the common law, and a different set of common law warranties.

Illustrative of the potential "gaps" in warranty coverage is a case where the owner of an industrial plant brought suit against a contractor for defective refrigeration equipment, who, in turn, brought a third-party action against the distributor of the equipment. The transaction between the contractor and its distributor was governed by the U.C.C. because the distributor's agreement to provide the refrigeration equipment was a "sale of goods." The owner, however, was not permitted to recover from the contractor for a U.C.C. breach of express warranty as its construction contract was not a "contract for the sale of goods" but instead one for "work, labor, and materials."[2] Warranty conflicts and gaps also exist between the contractor's express warranty of workmanship and the owner's implied warranty of the adequacy of design. Whether a defect is a construction or design problem can be a complicated question of fact.[3]

§ 9:3 Warranty as tort, contract, statutory or otherwise: Significance of characterization

Determining the conceptual nature of warranty is no easy task. Professor Prosser touched upon the dilemma when he remarked that warranty is "a freak hybrid born of the illicit intercourse of tort and contract."[1] The hermaphroditic nature of warranty has its genesis in the historical development of this remedy. Warranty originally derived from the tort of deceit.[2] As such, it was infused with the fault concepts normally associated with tort

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[2]See Authorized Supply Co. of Ariz. v. Swift & Co., 277 F.2d 710 (9th Cir. 1960). See also Peltz Const. Co. v. Dunham, 436 N.E.2d 892, 34 U.C.C. Rep. Serv. 14 (Ind. Ct. App. 1982).

[3]Compare Rhone Poulenc Rorer Pharmaceuticals Inc. v. Newman Glass Works, 112 F.3d 695 (3d Cir. 1997) (contractor's warranty of workmanship rather than owner's implied warranty of design adequately governed liability for delaminated opacifiers on curtainwall spandral glass) with Trustees of Indiana University v. Aetna Cas. & Sur. Co., 920 F.2d 429, 64 Ed. Law Rep. 680 (7th Cir. 1990) (abrogated on other grounds by, Watson v. Amedco Steel, Inc., 29 F.3d 274, 65 Fair Empl. Prac. Cas. (BNA) 580, 65 Empl. Prac. Dec. (CCH) P 43269 (7th Cir. 1994)) (owner's design warranty not "trumped" by contractor's express warranty of materials).

[Section 9:3]

[1]Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 Minn. L. Rev. 791, 800 (1966).

[2]A leading case discussing when a warranty claim becomes the basis for exemplary damages is Cantrell v. Amarillo Hardware Co., 226 Kan. 681, 602 P.2d 1326, 27 U.C.C. Rep. Serv. 1276 (1979), where punitive damages of $18,000 were added to a $13,000 compensatory recovery for personal injury caused by a

liability.[3] As it evolved, warranty became more closely associated with such contract concepts as expectation damages.[4] Given the rather indistinct evolution of this remedy, it is little wonder that courts and commentators have developed widely differing views as to the nature of warranty. If one focuses upon remediating the consequences of a breach of warranty to the exclusion of all else, then warranty takes on aspects of strict liability. As one commentator explained:

> Whether it is labeled tort or contract, implied (and express) warranty is grounded on a strict liability basis. It is oriented towards the ultimate outcome of a transaction, rather than the causes of that outcome. It looks to the consequences to the buyer rather than the fault of the seller. . .. The purchaser is relieved of the sometimes onerous burden of proving that the seller was negligent, had knowledge of the defects, or intended to sell defective goods. The seller can even be found to have breached the warranty when the defects are latent, and could not reasonably have been discovered by him.[5]

Warranty liability, particularly liability arising from implied warranties deemed to be in the nature of tort, is enforced by

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defective step ladder. The plaintiff sued on a warranty theory and recovered punitive damages based on evidence that the manufacturer continued to market the ladder even though it knew that ladders of the same model had collapsed on at least five prior occasions, and even after corrective designs had been determined and agreed upon with a certifying agency. See also James D. Pauls, Ltd. v. Pauls, 633 F. Supp. 34 (S.D. Fla. 1986) ($460,000 in punitive damages in sale of copy machines could be appropriate if fraud was involved). As one commentator put the issue:

