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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 Symposium - Business Tort Litigation - Case Note

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**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)

Melody Home Manufacturing Company (Melody Home) sold a modular home to Lonnie and Donna Barnes.¹ Two years after moving into the home, the Barneses discovered a drainpipe leak located in an interior wall which was causing puddles and dampness in their home.² Melody Home twice attempted to make repairs, but was unsuccessful and caused additional damage.³ The Barneses sued Melody Home under the provisions of the Texas Deceptive Trade Practices-Consumer Protection Act (DTPA),⁴ claiming Melody Home breached an implied warranty by failing to repair the home “in a good and workmanlike manner.”⁵ The trial court found that Melody Home knowingly breached an implied warranty and awarded discretionary damages of \$5,000 to the Barneses.⁶ The Fort Worth Court of Appeals affirmed the trial court’s judgment, and Melody Home filed an application

1. *Melody Home Mfg. Co. v. Barnes*, 31 Tex. Sup. Ct. J. 47, 47 (November 4, 1987). The Barneses ordered the modular prefabricated home in 1979, and it was delivered and installed in 1980. *Id.*

2. *Id.* Damage from the water consisted of “mold, crumbling sheetrock, and a rotting floor and insulation.” *Melody Home Mfg. Co. v. Barnes*, 708 S.W.2d 600, 602 (Tex. App.—Fort Worth 1986), *aff’d*, 31 Tex. Sup. Ct. J. 47 (November 4, 1987).

3. *Melody Home*, 31 Tex. Sup. Ct. J. at 47. The workers damaged the cabinets, floors, and carpeting in attempts to repair the home. *Id.*

4. TEX. BUS. & COM. CODE ANN. § 17.41-.62 (Vernon 1987).

5. *Melody Home*, 31 Tex. Sup. Ct. J. at 47.

6. *Id.* The jury found that Melody Home did not build the home “in a good and workmanlike manner.” They also found Melody Home had knowingly breached their implied warranty to repair the home “in a good and workmanlike manner” and, under section 17.50 of the DTPA, awarded discretionary damages of \$5,000 to the Barneses. *Id.* The DTPA allows for recovery of up to three times the amount of actual damages exceeding one thousand dollars when the defendant’s actions are found to have been committed “knowingly.” *See* TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (Vernon 1987). The statute defines “knowingly” as “actual awareness of the falsity, deception, or unfairness of the act or practice giving rise to the consumer’s claim or . . . actual awareness of the act or practice constituting the breach of warranty, but actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.” *Id.* § 17.45(9).

with the Texas Supreme Court for writ of error.⁷ Held-*Affirmed*. The breach of an implied warranty requiring goods or property to be modified or repaired "in a good and workmanlike manner" is actionable under the DTPA.⁸

In early common law, commercial transactions were subject to the rule of caveat emptor,⁹ based upon the assumption that the consumer could inspect the goods or services prior to purchase.¹⁰ In the nineteenth century, the doctrine of caveat emptor, though still applied in many instances,¹¹ was utilized less frequently as courts began to recognize the consumer's inability to protect himself from defective goods and services in the marketplace of an industrialized society.¹² Legislatures also began to enact laws to address the

7. *Melody Home*, 31 Tex. Sup. Ct. J. at 47. In affirming the trial court's judgment, the court of appeals agreed that the Barneses were entitled to receive damages because the jury found a knowing breach of "an implied warranty to repair the home in a good and workmanlike manner." *Melody Homes Mfg. Co. v. Barnes*, 708 S.W.2d 600, 602 (Tex. App.—Fort Worth 1986), *aff'd*, 31 Tex. Sup. Ct. J. 47 (November 4, 1987).

8. *Melody Home*, 31 Tex. Sup. Ct. J. at 51.

9. *See, e.g.*, *Brantley v. Thomas*, 22 Tex. 271, 274 (1858)(caveat emptor based on idea that purchaser may inspect what he buys and make own judgment); *McMorries v. Clardy*, 232 S.W.2d 167, 169 (Tex. Civ. App.—El Paso 1950, no writ)(caveat emptor applies where no reliance by buyer on seller); *Joy v. Nat'l Exch. Bank*, 74 S.W. 325, 325 (Tex. Civ. App. 1903, no writ)(caveat emptor applies where goods may be inspected by buyer and no fraud by seller even if latent defect); *Wood v. Ross*, 26 S.W. 148, 149 (Tex. Civ. App. 1894, no writ)(caveat emptor means buyer purchases at own risk). *See generally* 2 J. STORY, A TREATISE ON THE LAW OF CONTRACTS § 1050 (1874)(caveat emptor means buyer purchases at own risk unless express or implied warranty exists).

10. *See Humber v. Morton*, 426 S.W.2d 554, 557 (Tex. 1968)(at common law, buyer and seller had equal opportunity to discover information about goods). While caveat emptor was the general rule, the only actions available to a buyer were " 'express warranty,' 'deceit to disguise defects,' and 'provisions unwholesome at the time of delivery.' " *See Hamilton, The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133, 1174 (1931)(quoting 1 J. FONBLANQUE, A TREATISE OF EQUITY 109-10, 373-74 (1793)).

11. *See Barnard v. Kellogg*, 77 U.S. 383, 388-89 (1870)(caveat emptor universally followed). Justice Davis found caveat emptor to be of "such universal acceptance" that "the courts of all the States in the Union where the common law prevails" sanction it, with only one exception. *Id*; *see also, e.g.*, *Brantley v. Thomas*, 22 Tex. 271, 271 (1858)(caveat emptor applies where purchaser may inspect what he buys and make own judgment); *McMorries*, 232 S.W.2d at 169 (caveat emptor applies where buyer does not rely on seller); *Joy*, 74 S.W. at 325 (caveat emptor applies if buyer may inspect goods and seller does not act fraudulently even if defect latent); *Wood*, 26 S.W. at 149 (caveat emptor defined as buyer purchases at own risk); *Needham v. Dial*, 23 S.W. 240, 241 (Tex. Civ. App. 1893, no writ)(caveat emptor applies if buyer inspected or could have inspected goods).

12. *See, e.g.*, *Jacob E. Decker & Sons, Inc. v. Capps*, 139 Tex. 609, 612, 164 S.W.2d 828, 829 (1942)(consumer generally unable to inspect food for purity prior to consumption); *Jones v. George*, 56 Tex. 149, 152-53 (1882)(implied warranty where, as in sale of pharmaceuticals, buyer unable to skillfully inspect goods). *See generally* Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724, 727-28 (1972)(consumer's inability to protect himself in marketplace resulted from business' ability to neglect individual consumer and decrease qual-

problems faced by the average consumer attempting to protect himself in the bargaining process.¹³

Prior to enactment of the DTPA in Texas, there were no private, statutory causes of action for business activities which today would be defined as "deceptive trade practices."¹⁴ A consumer in Texas was forced to seek relief under common law causes of action, which included breach of contract,¹⁵

ity of goods being mass-produced). *Cf.* Federal Trade Comm'n v. Sterling Drug, Inc., 317 F.2d 669, 674 (2d Cir. 1963)(caveat emptor abolished so consumers could rely on representations of sellers). *But cf.* Nobility Homes of Texas, Inc. v. Shivers, 557 S.W.2d 77, 78 (Tex. 1977)(consumer protection no longer needs implied warranty based on policy).

13. *See* Woo v. Great Southwestern Acceptance Corp., 565 S.W.2d 290, 298 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.)(in enacting DTPA, legislature recognized inadequacies of common law remedies). Consumer dissatisfaction with treatment by business resulted in development of consumer protection laws. *See* Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724, 724-25 (1972). Consumers were no longer dealing with trusted neighbors where goods could be personally inspected, but with industry and manufacturing located in distant places and, therefore, became less able to protect themselves in the bargaining process. *See id.* at 727. Prior to the enactment of consumer protection laws, the claims of consumers were often stymied by disclaimers, difficult burdens of proof, and the high costs of litigation. *See id.* at 725 n.4; *see also* Woo, 565 S.W.2d at 298 (DTPA intended to encourage consumers to pursue claims). *See generally* Hill, *Introduction to Consumer Law Symposium*, 8 ST. MARY'S L.J. 609, 610 (1977)(common law remedies for consumers ineffective); Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724, 725 (1972)(inadequate remedies and prohibitive costs for consumers under common law); Maxwell, *Public and Private Rights and Remedies Under the Deceptive Trade Practices-Consumer Protection Act*, 8 ST. MARY'S L.J. 617, 617-18 (1977)(consumers suffered abuse prior to DTPA with no adequate remedy). *Cf.* Bragg, *Now We're All Consumers! The 1975 Amendments to the Consumer Protection Act*, 28 BAYLOR L. REV. 1, 7-8 (1976)(passage of DTPA abolished caveat emptor in Texas).

