 190 (Tex. App.—Austin 1983, writ ref'd n.r.e.)(printing of books); Holifield v. Coronado Bldg., Inc., 594 S.W.2d 214, 215 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ)(house repairs); Import Motors, Inc. v. Matthews, 557 S.W.2d 807, 809 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.)(car repairs); Boman v. Woodmansee, 554 S.W.2d 33, 34 (Tex. Civ. App.—Austin, 1977, no writ)(swimming pool installation); Trends, Inc. v. Stafford-Lowdon Co., 537 S.W.2d 778, 782 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.)(printing work); Mercedes Dusting Servs., Inc. v. Evans, 353 S.W.2d 894, 896 (Tex. Civ. App.—San Antonio 1962, no writ)(airplane repairs).

D. *The Policy Factors in Melody Home*

In *Melody Home*, the supreme court listed a number of public policy considerations that led the majority to recognize the implied warranty of good and workmanlike performance.[154] A review of these points illustrates the concerns that should also influence the court's decision with respect to "professional" services. The following considerations can be gleaned from the court's opinion:

(1) "Consumers of services did not have the protection of a statutory or common law implied warranty scheme";

(2) "the public interest in protecting consumers from inferior services is paramount to any monetary damages imposed upon sellers who breach an implied warranty";

(3) "service providers are in a much better position to prevent losses than are the consumers of the services";

(4) "[m]any services are so complicated and individually tailored that a consumer is unable to independently determine quality and must depend on the experience, skill, and expertise of the service provider";

(5) "a consumer should be able to rely upon the expertise of the service provider";

(6) "application of [an] implied warranty to services would encourage justifiable reliance on the service providers who would have more incentive to increase and maintain the quality of the services they provide";

(7) "a service provider is better able to absorb the cost of damages associated with inferior services through insurance and price manipulation than is the individual consumer";

(8) "the caveat emptor rule as applied to services such as repairs did a disservice to both ordinary prudent purchasers and to the industry by encouraging the purveyor of shoddy workmanship"; and

(9) recognizing an implied warranty actionable under the DTPA "would further the policy of giving consumers an efficient and economical means of securing protection from poor quality services" by allowing the recovery of attorneys' fees and discretionary damages.[155]

All of these considerations apply to professional service transac-

154. *Melody Home*, 741 S.W.2d at 353-55 n.9.

155. *Id.*

tions. (1) The same lack of remedy exists. (2) The public interest in protecting consumers from inferior services should have even greater force in professional service transactions, considering the economic stakes and potential human costs are often greater than in non-professional transactions such as repairing a leaky sink. (3) Given their education and training, professionals, for the most part, should be in an even better position to prevent losses. (4) As a rule, professional services are even more complicated, so the consumer is even less able to independently determine quality.[156] (5) There is no reason consumers should be any less able to rely on the expertise of professionals. To the contrary, their reliance in such cases is even more justified by the fact that the service provider is a "professional." (6) There is no reason to expect that professionals will be any less responsive to the incentive to increase and maintain the quality of their work. (7) Professionals are more likely to be able to absorb the cost of inferior services through insurance or price manipulation. (8) Professionals are more readily identifiable as groups whose general reputation can be harmed by bad actors, thus professionals should have an even greater desire to rid their ranks of purveyors of shoddy services. (9) The same need for an efficient and economical remedy exists in professional service transactions, especially in those cases in which a wrong could not otherwise be feasibly redressed. It seems those who advocate exempting professionals from the implied warranty of good and workmanlike performance have an insurmountable burden in trying to explain why these considerations do not apply.

E. *A Surplus Remedy?*

One final argument against recognizing an implied warranty that professional services will be performed in a good and workmanlike manner is that the remedy is unneeded. As the argument goes, existing remedies for breach of contract and negligence are sufficient.[157] The simple answer to this argument is that it comes too late. Whether one agrees or disagrees with the need for an implied warranty of good and workmanlike performance for service transactions at all, Texas now has one.

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156. *See* Barbee v. Rogers, 425 S.W.2d 342, 345-46 (Tex. 1968)(presence of individualized services was one factor court used to define "professional" services).

157. *See* Dennis v. Allison, 698 S.W.2d 94, 95-96 (Tex. 1985)(not necessary for court to impose implied warranty because plaintiff has adequate remedies).

The questions now are whether this existing remedy should be limited in its application to professional services and, if so, whether any rational basis exists for defining the limitation. It bears noting that even Justice Gonzalez, the most vocal critic of the majority holding in *Melody Home*, agreed that some expansion of the available remedies was justified.[158] His disagreement was with the scope of the expansion.[159] It would be improper to now use general animosity toward the implied warranty established in *Melody Home* as the unspoken reason for imposing arbitrary limitations on its application.