> In sum, the courts will award punitive damages in warranty suits where the seller's behavior smacks of fraud. In the usual case, breach of the implied warranties of merchantability and fitness will not give rise to punitive damages. But when the seller makes various representations about the product that would amount to an express warranty under § 2-313, and he knows that these representations are not accurate, breach of warranty may well overlap with tortious fraud and thus trigger liability for punitive damages. Such a result is consistent with §§ 1-106(1) and 2-715. Supporting this result is § 2-721, which provides that remedies for fraud under non-Code law can be added to all remedies for nonfraudulent breach of warranty available to the buyer under Article 2.

Clark and Smith, The Law of Product Warranties, 2d Ed., § 746 (Thompson/West 2002).

[3]See Harris, Jr. & Squillante, Warranty Law in Tort & Contract Actions § 2.5 (1989).

[4]See Harris, Jr. & Squillante, Warranty Law in Tort & Contract Actions § 2.5 (1989).

[5]Singal, Extending Implied Warranties Beyond Goods: Equal Protection for Consumers of Services, 12 New Eng. L. Rev. 859, 870 (1977) (footnotes omitted).

some courts as strict liability.[6] As such, breach is established once the plaintiff establishes that the goods or services do not comport with the warranty and the warrantor's conduct is irrelevant.[7] Other courts have treated warranty liability more in the nature of negligence.[8] When this is the case, the warrantor's

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[6]See Chandler v. Madsen, 197 Mont. 234, 642 P.2d 1028 (1982) (implied warranty of habitability does not involve the concept of fault or wrongdoing); La Sara Grain Co. v. First Nat. Bank of Mercedes, 673 S.W.2d 558, 565, 38 U.C.C. Rep. Serv. 963 (Tex. 1984) ("Implied warranties are created by operation of law and are grounded more in tort than contract."); Berman v. Watergate West, Inc., 391 A.2d 1351 (D.C. 1978). But see Groppel Co., Inc. v. U. S. Gypsum Co., 616 S.W.2d 49, 58-59, 32 U.C.C. Rep. Serv. 35 (Mo. Ct. App. E.D. 1981) (discussing differences between U.C.C. implied warranties and strict liability and particularly a defense to warranty liability based upon buyer's inspection which court equates to concept of contributory negligence).

[7]See Chandler v. Bunick, 279 Or. 353, 569 P.2d 1037 (1977) (warranty is a form of strict liability for which one can be liable even if all reasonable care was exercised by the warrantor). See also Garcia v. Edgewater Hosp., 244 Ill. App. 3d 894, 184 Ill. Dec. 651, 613 N.E.2d 1243, Prod. Liab. Rep. (CCH) ¶ 13584, 21 U.C.C. Rep. Serv. 2d 595 (1st Dist. 1993) (stating breach of implied warranty theory is a form of strict liability); Lloyd v. John Deere Co., 922 F.2d 1192, Prod. Liab. Rep. (CCH) ¶ 12716 (5th Cir. 1991) (discussing warranty as form of strict liability); Klages v. General Ordnance Equipment Corp., 240 Pa. Super. 356, 367 A.2d 304, 19 U.C.C. Rep. Serv. 22 (1976) (explaining historically how warranty became form of strict liability in tort).