14. *See* Maxwell, *Public and Private Rights and Remedies Under the Deceptive Trade Practices-Consumer Protection Act*, 8 ST. MARY'S L.J. 617, 617-18 (1977)(consumers suffered abuse prior to DTPA with no adequate remedy). *Cf.* Bragg, *Now We're All Consumers! The 1975 Amendments to the Consumer Protection Act*, 8 ST. MARY'S L.J. 617, 618 (1977)(public enforcement inadequate prior to enactment of DTPA). The Attorney General of Texas was authorized to institute an action to temporarily or permanently enjoin any person who committed "false, misleading, or deceptive acts or practices in the conduct of any trade or commerce" upon request by the Consumer Credit Commissioner. The Commissioner was to make such a request upon receipt of a written complaint or upon the reasonable belief of the Attorney General or Consumer Credit Commissioner that such person was engaging in, had engaged in, or was about to engage in such acts or practices. TEX. REV. CIV. STAT. ANN. art. 5069-10.02(b) (Vernon 1987), *repealed by* Texas Deceptive Trade Practices-Consumer Protection Act, ch. 143, 1973 Tex. Gen. Laws 322. The DTPA gives a noninclusive list of acts and practices which are actionable as "false, misleading, or deceptive acts or practices." TEX. BUS. & COM. CODE ANN. § 17.46(b) (Vernon 1987).

15. *See* Ligon v. Chas. P. Davis Hardware, Inc., 492 S.W.2d 374, 376 (Tex. Civ. App.—Austin 1973, no writ)(may recover damages due to breach of contract if reasonably contemplated by parties at time of making contract); *cf.* Stewart v. Basey, 150 Tex. 666, 670, 245 S.W.2d 484, 486 (1952)(damages for breach of contract generally allowed to compensate for loss actually sustained pursuant to breach); Fidelity & Deposit Co. v. Stool, 607 S.W.2d 17, 24

negligence,¹⁶ misrepresentation,¹⁷ promissory estoppel,¹⁸ fraud,¹⁹ and gross negligence.²⁰ In addition, Texas courts applied the theory of implied warranty,²¹ which evolved from the public policy of protecting the general pub-

(Tex. Civ. App.—Tyler 1980, no writ)(breach of contract includes failure to perform implied promise to use ordinary care).

16. See *Montgomery Ward & Co. v. Scharrenbeck*, 146 Tex. 153, 157, 204 S.W.2d 508, 510 (1947)(every party to contract liable for negligently failing to act with reasonable care and skill). See generally RESTATEMENT (SECOND) OF TORTS § 281 (1965)(stating elements of action for negligence).

17. See *Shatterproof Glass Corp. v. James*, 466 S.W.2d 873, 877 (Tex. Civ. App.—Fort Worth 1971, writ ref'd n.r.e.)(misrepresentations actionable even absent fraudulent or dishonest intent); see also *Rosenthal v. Blum*, 529 S.W.2d 102, 103-04 (Tex. Civ. App.—Waco 1975, writ ref'd n.r.e.)(action for negligent misrepresentation). See generally RESTATEMENT (SECOND) OF TORTS § 552 (1977)(stating elements of action for negligent misrepresentation).

18. See "*Moore*" *Burger, Inc. v. Phillips Petroleum Co.*, 492 S.W.2d 934, 936-37 (Tex. 1972)(promissory estoppel applies where promisor makes promise reasonably and foreseeably relied upon by promisee to his detriment and enforcement of promise necessary to prevent injustice); see also *Fretz Constr. Co. v. Southern Nat'l Bank*, 600 S.W.2d 878, 881 (Tex. Civ. App.—Houston [1st Dist.] 1980)(promissory estoppel elements include promise, foreseeability, detrimental reliance, and enforcement necessary to avoid injustice), *rev'd on other grounds*, 626 S.W.2d 478 (Tex. 1981). The burden of proof is on the party asserting promissory estoppel to prove each element. See *id.* See generally RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981)(listing elements of promissory estoppel).

19. See *Trenholm v. Ratcliff*, 646 S.W.2d 927, 930-31 (Tex. 1983)(common law fraud proven based on reckless misrepresentation). To establish common law fraud, the defrauded party must show:

- (1) that a material representation was made; (2) that it was false; (3) that, when the speaker made it he knew it was false or made it recklessly without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by the party; (5) that the party acted in reliance upon it; and (6) that he thereby suffered injury.

Id. at 930; see also *Stone v. Lawyers Title Ins. Corp.*, 554 S.W.2d 183, 185 (Tex. 1977)(requirements of proving actionable fraud).

20. See *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 920 (Tex. 1981)(gross negligence results from entire want of care which evidences conscious indifference to rights of others). The plaintiff has the burden of proving gross negligence. See *id.* at 920.

21. See, e.g., *Humber v. Morton*, 426 S.W.2d 554, 557-62 (Tex. 1968)(implied warranty applied where court rejected caveat emptor); *Mercedes Dusting Serv., Inc. v. Evans*, 353 S.W.2d 894, 896 (Tex. Civ. App.—San Antonio 1962, no writ)(seller representation of quality or standard of work impliedly warrants proper workmanship and reasonable fitness for intended use). Implied warranties arise by law in cases involving the sale of goods where a buyer could not reasonably discover a latent defect and the seller, holding itself out as having the requisite skill to perform the work, was the only party who knew or could have known how the work was performed. See *Kellogg Bridge Co. v. Hamilton*, 110 U.S. 108, 118-19 (1884). In refusing application of the rule of caveat emptor to sales of new homes, the Texas Supreme Court reasoned that to apply the rule would result in "a disservice not only to the ordinary prudent purchaser but to the industry itself by lending encouragement to the unscrupulous, fly-by-night operator and purveyor of shoddy work." *Humber*, 426 S.W.2d at 562. See gener-

lic in commercial transactions.²² Implied warranties arise by operation of law based upon factors such as the relationship of the parties and the nature of the transaction.²³ In Texas, an implied warranty has been defined as an inferred representation of the quality or suitability of a good or service.²⁴

In 1973, the Texas Legislature enacted the DTPA "to provide efficient and economical procedures" for consumer protection.²⁵ Through adoption of the DTPA, the legislature attempted to satisfy the consumer's need for a cause of action which did not require a difficult burden of proof and was not subject to the numerous defenses available at common law.²⁶ A consumer²⁷

ally 2 J. STORY, A TREATISE ON THE LAW OF CONTRACTS §§ 1060-1079(1874)(discussing implied warranties at common law).

22. See, e.g., *Dennis v. Allison*, 698 S.W.2d 94, 95 (Tex. 1985)(implied warranty deemed necessary under public policy prior to application of section 402A); *Jacob E. Decker & Sons, Inc. v. Capps*, 139 Tex. 609, 620, 164 S.W.2d 828, 833 (1942)(implied warranty based on policy of protecting health and life of public). See generally W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 97 (5th ed. 1984)(discussing history of implied warranty). But cf. *Milau Assocs., Inc. v. North Ave. Dev. Corp.*, 391 N.Y.S.2d 628, 629-30 (App. Div. 1977)(common law provides no implied warranty for performance of services; action for negligence appropriate remedy); *Hoffman v. Simplot Aviation, Inc.*, 539 P.2d 584, 588 (Idaho 1975)(strict liability not applicable to personal services).

23. See *Kamarath v. Bennett*, 568 S.W.2d 658, 661 (Tex. 1978)(implied warranty of habitability imposed based on landlord/tenant relationship). In *Jacob E. Decker & Sons, Inc., v. Capps*, the Texas Supreme Court found a manufacturer of goods liable for injuries based on public policy of protecting human health. See *Capps*, 139 Tex. at 612, 164 S.W.2d at 829. The court reasoned that, in manufacturing food, the only reasonable time and place for inspection for defects is at the point of manufacture. See *id.* Courts have found an implied warranty of proper workmanship and fitness for intended use arising where a person represents that he is specially qualified to perform services of a particular character. See *Evans*, 353 S.W.2d at 896; see also *Englebrecht v. W.D. Brannan & Sons, Inc.*, 501 S.W.2d 707, 710 (Tex. Civ. App.—Amarillo 1973, no writ)(court applied common law warranty to defective services). See generally W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 97 (5th ed. 1984)(discussing reasons for theory of implied warranty).