Aside from the response that the "surplus remedy" argument comes too late, there are substantive answers that justified rejection of this argument in *Melody Home*. First, recognizing an implied warranty cause of action, which can be brought under the DTPA, promotes the legislative purpose reflected in the statute to provide efficient and economical remedies to consumers.[160] Allowing recovery of attorney's fees encourages consumers to bring meritorious suits, as does the potential recovery of discretionary damages.[161] A second response, not clearly articulated in *Melody Home*, is that the causation standard for recovery under the implied warranty theory differs from that for negligence. Negligence requires a showing that the conduct was a *proximate* cause of the damages; *producing* cause is the standard for a warranty claim brought under the DTPA. The difference is that foreseeability is an element of the former but not the latter.[162] This difference reflects a conscious policy decision to shift more of the burden of losses on to the party causing them. Such a decision certainly follows from the policy considerations outlined in *Melody Home*.[163]

The "surplus remedy" argument is contradicted by another position taken by some critics of the implied warranty. The critics argue that the new remedy provides unduly harsh penalties because it subjects service providers to treble damages under the DTPA. If the new warranty really does add significant penalties, that argues that some-

158. Melody Home Mfg. Co. Barnes, 741 S.W.2d 349, 356 (Tex. 1987)(Gonzalez, J., concurring).

159. *Id.*

160. TEX. BUS. & COM. CODE ANN. § 17.44 (Vernon 1987).

161. *Id.* § 17.50.

162. Archibald v. Act III Arabians, 755 S.W.2d 84, 88 nn.1-2 (Tex. 1988)(Gonzlez, J., dissenting).

163. Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 353-55 n.9 (Tex. 1987).

thing was lacking in the prior remedies and that the new one is not redundant.

More significantly, complaints about "harsh" DTPA penalties raise a false issue. Exemplary damages were already available at common law, based on a showing of gross negligence or conscious indifference. Prior to 1987, there was no fixed limit on these damages. Since that date, certain types of personal injury and products liability cases are subject to a cap on exemplary damages of no more than four times the actual damages.[164] In contrast, since 1979, DTPA damages beyond the first $1,000 require a higher showing of culpability, "knowing" conduct, and are discretionary with the jury.[165] Moreover, the total award of actual and additional damages cannot exceed a combined award of three times the actual damages.[166] Thus, a plaintiff suing under the DTPA has a higher burden to get less money!

V. CONCLUSION

The supreme court in *Melody Home* confronted and resolved the broad issue of whether protection of consumers justified recognition of a common law implied warranty of good and workmanlike performance of services. The policy decision was made; the warranty was recognized.

All of the policy considerations relied on to support imposing the warranty on any service provider apply with equal or greater force to include professional service transactions within the scope of the warranty. As the preceding arguments demonstrate, the courts cannot craft a plausible, workable test for including non-professional services while excluding "professionals." Even if they could, they should not. Professionals have no right to special treatment. Consumers are no less deserving of protection when they are harmed by substandard professional services.

The strongest argument for shielding a professional from liability turns out to be a false one. Professionals will not be held strictly liable, nor will they be required to guarantee results that are beyond their control. The implied warranty recognized in *Melody Home* is firmly based on the concept of fault. Liability follows from a failure to perform at the level "generally considered proficient by those capa-

164. TEX. CIV. PRAC. & REM. CODE ANN. § 41.003, .007 (Vernon Supp. 1989).
165. TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (Vernon 1987).
166. *Id.*

ble of judging such work," not from a bad outcome. At bottom, services providers—professional or non-professional—are held to warrant what they already owe, a duty to perform reasonably.

With the warranty defined as it was in *Melody Home*, there are no unique countervailing arguments for exempting professionals. When the issue is presented, the Texas Supreme Court should rule that professionals and non-professionals alike warrant they will perform their services in a good and workmanlike manner.[167]

167. For additional readings on some of the topics covered by this article, see, e.g., Alderman & Rosenthal, *A Consumer Update: Recent Developments Under the Texas Deceptive Trade Practices Act*, 20 ST. MARY'S L.J. 495, 509-16 (1989); Curry, *Common Law Warranties*, 1989 UNIV. TEX., DTPA: FROM THE BASICS TO BAD FAITH LITIGATION 12-13; Krahmer, *Warranties: UCC*, in 1989 UNIV. TEX., DTPA: FROM THE BASICS TO BAD FAITH LITIGATION; Maxwell, *Statutory and Common Law Remedies for Denial of Insurance Claims*, in 1989 UNIV. TEX., DTPA: FROM THE BASICS TO BAD FAITH LITIGATION 17-18; Comment, *The Implied Warranty of Good and Workmanlike Performance Extends to Professional Services That Involve the Modification of an Existing Tangible Good*: Archibald v. Act III Arabians, 755 S.W.2d 84 (Tex. 1988), 30 S. TEX L. REV. 491 (1989); Comment, *Melody Home Manufacturing Co. v. Barnes: An Implied Warranty is Created*, 40 BAYLOR L. REV. 321 (1988); Comment, *An Implied Warranty of Good and Workmanlike Quality Extends to the Repair and Modification of Existing Tangible Goods:* Melody Home Manufacturing Co. v. Barnes, 741 S.W.2d 349 (1987), 19 TEX. TECH. L. REV. 1141 (1988); Comment, *Breach of Implied Warranty Under the DTPA as Applied to Service Contracts:* Diversified Human Resources Group, Inc. v. PB-KBB, Inc., 37 BAYLOR L. REV. 549 (1985); Note, *Consumer Protection — Deceptive Trade Practices — Breach of Implied Warranty Requiring Goods or Property to Be Modified or Repaired in Good and Workmanlike Manner Actionable Under Deceptive Trade Practices-Consumer Protection Act*, Melody Home Manufacturing Co. v. Barnes, 31 Tex. Sup. Ct. J. 47 (November 4, 1987), 19 ST. MARY'S L.J. 791 (1988); Recent Development, 20 ST. MARY'S L.J. 731 (1989).