[8]See Builder-Vendor's Liability to Purchaser of New Dwelling for Breach of Implied Warranty of Fitness or Habitability, 50 Am. Jur. Proof of Facts 3d 543 §§ 20-23. See also LaPuma v. Collinwood Concrete, 75 Ohio St. 3d 64, 1996-Ohio-305, 661 N.E.2d 714, 716, Prod. Liab. Rep. (CCH) ¶ 14583 (1996) ("The LaPumas do have a common-law claim against Collinwood . . .. Despite the lack of privity between the plaintiff and the supplier, this court held [in an unrelated case] that the plaintiff could maintain a tort action against the supplier based on the theory of breach of implied warranty."); Pepsi Cola Bottling Co. of Anchorage v. Superior Burner Service Co., 427 P.2d 833 (Alaska 1967) (implied warranty claim dismissed as unnecessary because it was identical to negligence count which was sufficient to afford plaintiff a basis of relief). Klages v. General Ordnance Equipment Corp., 240 Pa. Super. 356, 367 A.2d 304, 19 U.C.C. Rep. Serv. 22 (1976) (discussing historical development of warranty as form of strict liability in tort); Wallace v. Parks Corp., 212 A.D.2d 132, 629 N.Y.S.2d 570, 28 U.C.C. Rep. Serv. 2d 825 (4th Dep't 1995) (discussing commonlaw tort actions that arise out of warranties); Jacobs v. Yamaha Motor Corp., U.S.A., 420 Mass. 323, 649 N.E.2d 758, 26 U.C.C. Rep. Serv. 2d 747 (1995) (analyzing recovery available for tort-based breach of warranty claims). But see Groppel Co., Inc. v. U. S. Gypsum Co., 616 S.W.2d 49, 59, 32 U.C.C. Rep. Serv. 35 (Mo. Ct. App. E.D. 1981) ("A negligence action, however, is not identical to the U.C.C. claim [breach of implied warranty of merchantability]. The implied warranty obligations of the Code apply without regard to any negligence, knowledge or fault of the vendor or manufacturer. Thus, to recover under the Code, a plaintiff need not allege or prove that the manufacturer was negligent in any way; he need only prove that the item was defective. The Code

conduct or fault may become relevant.[9] Still other courts treat warranties as a species of contract,[10] particularly when they are express warranties contained within a written agreement. Implied warranties, as obligations growing out of the parties' contract negotiations, have received dual treatment, i.e., as obligations in the nature of contract and of tort.[11] Finally, there are cases treating warranty as a separate and distinct cause of action rather than a subspecies of tort or contract.[12]

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does require that the buyer give notice to his seller of the breach of warranty, whereas notice is not required when recovery is sought on a negligence theory.") The notice requirement may not be a significant distinction in the case of remote purchasers. See Third-party beneficiaries of warranties under UCC sec. 2-318, 50 A.L.R.5th 327352 ("[M]ost courts which have considered the issue have refused to permit a seller or manufacturer to invoke U.C.C. § 2-607(3)(a)'s notice requirement as a defense to a third-party beneficiary's breach of warranty claim.") Moreover, the proof relative to the item being "defective" is more in the nature of nonconformance with the warranty rather than a "defect" as that term is usually employed in product liability cases. See Hillcrest Country Club v. N.D. Judds Co., 236 Neb. 233, 461 N.W.2d 55, 65, 12 U.C.C. Rep. Serv. 2d 990 (1990) (discussing the differences between product liability and express warranty claims). Of course, if the warranty in question is the implied warranty of merchantability, then the concept of "defect" may be similar to that employed in product liability cases.

[9]In such cases it is not uncommon to find courts requiring the party seeking to establish a breach of warranty to offer expert proof as to the standard of care required of the warrantor. See Davis v. McCall, 568 P.2d 956 (Alaska 1977); Brewer v. Custom Builders Corp., 42 Ill. App. 3d 668, 1 Ill. Dec. 377, 356 N.E.2d 565 (5th Dist. 1976); Hebert v. McDaniel, 479 So. 2d 1029 (La. Ct. App. 3d Cir. 1985); Jones v. Honchell, 14 Ohio App. 3d 120, 470 N.E.2d 219 (12th Dist. Butler County 1984).

[10]Redarowicz v. Ohlendorf, 92 Ill. 2d 171, 183, 65 Ill. Dec. 411, 417, 441 N.E.2d 324, 330 (1982) (implied warranty extended to subsequent purchaser for cracks and leakage but no recovery for economic loss in negligence); Cosmopolitan Homes, Inc. v. Weller, 663 P.2d 1041 (Colo. 1983) (implied warranty arises from contractual relationship).