24. See *Donelson v. Fairmont Foods Co.*, 252 S.W.2d 796, 799 (Tex. Civ. App.—Waco 1952, writ ref'd n.r.e.)(implied warranty is implied promise of quality of goods).

25. TEX. BUS. & COM. CODE ANN. § 17.44 (Vernon 1987)(DTPA enacted to provide procedures for consumers to protect against deceptive business practices, unconscionable acts, and breaches of warranty). The initial purpose of the DTPA was to attempt to balance the unequal bargaining power of the merchant over the consumer. See, e.g., *Curry, The 1979 Amendments to the Deceptive Trade Practices-Consumer Protection Act*, 32 BAYLOR L. REV. 51, 52-54 (1980)(legislature responded to consumers' needs through enactment of DTPA); Comment, *The Deceptive Trade Practices-Consumer Protection Act: The Shield Becomes a Sword*, 17 ST. MARY'S L.J. 879, 882 (1986)(DTPA designed to balance unequal bargaining power). Three objectives were targeted by the DTPA: (1) remove the economic barriers to litigation; (2) replace the inadequacies of common law remedies; and (3) deter future violations of consumer's rights. *Id.* at 883-84.

26. See, e.g., *Pope v. Rollins Protective Servs. Co.*, 703 F.2d 197, 201 (5th Cir. 1983)(primary reason for DTPA is to provide remedy without difficult burden of proof and numerous defenses in common law action); *Smith v. Baldwin*, 611 S.W.2d 611, 616 (Tex. 1980)(DTPA

may recover under the DTPA where a deceptive trade practice,²⁸ a breach of express or implied warranty,²⁹ an unconscionable act,³⁰ or a violation of the Texas Insurance Code³¹ is a producing cause of actual damage.³² A success-

enacted to provide cause of action without difficult burden of proof and numerous defenses under common law). Common law remedies were ineffective for consumers because of the imbalance between the cost of litigation and recovery, the difficult burden of proof, and the disclaimers and waivers of liability by merchants. *See Hill, Introduction to Consumer Law Symposium*, 8 ST. MARY'S L.J. 609, 610 (1977). *See generally Lovett, State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724, 725 n. 4 (1972)(burdens on consumer under common law cause of action). *Cf. Maxwell, Public and Private Rights and Remedies Under the Deceptive Trade Practices-Consumer Protection Act*, 8 ST. MARY'S L.J. 617, 655-57 (1977)(privity between consumer and seller not required under DTPA). *But see Comment, Caveat Vendor: The Texas Deceptive Trade Practices and Consumer Protection Act*, 25 BAYLOR L. REV. 425, 425 (1973)(balance of bargaining power shifted from seller to buyer).

27. *See TEX. BUS. & COM. CODE ANN. § 17.45(4)* (Vernon 1987). The definition of consumer encompasses any individual, partnership, or corporation except for businesses which have assets of more than \$25 million or are controlled by a business which has assets of more than \$25 million. The consumer must seek or acquire goods or services for purchase or lease. *Id.* In order to have standing to sue as a consumer under the DTPA, the Texas Supreme Court requires proof that a buyer (1) "sought or acquired goods or services by purchase or lease" and (2) "the goods or services purchased or leased must form the basis of the complaint." *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 539 (Tex. 1981). Status as a consumer is obtained through the relationship to a transaction; privity of contact is not required. *See, e.g., Flenniken v. Longview Bank and Trust Co.*, 661 S.W.2d 705, 707 (Tex. 1983)(consumer status obtained through relationship to transaction, not privity); *Stagner v. Friendswood Dev. Co.*, 620 S.W.2d 103, 103 (Tex. 1981)(per curiam)(privity not required to establish status as consumer); *Cameron*, 618 S.W.2d at 541 (consumer establishes status through transaction, not relationship to party being sued); *see also Chastain v. Koonce*, 700 S.W.2d 579, 581-82 (Tex. 1985)(purchaser of lot was consumer even though complaint concerned other lots in development); *Kennedy v. Sale*, 689 S.W.2d 890, 892 (Tex. 1985)(consumer includes employee covered under insurance policy purchased by employer); *Big H Auto Auction, Inc. v. Saenz*, 665 S.W.2d 756, 758-59 (Tex.1984)(buyer for resale is consumer). *Compare Knight v. International Harvester Credit Corp.*, 627 S.W.2d 382, 388-89 (Tex. 1982)(borrower is consumer where purpose of financing to obtain goods) *with La Sara Grain Co. v. First Nat'l Bank*, 673 S.W.2d 558, 567 (Tex. 1984)(borrower not consumer where only objective to obtain loan).

28. *See TEX. BUS. & COM. CODE ANN. § 17.50(a)(1)* (Vernon 1987); *see also Great Am. Homebuilders, Inc. v. Gerhart*, 708 S.W.2d 8, 11 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.)(failure to repair after promising to do so is deceptive act).

29. *See TEX. BUS. & COM. CODE ANN. § 17.50(a)(2)* (Vernon 1987); *see also Birds Constr., Inc. v. McKay*, 657 S.W.2d 514, 516 (Tex. App.—Corpus Christi 1983, no writ)(defects in home showed breach of express and implied warranties).

30. *See TEX. BUS. & COM. CODE ANN. § 17.50(a)(3)* (Vernon 1987); *see also First Tex. Sav. Ass'n v. Stiff Properties*, 685 S.W.2d 703, 707 (Tex. App.—Corpus Christi 1984, no writ)(unconscionable where gross disparity between consideration paid and value received).

31. *See TEX. BUS. & COM. CODE ANN. § 17.50(a)(4)* (Vernon 1987); *see also Allstate Ins. Co. v. Kelly*, 680 S.W.2d 595, 603-04 (Tex. App.—Tyler 1984, writ ref'd n.r.e.)(liable where consumer asserts complaint arising out of liability insurance policy).

32. *See TEX. BUS. & COM. CODE ANN. § 17.50(a)* (Vernon 1987); *see also Rourke v.*

ful case for breach of implied warranty under the DTPA requires proof of the plaintiff's status as a consumer, existence of an implied warranty,³³ and breach of the warranty which is a producing cause of actual damages.³⁴ The only defenses available, other than rebutting the consumer's allegations, are those listed within the DTPA.³⁵ If successful in a lawsuit under the DTPA, a consumer is awarded actual damages, two times the amount of actual damages that do not exceed \$1,000, court costs, and reasonable attorney fees.³⁶ If a consumer proves a defendant acted knowingly,³⁷ the recovery may also

Garza, 530 S.W.2d 794, 801 (Tex. 1975)(producing cause defined as contributing cause which produced injury or damage in natural sequence); Hycel, Inc. v. Wittstruck, 690 S.W.2d 924, 922 (Tex. App.—Waco 1985, writ dismissed)(producing cause proven by showing deceptive trade practice actually caused damage). See generally Curry, *The 1979 Amendments to the Deceptive Trade Practices-Consumer Protection Act*, 32 BAYLOR L. REV. 51, 60 (1980)(analyzing producing cause).

33. See TEX. BUS. & COM. CODE ANN. § 17.50(a)(2) (Vernon 1987). The DTPA creates a cause of action for breach of express or implied warranty, but does not create any implied or express warranties. *Id.* Therefore, warranties must be supplied by another statute or common law. See *La Sara Grain Co. v. First Nat'l Bank*, 673 S.W.2d 558, 565 (Tex. 1984)(warranties derived primarily from statute or common law). See generally Maxwell, *Public and Private Rights and Remedies Under the Deceptive Trade Practices-Consumer Protection Act*, 8 ST. MARY'S L.J. 617, 658-61 (1977)(warranties created by statute or common law).

34. See TEX. BUS. & COM. CODE ANN. § 17.50(a) (Vernon 1987); see also *Wood v. Component Constr. Corp.*, 722 S.W.2d 439, 445-46 (Tex. App.—Fort Worth 1986, no writ)(upon proving breach of warranty under DTPA, consumer recovers all actual damages proven to be caused by breach). See generally Maxwell, *Public and Private Rights and Remedies Under the Deceptive Trade Practices-Consumer Protection Act*, 8 ST. MARY'S L.J. 617, 657-61 (1977)(discussion of cause of action for breach of warranty under DTPA).