[11]See Cabal v. Donnelly, 302 Or. 115, 727 P.2d 111 (1986) (contract); Velotta v. Leo Petronzio Landscaping, Inc., 69 Ohio St. 2d 376, 23 Ohio Op. 3d 346, 433 N.E.2d 147, 150 (1982) ("The obligation to perform in a workmanlike manner using ordinary care may arise from or out of a contract, i.e., from the purchase agreement, but the cause of action is not based on contract; rather it is based on a duty imposed by law.").

[12]See Spence v. Three Rivers Builders & Masonry Supply, Inc., 353 Mich. 120, 90 N.W.2d 873 (1958); Scott v. Strickland, 10 Kan. App. 2d 14, 691 P.2d 45, 50 (1984) (discussing first purchaser's rights to sue for economic loss, found implied warranty could be tort contract); Oats v. Nissan Motor Corp. in U.S.A., 126 Idaho 162, 879 P.2d 1095, Prod. Liab. Rep. (CCH) ¶ 13993, 26 U.C.C. Rep. Serv. 2d 1080 (1994) (stating that whether breach of warranty action is governed by tort or contract depends upon the type of recovery sought); In re Master Mortg. Inv. Fund, Inc., 161 B.R. 228 (Bankr. W.D. Mo. 1993) (holding that

Whatever their perceived origin, implied warranties are inferred from the facts or created by operation of law to advance the interests of justice.[13] They have been found to arise even where the injury is economic in nature, and the issue is whether a breach of warranty claim permits recovery for such losses.[14] The nature of warranty is also critical to the issue of what statute of limitations applies to the cause of action.[15]

The confusion over the nature of warranty remains unabated in the 21st century. Warranties are a diverse lot. The U.C.C. implied warranties of merchantability and fitness for a particular purpose are "end result" warranties[16] that are radically different than, for example, the implied warranty of workmanlike "performance."[17] A seller's goods are either merchantable or they are not. The conduct of the seller has little to do with whether

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hybrid cause of action sounding in both contract and tort law exists for breach of implied warranty).

[13]See Elliott v. Lachance, 109 N.H. 481, 256 A.2d 153, 155, 6 U.C.C. Rep. Serv. 1051 (1969) ("Such warranties [U.C.C. merchantability] are not created by agreement . . . but are said to be imposed by law on the basis of public policy."); Richards v. Powercraft Homes, Inc., 139 Ariz. 242, 678 P.2d 427 (1984) (en banc) (warranty of workmanlike quality and habitability is imposed by law); Terlinde v. Neely, 275 S.C. 395, 271 S.E.2d 768, 10 A.L.R.4th 379 (1980) (recovery allowed under implied warranties based on public policy grounds and builder held to industry standards); Petersen v. Hubschman Const. Co., Inc., 76 Ill. 2d 31, 38, 27 Ill. Dec. 746, 749, 389 N.E.2d 1154, 1157 (1979) ("implied warranty . . . is a judicial innovation . . . used to avoid the harshness of *caveat emptor* . . .."); George v. Veach, 67 N.C. App. 674, 313 S.E.2d 920, 922 (1984) (implied warranty arises from operation of law).

[14]See Seely v. White Motor Co., 63 Cal. 2d 9, 45 Cal. Rptr. 17, 403 P.2d 145, 2 U.C.C. Rep. Serv. 915 (1965). See also Lempke v. Dagenais, 130 N.H. 782, 547 A.2d 290 (1988) (discussing the nature of warranty and how it relates to builder's liability to subsequent purchaser).

[15]See Woodward v. Chirco Const. Co., Inc., 141 Ariz. 514, 687 P.2d 1269 (1984) (discussing the nature of warranty for purposes of determining which statute of limitations applies).