35. See TEX. BUS. & COM. CODE ANN. § 17.505 (Vernon 1987); see also *Smith v. Baldwin*, 611 S.W.2d 611, 616 (Tex. 1980)(DTPA relieved consumers from threat of common law defenses); *Thomas Constr. Co. v. Arbs*, 692 S.W.2d 926, 932 (Tex. App.—Fort Worth 1985, writ refused n.r.e.)(common law defenses not applicable under DTPA). A successful defense under the DTPA may be asserted where the consumer has notice before the transaction of the seller's reliance on either official written governmental records, written information obtained from a third-party, or written information pursuant to a government test, if the seller did not or could not have known of the inaccuracy, and such reliance was a producing cause of damage. TEX. BUS. & COM. CODE ANN. § 17.506(a) (Vernon 1987). A defendant may avoid liability by tendering the full amount of damages plus all expenses reasonably incurred by the consumer within thirty days of receiving notice of the consumer's complaint. See *id.* § 17.506(d). See generally Goodfriend & Lynn, *Of White Knights and Black Knights: An Analysis of the 1979 Amendments to the Texas Deceptive Trade Practices Act*, 33 SW. L.J. 941, 996-98 (1979)(analyzing defenses under DTPA).

36. See TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (Vernon 1987). A consumer can recover as actual damages the largest amount of damages which are factually caused by defendant's conduct, including reasonable and necessary expenses. See *Kish v. Van Note*, 692 S.W.2d 463, 466 (Tex. 1985)(under DTPA, consumer awarded largest amount of damages established); *Leyendecker & Assocs. v. Wechter*, 683 S.W.2d 369, 373 (Tex. 1984)(DTPA allows recovery of greater of "out of pocket" or "benefit of bargain" damages).

37. See TEX. BUS. & COM. CODE ANN. § 17.45(9) (Vernon 1987). "Knowingly" is actual

include three times the amount of actual damages which exceed \$1,000.³⁸

Both the courts and the Texas Legislature have expanded the boundaries of the DTPA.³⁹ In attempting to insure protection for the consumer, the legislature has broadened the scope of the DTPA in almost every legislative session since its original enactment in 1973.⁴⁰ In interpreting the DTPA, the

awareness of the conduct constituting a breach of warranty and may be inferred from objective manifestations indicating actual awareness. *Id.* In *Jim Walter Homes v. Valencia*, the Texas Supreme Court stated that a jury could infer that a builder acted "knowingly" by representing that a house would be built in a good and workmanlike manner when, in fact, it was not. *See Jim Walter Homes v. Valencia*, 690 S.W.2d 239, 242 (Tex. 1985).

38. *See* TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (Vernon 1987); *see also* McAllen State Bank v. Linbeck Constr. Corp., 695 S.W.2d 10, 24 (Tex. App.—Corpus Christi 1985 writ ref'd n.r.e.) (award of actual damages trebled under DTPA).

39. *See* Pennington v. Singleton, 606 S.W.2d 682, 688 (Tex. 1980) (DTPA to be liberally construed to counteract "human inventiveness in engaging in deceptive or misleading conduct."); Bragg, *Now We're All Consumers! The 1975 Amendments to the Consumer Protection Act*, 28 BAYLOR L. REV. 1, 3-22 (1976) (reviewing 1975 amendments); Curry, *The 1979 Amendments to the Deceptive Trade Practices-Consumer Protection Act*, 32 BAYLOR L. REV. 51, 56-79 (1980) (analyzing 1979 amendments); Comment, *What Hath the Legislature Wrought? A Critique of the Deceptive Trade Practices Act as Amended in 1977*, 29 BAYLOR L. REV. 525, 525-43 (1977) (discussing 1977 amendments to DTPA); Comment, *The Deceptive Trade Practices-Consumer Protection Act: The Shield Becomes a Sword*, 17 ST. MARY'S L.J. 879, 884-87 (1986) (discussing legislative revisions to DTPA).

40. *See* Deceptive Trade Practices-Consumer Protection Act, ch. 62, 1975 Tex. Gen. Laws 149 (amending provisions relating to definitions of goods, services and consumer and to defenses to class action); Deceptive Trade Practices-Consumer Protection Act, ch. 216, 1977 Tex. Gen. Laws 600 (amending provisions relating to definitions, relief to consumer, defenses, intent of legislature, allowing indemnity and contribution, receivership and venue); Deceptive Trade Practices-Consumer Protection Act, ch. 603, 1979 Tex. Gen. Laws 1327 (amending provisions relating to cumulative remedies, consumer relief, notice and offer of settlement, damages, defenses, venue and limitation); Deceptive Trade Practices-Consumer Protection Act, ch. 307, 1981 Tex. Gen. Laws 863 (amending provision relating to waivers); Deceptive Trade Practices-Consumer Protection Act, ch. 883, 1983 Tex. Gen. Laws 4943 (amending provisions relating to waivers and definitions); Deceptive Trade Practices-Consumer Protection Act, ch. 564, 1985 Tex. Gen. Laws 2165 (amending provisions relating to restraining orders against sellers); Deceptive Trade Practices-Consumer Protection Act, ch. 280, 1987 Tex. Gen. Laws 3235 (amending provision listing specific deceptive acts). *See generally* Bragg, *Now We're All Consumers! The 1975 Amendments to the Consumer Protection Act*, 28 BAYLOR L. REV. 1, 3-22 (1976) (reviewing 1975 amendments); Curry, *The 1979 Amendments to the Deceptive Trade Practices-Consumer Protection Act*, 32 BAYLOR L. REV. 51, 56-79 (1980) (analyzing 1979 amendments); Goodfriend & Lynn, *Of White Knights and Black Knights: An Analysis of the 1979 Amendments to the Texas Deceptive Trade Practices Act*, 33 SW. L.J. 941, 942-1002 (1979) (reviewing 1979 amendments); Comment, *What Hath the Legislature Wrought? A Critique of the Deceptive Trade Practices Act as Amended in 1977*, 29 BAYLOR L. REV. 525, 525-43 (1977) (discussing 1977 amendments to DTPA); Comment, *The Deceptive Trade Practices-Consumer Protection Act: The Shield Becomes a Sword*, 17 ST. MARY'S L.J. 879, 884-87 (1986) (discussing legislative revisions to DTPA). *But see* Deceptive Trade Practices-Consumer Protection Act, ch. 883, 1983 Tex. Gen. Laws 4943 (narrowed definition of consumer to exclude certain business consumers and allowed waiver of DTPA provisions by

function of the courts is to construe the act as a whole to determine the intent of the legislature.⁴¹ Using the DTPA mandate of liberal construction,⁴² the courts have advanced the actions of the legislature by further enlarging the scope of the DTPA.⁴³

Because the DTPA does not create any warranties, either express or implied, warranties must be found independent of the DTPA, from statute or common law.⁴⁴ At common law, courts imply warranties where the buyer's inexperience is far outweighed by the seller's knowledge.⁴⁵ Thus, Texas

certain business consumers); Deceptive Trade Practices-Consumer Protection Act, ch. 216, 1977 Tex. Gen. Laws 600 (repealing provision providing for class actions).

41. *See, e.g.,* Cameron v. Terrell & Garrett, Inc., 618 S.W.2d 535, 540 (Tex. 1981)(primary objective to ascertain legislative intent); Pennington v. Singleton, 606 S.W.2d 682, 686 (Tex. 1980)(primary emphasis on legislative intent).

42. *See* TEX. BUS. & COM. CODE ANN. § 17.44 (Vernon 1987)(DTPA to be liberally construed to promote underlying purpose of providing efficient and economic procedures to protect consumers); *see also* Melody Home Mfg. Co. v. Barnes, 31 Tex. Sup. Ct. J. 47, 50 (November 4, 1987)(DTPA to be liberally construed). *See generally* Comment, *The Deceptive Trade Practices-Consumer Protection Act: The Shield Becomes a Sword*, 17 ST. MARY'S L.J. 879, 887-89 (1986)(discussing liberal construction mandate).

43. *See* Pennington v. Singleton, 606 S.W.2d 682, 688 (Tex. 1980)(DTPA interpreted broadly to prevent deceptive sellers from finding "loopholes"); Sanchez v. Schindler, 651 S.W.2d 249, 252 (Tex. 1983)(courts, continually striving to interpret law to avoid inequity, should not be constrained by legislative inaction). *See generally* Comment, *The Deceptive Trade Practices-Consumer Protection Act: The Shield Becomes a Sword*, 17 ST. MARY'S L.J. 879, 889-910 (1986)(discussing specific judicial interpretations of DTPA). For specific instances of judicial expansion of the DTPA, *see, e.g.,* Kennedy v. Sale, 689 S.W.2d 890, 892 (Tex. 1985)(third party beneficiaries found to be consumers); Luna v. North Star Dodge Sales, Inc., 667 S.W.2d 115, 117 (Tex. 1984)(damages for mental anguish recoverable under DTPA); Big H Auto Auction, Inc. v. Saenz Motors, 665 S.W.2d 756, 759 (Tex. 1984)(purchase for resale is "use" as contemplated by DTPA); Flenniken v. Longview Bank & Trust Co., 661 S.W.2d 705, 707-08 (Tex. 1983)(bank services are "services" under DTPA); White v. Southwestern Bell Tel. Co., 651 S.W.2d 260, 262 (Tex. 1983)(lost profits recoverable under DTPA); and Cameron v. Terrell & Garrett, Inc., 618 S.W.2d 535, 539-40 (Tex. 1981)(no privity required between plaintiff and defendant).

44. *See* La Sara Grain Co. v. First Nat'l Bank, 673 S.W.2d 558, 565 (Tex. 1984)(warranties derived primarily from statute or common law); *see also* Cheney v. Parks, 605 S.W.2d 640, 642 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.)(warranty created independent of DTPA); Maxwell, *Public and Private Rights and Remedies Under the Deceptive Trade Practices-Consumer Protection Act*, 8 ST. MARY'S L.J. 617, 658-61 (1977)(warranties created by statute or common law).

45. *See, e.g.,* Jacob E. Decker & Sons, Inc. v. Capps, 139 Tex. 609, 612, 164 S.W.2d 828, 829 (1942)(consumer unable to inspect food for purity prior to consumption); Jones v. George, 56 Tex. 149, 152-53 (1882)(implied warranty where buyer unable to skillfully inspect goods). *See generally* Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724, 727-28 (1972)(consumer's inability to protect himself in marketplace resulted from tendency of business to neglect individual consumer and decrease quality of goods through mass production). *But see* Nobility Homes of Texas, Inc. v. Shivers, 557 S.W.2d 77, 78 (Tex. 1977)(consumer protection no longer needs implied warranty based on policy).

courts have held service providers to an implied warranty of good and workmanlike performance of services.⁴⁶ For example, in *Humber v. Morton*,⁴⁷ the Texas Supreme Court found that the severity and injustice of the application of the doctrine of caveat emptor mandated application of an implied warranty to the residential construction industry,⁴⁸ and established an implied warranty that a home be constructed in a good and workmanlike manner.⁴⁹ Recently, Texas courts have also established implied warranties in cases brought under the DTPA involving used goods⁵⁰ and construction of a townhome.⁵¹

In *Melody Home Manufacturing Co. v. Barnes*,⁵² the Texas Supreme Court held that breach of the implied warranty requiring that goods or property be modified or repaired "in a good and workmanlike manner" was actionable under the DTPA.⁵³ This opinion was issued pursuant to a motion for rehearing filed by Melody Home and was substituted for a withdrawn opinion of the court dated June 17, 1987.⁵⁴ The court reasoned that the continual decrease of the quality of services sold to the public required ac-

46. See e.g., *Bachynski v. Fox and Co.*, 662 S.W.2d 771, 773 (Tex. App.—Houston [14th Dist.] 1983, no writ)(untimely preparation of tax return breach of duty to perform in good and workmanlike manner); *Clark v. Smith*, 494 S.W.2d 192, 196-97 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.)(improper care of corpse breach of duty to perform in workmanlike manner); *Moody v. Messer*, 489 S.W.2d 319, 321 (Tex. Civ. App.—Corpus Christi 1972, no writ)(every professional service contract implies duty of good and workmanlike performance of work).

47. 426 S.W.2d 554 (Tex. 1968).

48. See *id.* at 561 (unjust and harsh to apply caveat emptor to sale of new home); see also Note, *Property-Implied Warranty in Real Estate Transactions*, 21 BAYLOR L. REV. 89, 89-94 (1969)(discussion of decision).

49. See *Humber*, 426 S.W.2d at 555. The *Humber* warranty requires that a home be constructed in a good and workmanlike manner and be suitable for human habitation. See *id.*; see also *Evans v. J. Stiles, Inc.*, 689 S.W.2d 399, 400 (Tex. 1985)(per curiam)(implied warranty of construction in good and workmanlike manner is distinct warranty and no longer necessary to also find breach of implied warranty of habitability).

50. See *Bunting v. Fodor*, 586 S.W.2d 144, 145 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ)(DTPA extends to warranties on used goods). Cf. *Gupta v. Ritter Homes, Inc.*, 646 S.W.2d 168, 169 (Tex. 1983)(subsequent purchasers of home granted benefit of implied warranty of good and workmanlike performance).

51. See *Young v. DeGuerin*, 591 S.W.2d 296, 298-99 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ)(townhouse impliedly warranted suitable for human habitation and constructed in workmanlike manner).

52. 31 Tex. Sup. Ct. J. 47 (November 4, 1987).

53. See *id.* at 51. The court held that repairs or modifications to existing goods or property is subject to an implied warranty of performance "in a good and workmanlike manner." *Id.* at 49. The Texas Supreme Court defined "good and workmanlike manner" as the quality of work which is performed by a person "who has the knowledge, training, or experience necessary for the successful practice of a trade or occupation and performed in a manner generally considered proficient by those capable of judging such work." *Id.* at 50.

54. *Id.* at 47. In the prior opinion, the majority held that *all* service providers were subject to an implied warranty requiring services to be rendered "in a good and workmanlike

tion by the courts and the legislature.⁵⁵ Therefore, based on factors generally given cognizance through the theory of strict liability,⁵⁶ the court extended the doctrine of implied warranty to repairs or modifications of existing goods.⁵⁷ However, the court specifically stated that the warranty does not require a guaranty of the results of the repairs or modifications, but only that the service provider perform the work "in a good and workmanlike manner."⁵⁸ Further, the court reserved the question of whether such implied warranty extends to service providers whose exercise of professional judgment is the basis of the transaction.⁵⁹ The court overruled *G-W-L, Inc. v. Robichaux*⁶⁰ to the extent that it allowed consumers to waive or disclaim the implied warranty requiring repairs or modifications to existing goods or services to be performed "in a good and workmanlike manner," since such a disclaimer or waiver of the warranty would circumvent the policies which form the basis of the warranty.⁶¹ Based in part on the liberal construction provision of the DTPA,⁶² and the court's interpretation of the DTPA,⁶³ the

manner." *Melody Home Mfg. Co. v. Barnes*, 30 Tex. Sup. Ct. J. 489, 490-91 (June 17, 1987), *withdrawn*, 31 Tex. Sup. Ct. J. 47 (November 4, 1987).

55. *Melody Home Mfg. Co. v. Barnes*, 31 Tex. Sup. Ct. J. 48-49 (November 4, 1987). The reason for such decline in services is the shift of the economy from goods-oriented to service-oriented industries during the previous thirty-five years. The legislature and the courts have responded to the problem by applying the theory of implied warranty to various consumer transactions. *See id.*

56. *Id.* at 49. The court cited four factors: (1) the importance of protecting consumers outweighs the damages assessed to businesses breaching an implied warranty; (2) the fact that service providers can more easily prevent loss than the consumer who relies on the service provider's expertise, experience and skill; (3) the belief that consumers should be able to justifiably rely on the advice of service providers; and (4) the ability of service providers, through the use of insurance and price manipulation, to absorb the cost of defective services. *Id.*

57. *See id.* (theory of implied warranty extended to repairs and modifications of existing goods or property).

58. *Id.* at 50.

59. *See id.*

60. 643 S.W.2d 392 (Tex. 1982).

61. *Melody Home Mfg. Co. v. Barnes*, 31 Tex. Sup. Ct. J. 47, 50 (November 4, 1987). The court reasoned that the implied warranty would not protect unwary consumers if service providers were allowed to obtain disclaimers or waivers from consumers. The public policy applied by the court in extending the theory of implied warranty is not consistent with disclaimers or waivers of such warranty. *Id.* In *G-W-L*, the court allowed an implied warranty to be waived provided the language was "clear and free from doubt," reasoning that the parties to a contract have a responsibility to read what they sign to protect their interests. *G-W-L, Inc. v. Robichaux*, 643 S.W.2d 392, 393 (Tex. 1982).

62. *Melody Home*, 31 Tex. Sup. Ct. J. at 50; *see also* TEX. BUS. & COM. CODE ANN. § 17.44 (Vernon 1987)(DTPA to be liberally interpreted to protect consumers).