[16]See City Public Service Bd. v. General Elec. Co., 947 F.2d 747 (5th Cir. 1991) (discussing the difference between warranties pertaining to performance in contrast to those guaranteeing an end result). See also Davis, The Elusive Warranty of Workmanlike Performance: Constructing a Conceptual Framework, 72 Neb. L. Rev. 981 (1993) (contrasting performance-based warranties to those setting forth an end result).

[17]See Duff v. Bonner Bldg. Supply, Inc., 103 Idaho 432, 649 P.2d 391, 394, 34 U.C.C. Rep. Serv. 888 (Ct. App. 1982), aff'd, 105 Idaho 123, 666 P.2d 650, 36 U.C.C. Rep. Serv. 1564 (1983) (explaining that it is appropriate to permit defense of comparative negligence to implied warranty of workmanlike performance as the warranty is cast in terms of negligence; whereas the U.C.C. warranty of merchantability is not couched in terms of negligence and therefore defenses based on contributory fault, e.g., failure to discover the defect, were not defen-

the goods meet that standard.[18] Other warranties, however, are more "conduct-related." The implied warranty of workmanlike performance is a conduct or "proper efforts" standard tied to local custom and practice and applicable contract specifications.[19] While the end result of a builder's efforts is not irrelevant to the inquiry of whether it employed workmanlike performance, the two are not equivalent. Depending upon the specific circumstances, a builder may employ workmanlike performance and still provide a structure that contains defects or is otherwise unsatisfactory to the owner or, in the exceptional case, the public at large (i.e., a merchantability-like standard).[20] Similarly, a structure may be perfectly fine but the builder's standard of conduct still falls below a "workmanlike" (in the broadest sense) performance as it failed to complete the structure on time or it failed to pay its subcontractors. The implied warranty of habitability, on the other hand, is more in the nature of an end result warranty. The implied obligation of good faith and fair dealing goes a level deeper and focuses not only on conduct but, depending upon the jursidiction, subjective intentions.[21]

Because warranties cover such a broad and diverse spectrum it is little wonder that courts have fashioned no single treatment. To do so would ignore the diverse nature and overlay of the various express implied warranties and obligations. Rather than trying to pigeonhole a warranty action into a particular conceptual slot, it is more productive to focus upon the particular nature of the warranty in question and apply rules appropriate for that specific warranty or obligation.

§ 9:4 Warranty as tort, contract, statutory or otherwise: Significance of characterization—Warranty-type representations serving as basis for liability: Tort, contract or warranty

The law of warranty stands at the crossroads of tort and

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ses to a breach of this implied warranty).

[18]See Cipollone v. Yale Indus. Products, Inc., 202 F.3d 376, 379, Prod. Liab. Rep. (CCH) ¶ 15740, 53 Fed. R. Evid. Serv. 1206 (1st Cir. 2000) ("[A] defendant may be liable on a theory of breach of warranty of merchantability even though he or she properly designed, manufactured, and sold his or her product.").

[19]See Davis, The Elusive Warranty of Workmanlike Performance: Constructing a Conceptual Framework, 72 Neb. L. Rev. 981 (1993).

[20]The reverse is perhaps more likely. A builder of luxury homes, for example, may well provide a home free of defects but its work may still not measure up to the reasonable (for the luxury home market) workmanlike standards of its client.

[21]See § 9:103.

contract. Its ambiguous ancestral heritage has contributed to its unique position in American jurisprudence.[1] Warranty liability requires neither a seller's wrongdoing nor the existence of a dangerous product. Unlike the uneasy interrelationship between contract and tort liability, warranty liability comfortably co-exists with other theories, such as the concept of strict liability in product cases on the one hand and tort-based misrepresentation liability on the other. Warranty, reduced to its essentials, "is simply a quality standard that the seller is required to maintain."[2] With respect to express warranties, this quality standard is generally established through some form of communication.[3]

Where the actual level of quality fails to comport with the seller's representations it does not require unusually clever or imaginative lawyering to think in terms of tort or warranty concepts. It is common to find express warranty claims coupled with misrepresentation allegations grounded in tort[4] or implied warranty.[5] A more recent development has been the rise of statu-

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[Section 9:4]

[1]As Professor Williston noted, "warranty is a hybrid between tort and contract." Williston, Liability for Honest Misrepresentation, 24 Harv. L. Rev. 415, 420 (1911).