63. *See id.* at 50-51 (extension of warranty consistent interpretation of DTPA); *see also* TEX. BUS. & COM. CODE ANN. § 17.50(a)(2) (Vernon 1987). The DTPA does not create any implied or express warranties but rather creates a cause of action for breach of express or implied warranty. *See id.*

court reasoned that a "logical, consistent, and intended interpretation of the Act" would allow consumers to sue service providers who breach an implied warranty of performing services "in a good and workmanlike manner."⁶⁴

Justice Campbell, joined by Justice Wallace, concurred with the majority's result, but would have extended the warranty only to subsequent repairs, performed by the manufacturer, of defects existing at the time of the product's sale to the consumer.⁶⁵ Additionally, Justice Campbell disagreed with that portion of the majority's opinion which refused to allow disclaimer of the warranty on the grounds that such disclaimer would interfere with the parties' right to contract.⁶⁶

Justice Gonzalez, joined by Chief Justice Hill, concurred with the majority's result, but would have simply extended the *Humber* construction warranty, which requires a home to be constructed in a good and workmanlike manner, to include repairs.⁶⁷ Justice Gonzalez concluded that the court, under "guise of interpretation," had extended the scope of the DTPA beyond the legislature's intent.⁶⁸ The authority cited by the majority, in the opinion of Justice Gonzalez, was inadequate to justify extending the implied warranty to professional service providers.⁶⁹ Justice Gonzalez found that the lack of public outcry or requests for such an extension further militated against the judicial expansion espoused by the majority.⁷⁰ Because other causes of action were available to the Barneses, including other remedies under the DTPA,⁷¹ Justice Gonzalez concluded that an extension of the

64. *Melody Home*, 31 Tex. Sup. Ct. J. at 51. The court determined that it should interpret the DTPA to promote the underlying purpose of protecting the consumer and to allow for efficient, economical procedures to ensure protection. *See id.* at 50.

65. *Melody Home*, 31 Tex. Sup. Ct. J. at 51 (Campbell, J., concurring).

66. *See id.*

67. *See Melody Home*, 31 Tex. Sup. Ct. J. at 51 (Gonzalez, J., concurring)(appellees only requested extension of *Humber* warranty to apply to repairs attempted by builder); *Humber v. Morton*, 426 S.W.2d 554, 555 (Tex. 1968)(home shall be constructed in good and workmanlike manner and be suitable for human habitation); *see also* *Evans v. J. Stiles, Inc.*, 689 S.W.2d 399, 400 (Tex. 1985)(per curiam)(no longer necessary to find breach of implied warranty of habitability to apply *Humber* warranty).

68. *See Melody Home*, 31 Tex. Sup. Ct. J. at 51 (Gonzalez, J., concurring)(judicial responsibilities of judges prohibit amending statutes under guise of interpretation).

69. *See id.* at 52. Justice Gonzalez viewed the cases cited by the court recognizing an implied warranty that services will be performed "in a good and workmanlike manner" as illustrating that there is no definitive meaning of the term "implied warranty" at common law. *See id.* at 53.

70. *See id.* at 52. In criticizing the authorities cited by the court in support of their public policy analysis, *Time*, *Fortune* and *The New York Times*, Justice Gonzalez stated that "the least the court could do is to cite empirical studies that can withstand critical scrutiny as to their validity." *Id.* at n.5.

71. *See id.* (consumer has choice of remedies under contract, tort or DTPA). Justice Gonzalez concluded that the real question addressed by the court is not whether the consumer

Humber construction warranty would adequately compensate the consumer without ignoring the intent of the legislature.⁷²

Justice Mauzy allowed his concurrence from the withdrawn opinion of June 17, 1987, to stand without amending it to address either the majority opinion or concurring opinions dated November 4, 1987.⁷³ In this opinion, Justice Mauzy denied that the *Melody Home* decision was affected by any political concessions made by the legislature during the enactment of the DTPA in 1973.⁷⁴ According to Justice Mauzy, the court was justified in overruling *Dennis v. Allison*⁷⁵ and *G-W-L, Inc. v. Robichaux*,⁷⁶ even though the cases were recently decided, based on the majority's reasoning that those cases were decided erroneously.⁷⁷ Justice Mauzy concluded that the court

should be compensated for his losses, but how should the court punish the service provider. Justice Gonzalez stated that, if the service provider is grossly negligent, the courts already allow remedies which provide for exemplary damages. Therefore, Justice Gonzalez reasoned, there is no reason why all service providers should be subjected to penalties regardless of their standard of care. Justice Gonzalez pointed out a consumer who has suffered damages based on a transaction involving services may be able to recover under section 17.50(a)(1) of the DTPA. *See id.*; *see also* TEX. BUS. & COM. CODE ANN. § 17.50(a)(1) (Vernon 1987). For example, a consumer may maintain an action where the service provider represented that the service had benefits which it did not have. *See Melody Home*, 31 Tex. Sup. Ct. J. at 53 (Gonzalez, J., concurring); *see also* TEX. BUS. & COM. CODE ANN. § 17.46(b)(5) (Vernon 1987).

72. *Melody Home*, 31 Tex. Sup. Ct. J. at 55 (Gonzalez, J., concurring). Justice Gonzalez concluded that since the *Humber* warranty existed prior to the enactment of the DTPA and is part of common law, a builder who attempts to repair a home to extinguish his liability under the *Humber* warranty should also be liable under the same warranty if such repairs are not effective. *See id.*

73. *Melody Home Mfg. Co. v. Barnes*, 30 Tex. Sup. Ct. J. 489, 495 (June 17, 1987)(Mauzy, J., concurring), *majority opinion withdrawn*, 31 Tex. Sup. Ct. J. 47 (November 4, 1987). Justice Mauzy did not withdraw his concurrence with the majority opinion dated June 17, 1987, although the majority opinion was withdrawn. *See Melody Home Mfg. Co. v. Barnes*, 31 Tex. Sup. Ct. J. 47 (November 4, 1987).

74. *See Melody Home*, 30 Tex. Sup. Ct. J. at 495 (Mauzy, J., concurring). As Senate sponsor of the bill which resulted in the DTPA, Justice Mauzy was privy to the political concessions made by the Attorney General and concluded that such agreements had no bearing on the issue before the court in 1987. *See id.*

75. 698 S.W.2d 94 (Tex. 1985). In its ultimate opinion, the majority did not overrule *Dennis v. Allison*. *See Melody Home Mfg. Co. v. Barnes*, 31 Tex. Sup. Ct. J. 47, 50 (November 4, 1987). Further, the majority expressly declined to address the issue of whether an implied warranty of "good and workmanlike manner" exists with regards to professional services. *See id.*

76. 633 S.W.2d 392 (Tex. 1982).

77. *See Melody Home Mfg. Co. v. Barnes*, 30 Tex. Sup. Ct. J. 489, 496 (June 17, 1987)(Mauzy, J., concurring), *majority opinion withdrawn*, 31 Tex. Sup. Ct. J. 47 (November 4, 1987). Justice Mauzy stated that "[p]redictability and stability in our law is not to be maintained at the cost of being wrong." *Id.* at 495. According to Justice Mauzy, the electorate had voiced its opinion on the prior court's decisions through the election process. *Id.* at 495-96. The court, in Justice Mauzy's opinion, should decide issues based on the "perceived ills of a changing society." *Id.* at 496. Justice Mauzy concluded that any other basis for decision-

should not be limited by precedent if following precedent would result in erroneous decisions.⁷⁸

In *Melody Home*, the Texas Supreme Court decided, based on public policy, that the implied warranty of good and workmanlike performance for repairs and modifications which exists at common law is actionable under the DTPA.⁷⁹ The court's application of the common law warranty requiring good and workmanlike performance to an action by consumers under the DTPA for breach of "an implied warranty to repair or modify existing tangible goods or property in a good and workmanlike manner" correctly followed precedent.⁸⁰ Also, the court's prior opinion,⁸¹ which granted an implied warranty of good and workmanlike performance to all service providers, was properly withdrawn.⁸² Therefore, many of the problems which consumers and businesses would have encountered if the warranty was not limited to repairs or modifications of existing goods and property have been anticipated and eliminated through the court's decision.⁸³

In *Melody Home*, the Texas Supreme Court correctly applied the common law warranty requiring good and workmanlike performance by allowing consumers to sue under the DTPA for breach of "an implied warranty to repair or modify existing tangible goods or property in a good and workman-

making by the court nullifies the ability of the electorate to have a representative court. *See id.* at 495-96.