[2]Quinn's Uniform Commercial Code Commentary and Law Digest, vol. 1 ¶ 2-313[A][2] (2d ed. 1991).

[3]The historical source of this warranty is the verbal guaranty of the seller. See Quinn's Uniform Commercial Code Commentary and Law Digest, vol. 1 ¶ 2-313[RJ][3] (2d ed. 1991).

[4]See Salt Lake City Corp. v. Kasler Corp., 855 F. Supp. 1560, 24 U.C.C. Rep. Serv. 2d 518 (D. Utah 1994); Fuchs v. Parsons Const. Co., 166 Neb. 188, 88 N.W.2d 648 (1958); Woodward v. Chirco Const. Co., Inc., 141 Ariz. 514, 687 P.2d 1269 (1984); Ohio Sav. Bank v. H.L. Vokes Co., 54 Ohio App. 3d 68, 560 N.E.2d 1328, 13 U.C.C. Rep. Serv. 2d 92 (8th Dist. Cuyahoga County 1989); In re Lone Star Industries, Inc., Concrete R.R. Cross Ties Litigation, 776 F. Supp. 206, 16 U.C.C. Rep. Serv. 2d 301 (D. Md. 1991); Sherkate Sahami Khass Rapol (Rapol Construction Co.) v. Henry R. Jahn & Son, Inc., 531 F. Supp. 1048 (S.D. N.Y. 1982), aff'd in part on other grounds, vacated in part, rev'd in part on other grounds, 701 F.2d 1049, 35 U.C.C. Rep. Serv. 790 (2d Cir. 1983). See also 1 White & Summers, Uniform Commercial Code (4th ed.) p 540 § 11-7 ("Usually courts characterize such cases [claims based on express representations concerning goods] as express warranties, though in some jurisdictions they are classed as misrepresentation cases.") (footnotes omitted).

[5]See Bee Window, Inc. v. Stough Enterprises, Inc., 698 N.E.2d 328 (Ind. Ct. App. 1998) (a contractor's recommendations to an owner regarding the suitability and satisfactory performance of a brand of vinyl windows constituted an implied warranty because the express contract was silent on the subject). See also In re Ferguson, 222 B.R. 576 (Bankr. N.D. Ill. 1998); Waldroup v. Dravenstott, 972 S.W.2d 364 (Mo. Ct. App. W.D. 1998).

tory claims premised upon a state's consumer protection act.[6] Of course, there is always the old standby breach of contract action available to plaintiffs in privity with a defendant seller or manufacturer.[7]

The judiciary have adopted no consistent approach for dealing with tort claims asserted on the basis of the same operative facts as a count alleging "breach of warranty."[8] In some respects this diverse treatment reflects the hermaphroditic nature of warranty. While breach of warranty originally derived from the tort of deceit, it is now commonly thought of as a contract doctrine.[9] A remarkable evolution bringing to mind Professor Prosser's oft-quoted remark that warranty is "a freak hybrid born of the illicit intercourse of tort and contract."[10]

It is impossible to put judicial treatment of warranties into proper perspective without distinguishing between the various types of warranties. Certain implied warranties, particularly

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[6]See Jackie Scott, Carol Scott v. Noland Company, Aqua Glass Corporation, 1995 WL 440375 (Tenn. Ct. App. 1995); Eastern Mountain Platform Tennis, Inc. v. Sherwin-Williams Co., Inc., 40 F.3d 492, 25 U.C.C. Rep. Serv. 2d 48 (1st Cir. 1994); Keiber v. Spicer Constr. Co., 85 Ohio App. 3d 391, 619 N.E.2d 1105 (2d Dist. Greene County 1993); Richards v. Powercraft Homes, Inc., 139 Ariz. 242, 678 P.2d 427 (1984); Cox v. Sears Roebuck & Co., 138 N.J. 2, 647 A.2d 454 (1994).