78. *Id.* at 496. When the reason for the law no longer exists or when circumstances change, Justice Mauzy opined, the court must be responsive and disregard the old law where it no longer applies. According to Justice Mauzy, the court need not wait for the legislature to change or enact a statute to decide that the old law no longer is applicable. *Id.*

79. *Melody Home Mfg. Co. v. Barnes*, 31 Tex. Sup. Ct. J. 47, 50-51 (November 4, 1987).

80. *See La Sara Grain Co. v. First Nat'l Bank*, 673 S.W.2d 558, 565 (Tex. 1984)(warranties under DTPA established independent of Act); *see also Gupta v. Ritter Homes, Inc.*, 646 S.W.2d 168, 169 (Tex. 1983)(builder's implied warranties of workmanlike performance and habitability actionable under DTPA); *Thrall v. Renno*, 695 S.W.2d 84, 87 (Tex. App.—San Antonio 1985, writ ref'd n.r.e)(failure to perform work in good and workmanlike manner actionable under DTPA); Comment, *Expansion of Implied Warranty Coverage Under the DTPA: Service Contracts*, 17 TEX. TECH L. REV. 917, 934-36 (1986)(essence of DTPA encourages extension of implied warranty of workmanlike performance to service contracts).

81. *Melody Home Mfg. Co. v. Barnes*, 30 Tex. Sup. Ct. J. 489 (June 17, 1987), *withdrawn*, 31 Tex. Sup. Ct. J. 47 (November 4, 1987).

82. *See La Rossa v. Scientific Design Co.*, 402 F.2d 937, 942-43 (3d Cir. 1968)(public policy requiring strict liability not applicable to professional services); Huber, *Admission to the Practice of Law in Texas: A Critique of Current Standards and Procedures*, 17 HOUSTON L. REV. 687, 690-743 (1980)(discussing requirements for attorneys for admission and licensing).

83. *See Broyles v. Brown Eng'g Co.*, 151 So. 2d 767, 771 (Ala. 1963)(services by attorneys and doctors subject to external factors beyond their control); Steiner, *The Legalization of American Society: Economic Regulation*, 81 MICH. L. REV. 1285, 1302-03 (1983)(costs of doing business increase as regulation increases and additional cost passed on to beneficiaries of regulation); Comment, *Professional Negligence*, 121 U. PA. L. REV. 627, 650-52 (1973)(guarantee of results of professional services would result in higher prices for consumers).

like manner”⁸⁴ Pursuant to the legislative mandate of liberal construction⁸⁵ and the failure of the DTPA to create either express or implied warranties,⁸⁶ the court has interpreted section 17.50(a)(2) of the DTPA as requiring application of warranties created by statutory or common law.⁸⁷ The implied warranty of performing services in a good and workmanlike manner existed at common law prior to the enactment of the DTPA and is therefore properly actionable under the DTPA.⁸⁸

Additionally, the court, in restricting the holding of *Melody Home* only to repairs or modifications of existing goods or property, properly followed the precedent of *Dennis v. Allison*, which held that public policy does not justify an extension of the theory of implied warranties to professional services, because in those situations the consumer has other adequate remedies.⁸⁹ Recent decisions in Texas have illustrated that consumers have adequate remedies in actions for damages based upon defective professional services,⁹⁰

84. *Melody Home Mfg. Co. v. Barnes*, 31 Tex. Sup. Ct. J. 47, 51 (Nov. 4, 1987); see also *La Sara Grain Co. v. First Nat'l Bank*, 673 S.W.2d 558, 565 (Tex. 1984)(DTPA warranties created independent of Act); Comment, *Expansion of Implied Warranty Coverage Under the DTPA: Service Contracts*, 17 TEX. TECH L. REV. 917, 934-36 (1986)(intent of DTPA would subject service contracts to implied warranty of workmanlike performance).

85. See *Pennington v. Singleton*, 606 S.W.2d 682, 686 (Tex. 1980)(interpretation of DTPA not confined to strict meaning); Beckham, *The Judicial Avoidance of Liberal Statutory Construction: Is Article 10, Section 8 Lost and Forgotten?*, 10 ST. MARY'S L.J. 163, 171-72 (1978)(legislative intent requires liberal construction); see also TEX. BUS. & COM. CODE ANN. § 17.44 (Vernon 1987)(DTPA shall be liberally construed).

86. See *La Sara Grain*, 673 S.W.2d at 565 (DTPA does not create warranties); see also D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION SECOND § 3.01 (2d ed. 1983)(warranties not created by DTPA).

87. See *La Sara Grain*, 673 S.W.2d at 565 (warranty under DTPA derived from statute or common law); see also Comment, *Expansion of Implied Warranty Coverage Under the DTPA: Service Contracts*, 17 TEX. TECH L. REV. 917, 934 (1986)(warranties actionable under DTPA created independent of DTPA).

88. See *Humber v. Morton*, 426 S.W.2d 554, 555 (Tex. 1968)(implied warranty of good and workmanlike performance applied to home construction); Krahmer, *Commercial Transactions*, 37 SW. L.J. 145, 150-51 (1983)(implied warranty of quality on purchase of home).

89. See *Dennis v. Allison*, 698 S.W.2d 94, 96 (Tex. 1985)(implied warranty unnecessary because adequate remedies exist). In *Dennis*, an intoxicated psychiatrist physically and sexually assaulted a patient who had contacted him for help. See *id.* at 94; see also *Nobility Homes of Texas, Inc. v. Shivers*, 557 S.W.2d 77, 78 (Tex. 1977)(alternate remedies reduce need for implied warranties); Comment, *Professional Negligence*, 121 U. PA. L. REV. 627, 650-52 (1973)(justifications for not creating guarantee of professional services outweighs need by consumers).

90. See, e.g., *Heath v. Herron*, 732 S.W.2d 748, 754 (Tex. App.—Houston [14th Dist.] 1987, no writ)(\$298,308.58 awarded to plaintiff as actual damages in legal malpractice case); *Fillion v. Troy*, 656 S.W.2d 912, 915 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.)(\$90,000 exemplary damages not excessive). For damages caused by physicians, see, e.g., *Tsai v. Wells*, 725 S.W.2d 271, 274-75 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.)(award of \$590,000 as exemplary damages notwithstanding statutory limit of \$500,000);

under such theories as negligent preparation of architectural plans⁹¹ and failure to provide professional legal advice.⁹²

The court was correct in withdrawing its prior opinion which granted an implied warranty of good and workmanlike performance to all service providers, including both professionals and nonprofessionals.⁹³ First, many professional service providers in Texas are subject to self-enforced ethical rules and state-enforced licensing requirements which serve as preventive measures designed to protect the public from defective services.⁹⁴ Additionally,

Beal v. Hamilton, 712 S.W.2d 873, 875 (Tex. App.—Houston [1st Dist.] 1986, no writ)(default judgment of \$250,000 for misdiagnosis upheld); and *Tucker v. Lightfoot*, 653 S.W.2d 587, 591-92 (Tex. App.—San Antonio 1983, no writ)(\$31,000 pain and suffering and \$46,500 for loss of earnings not excessive in case involving overdenture performed by dentist).

91. See *Associated Architects & Eng'rs, Inc. v. Lubbock Glass & Mirror Co.*, 422 S.W.2d 942, 934-44 (Tex. Civ. App.—Amarillo 1967, writ ref'd n.r.e.)(architect found negligent in preparation of plans for skylights).

92. See *Yarbrough v. Cooper*, 559 S.W.2d 917, 920 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.)(attorney negligently failed to give professional legal advice).

93. See *Dennis*, 698 S.W.2d at 95-96 (no implied warranty where adequate remedies exist); see also *Broyles v. Brown Eng'g Co.*, 151 So. 2d 767, 771 (Ala. 1963)(courts reluctant to imply guarantee of favorable results by professional service providers).

94. See, e.g., TEX. REV. CIV. STAT. ANN. art. 249a (Vernon 1973 & Supp. 1988)(regulating architects); TEX. REV. CIV. STAT. ANN. art. 4495b (Vernon Supp. 1988)(regulating physicians); TEX. GOV'T CODE §§ 81.001-82.064 (Vernon Pamph. 1988) (regulating attorneys); SUPREME COURT OF TEXAS, RULES GOVERNING THE STATE BAR OF TEXAS arts. I—XII (Vernon 1973 & Supp. 1988)(regulating attorneys). To provide services in Texas, architects are required to be registered with the Board of Architectural Examiners to protect the general public against irresponsible architectural practices. See TEX. REV. CIV. STAT. ANN. art. 249a, § 1 (Vernon 1973); see also *Cobb v. Thomas*, 565 S.W.2d 281, 286-87 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.)(architect owes duty of exercising reasonable skill and diligence and duty to disclose all relevant matters within knowledge); *Piland v. Texas Board of Architectural Examiners*, 562 S.W.2d 26, 28 (Tex. Civ. App.—Austin 1978, no writ)(architectural license revoked for dishonest conduct); TEX. REV. CIV. STAT. ANN. art. 249a, § 11 (Vernon Supp. 1988)(Board of Architectural Examiners has authority to revoke architect's registration for reckless, dishonest, or grossly negligent conduct in practicing architecture).

The Board of Law Examiners is authorized to investigate the moral character and fitness of any person applying for a license to practice law. TEX. GOV'T CODE § 82.028(a) (Vernon Pamph. 1988); see also *Galindo v. State*, 535 S.W.2d 923, 925 (Tex. Civ. App.—Corpus Christi 1976, no writ)(purpose of statutory regulation of attorneys to protect public from morally unfit attorneys); TEX. GOV'T CODE § 82.062 (Vernon Pamph. 1988)(attorney subject to disbarment or suspension for malpractice or dishonest or fraudulent conduct); TEX. REV. CIV. STAT. ANN. Title 14-Appendix (Vernon Supp. 1987)(code governing practice of law in Texas). See generally *Huber, Admission to the Practice of Law in Texas: A Critique of Current Standards and Procedures*, 17 HOUSTON L. REV. 687, 690-743 (9180)(discussing admission and licensing requirements for attorneys in Texas).

Each applicant for a license to practice medicine in Texas must be qualified, examined, and registered by the Texas State Board of Medical Examiners. TEX. REV. CIV. STAT. ANN. art. 4495b, §§ 3.01, .04, .05 (Vernon Supp. 1988)(registration, qualification and examination provisions). The Board may refuse to admit a person for supplying false information, conviction or

professional services are usually provided to the consumer on a one-on-one basis and are custom-tailored to the individual needs of the consumer, resulting in a large degree of variation in the service and standard of skill exercised by professional service providers.⁹⁵ Further, unlike nonprofessional services and products which are found to be defective, a purchaser of professional services knows who is responsible if such services are defective and will have little difficulty in tracing the defect to the service provider.⁹⁶ Therefore, extending the implied warranty to professional service providers is neither necessary nor appropriate.⁹⁷

Through its opinion, the court has anticipated and eliminated many of the problems which consumers and businesses probably would have experienced if the implied warranty had not been restricted to the performance of repairs and modifications to existing goods and property.⁹⁸ The increased risk of liability and larger damage awards under the DTPA may have ultimately forced some service providers out of business.⁹⁹ Consequently, consumers, who generally select service providers based upon factors such as cost, quality, reliability and convenience, would have had fewer professionals avail-

a crime involving moral turpitude, use of alcohol or drugs, or unprofessional or dishonorable conduct. *Id.* § 3.08. The Board may also revoke a physician's license or implore other sanctions for similar reasons. *Id.* § 4.12.

95. See *King v. Flamm*, 442 S.W.2d 679, 681 (Tex. 1969)(general practitioner not subject to same degree of skill as specialist); see also *Hoffman v. Simplot Aviation, Inc.*, 539 P.2d 584, 588 (Idaho 1975)(personal service as opposed to mass production alleviates burden of proving negligence). Persons who provide economic, personal or financial services should not be liable unless proven to be negligent or to have acted intentionally. *La Rossa v. Scientific Design Co.*, 402 F.2d 937, 942-43 (3d Cir. 1968)(policy underlying strict liability does not apply to professional services). See generally *Sales, The Service-Sales Transaction: A Citadel Under Assault*, 10 ST. MARY'S L.J. 13 18, (1978) (goods individually tailored to consumer's needs).

96. See *La Rossa*, 402 F.2d at 942 (no remote sellers in professional service transactions which hinder tracing source of defect); *Sales, The Service-Sales Transaction: A Citadel Under Assault*, 10 ST. MARY'S L.J. 13, 18 (1978)(not difficult to locate and prove incompetence of service provider).

97. See *Dennis v. Allison*, 698 S.W.2d 94, 95-96 (Tex. 1985)(no implied warranty of professional services because adequate remedies exist); see also *Broyles v. Brown Eng'g Co.*, 151 So. 2d 767, 771 (Ala. 1963)(courts do not favor an implied warranty of the results of professional services).

98. See *Broyles*, 151 So. 2d at 771 (courts disfavor implied guarantee of favorable results in contracts involving professional services).

99. See, e.g., *Goodfriend & Lynn, Of White Knights and Black Knights: An Analysis of the 1979 Amendments to the Texas Deceptive Trade Practices Act*, 33 Sw. L.J. 941, 942-44 (1979)(discussion of effects of DTPA on business); *Sales, The Service-Sales Transaction: A Citadel Under Assault*, 10 ST. MARY'S L.J. 13, 19 (1978)(inability to effectively allocate risk will jeopardize some service providers). If found to have acted "knowingly," a defendant under the DTPA may, at the discretion of the jury, be held liable for three times the actual amount of damages which exceed \$1,000. See TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (Vernon 1987); see also *id.* § 17.45(9) (defining "knowingly" as actual awareness, which may be inferred from objective manifestations).

able, diminishing their freedom of choice.¹⁰⁰ Consumers most likely would have had to pay higher prices based on the allocation of risks by the service provider of large damage awards under DTPA through increased prices.¹⁰¹

Mass production and consumers' lack of information necessitated enactment of consumer protection laws such as the DTPA in order to balance the effects of unequal bargaining power and to provide a remedy for consumers against unfair business practices. The Texas Supreme Court, through its decision in *Melody Home*, followed the intent of the legislature and the court's precedent in extending a common law implied warranty to a cause of action under the breach of warranty provision of the DTPA. With the issuance of a new opinion, the court avoided the potential problems created by the prior opinion. As a result, consumers are less likely to be confronted by higher prices and reduced competition among professional service providers, whose continued existence may have been jeopardized by the risks of large damage awards.

100. See Bandow, *Doctors Operate to Cut Out Competition*, 58 BUS. & SOC'Y REV. 4, 4 (1986)(lack of competition raises prices and reduces freedom of choice); Sales, *The Service-Sales Transaction: A Citadel Under Assault*, 10 ST. MARY'S L.J. 13, 25-26 (1978)(providing affordable medical care of utmost public concern); Comment, *The Deceptive Trade Practices-Consumer Protection Act: The Shield Becomes a Sword*, 17 ST. MARY'S L.J. 879, 918-21 (1986)(hypotheticals by author illustrate effect of large damage awards on continued production of goods). Cf. Sales, *The Service-Sales Transaction: A Citadel Under Assault*, 10 ST. MARY'S L.J. 13, 25 (1978)(consumer bargains for skill, knowledge and experience of service provider).

101. See Steiner, *The Legalization of American Society: Economic Regulation*, 81 MICH. L. REV. 1285, 1302-03 (1983)(increased regulation raises cost of doing business and beneficiaries of regulation pay increased cost of business); Note, *Advertising the Economics of High Jury Awards: The Insurance Industry's Bid for Prospective Jurors to Tighten Their Purse*, 37 WASH. & LEE L. REV. 1175, 1175 (1980)(consumers ultimately bear cost of jury verdicts against insurance companies through higher premiums). See generally Bragg, *Now We're All Consumers! The 1975 Amendments to the Consumer Protection Act*, 28 BAYLOR L. REV. 1, 8 (1976)(burden of damage awards passed on to consumer). The ultimate question is whether increased cost outweighs the restriction on the consumer's choice of service providers. See Steiner, *The Legalization of American Society: Economic Regulation*, 81 MICH. L. REV. 1285, 1304 (1983)(ideal regulation maximizes benefits and costs). Cf. *id.* at 1286 (substantial costs as well as benefits result from regulation); Sales, *The Service-Sales Transaction: A Citadel Under Assault*, 10 ST. MARY'S L.J. 13, 19 (1978)(distribution of risk for service provider is unrealistic). But see Greenfield, *Consumer Protection in Service Transactions-Implied Warranties and Strict Liability in Tort*, 1974 UTAH L. REV. 661, 694 (increased cost will not substantially diminish availability of services required by consumer).