[7]See Point East Condominium Owners' Assn. v. Cedar House Assoc., 104 Ohio App. 3d 704, 663 N.E.2d 343 (8th Dist. Cuyahoga County 1995); Interwest Const. v. Palmer, 886 P.2d 92 (Utah Ct. App. 1994), aff'd, 923 P.2d 1350 (Utah 1996).

Of course, the requirements for breach of contract are different from those of breach of warranty. The common perception is that it is more difficult for plaintiffs to obtain relief on a summary judgment basis on a breach of contract claim as opposed to a warranty theory. This may be the case although proving a breach of warranty claim, whether express or implied, still requires something more than merely establishing a difference between the good or service delivered and the representation made. Nevertheless, the requirement that the plaintiff establish compliance with all contractual conditions precedent to the defendant's performance can be a fertile ground for factual dispute. Another issue that sometimes arises in breach of contract actions that can present proof problems is the materiality of the breach. Materiality creeps into warranty analysis, at least express U.C.C warranties, through the concept of the "basis of the bargain." Breach of contract actions more often give rise to defenses based on waiver and estoppel than warranty claims. See Cause of Action for Breach of Contract for Construction or Repair of Residence, 19 Causes of Action 647.

[8]The same issue exists generally between tort, contract breach and restitution claims. See §§ 19:1, 19:2.

[9]See Harris, Jr. & Squillante, Warranty Law in Tort & Contract Actions § 2.5 (1989).

[10]Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 Minn. L. Rev. 791, 800 (1966).

those pertaining to a party's conduct or standard of care, closely resemble tort concepts and are often treated as such.[11] In *Pepsi Cola Bottling Co. of Anchorage v. Superior Burner Service Co.*,[12] an owner sued a repair contractor for damages which were claimed to be the result of a faulty repair to one of its boilers, on theories of negligence and breach of an implied warranty to make the repair in a workmanlike manner. The court rejected the implied warranty claim, finding it identical to the negligence count and holding that the owner had a sufficient remedy in tort.[13] The fact that implied warranties are duties imposed by law has not been sufficient in all cases to make out a tort claim.[14] This is particularly true where implied warranties are deemed to be a species of contract.[15] That reasoning is consistent with the

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[11]See Woodward v. Chirco Const. Co., Inc., 141 Ariz. 514, 687 P.2d 1269 (1984) (en banc) ("[I]njury incurred due to negligent construction of a residence may give rise to an action for breach of the implied warranty of workman-like performance and habitability and an action for breach of the contractor's common law duty of care."); Hoffman v. Simplot Aviation, Inc., 97 Idaho 32, 539 P.2d 584, 589 (1975).

[12]Pepsi Cola Bottling Co. of Anchorage v. Superior Burner Service Co., 427 P.2d 833 (Alaska 1967).

[13]Pepsi Cola Bottling Co. of Anchorage v. Superior Burner Service Co., 427 P.2d 833, 843 (Alaska 1967). See also Securities-Intermountain, Inc. v. Sunset Fuel Co., 289 Or. 243, 611 P.2d 1158, 1169 (1980) ("unworkmanlike performance" is a general standard and therefore "appears to invoke a negligence standard or general professional duty of care and skill rather than a contractual standard."); Georgetown Realty, Inc. v. Home Ins. Co., 313 Or. 97, 831 P.2d 7, 12 (1992) (suit may be maintained in both tort and contract if breaching party is subject to a standard of care independent of the express terms of the contract, e.g., an implied duty to perform in a workmanlike manner); National Fire Ins. Co. of Hartford v. Westgate Const. Co., 227 F. Supp. 835, 837 (D. Del. 1964)cite> (breach of an implied duty to perform in a workmanlike manner creates both tort and contract remedies); Lucas v. Canadian Valley Area Vocational Technical School of Chickasha, Dist. No. Six, 1992 OK CIV APP 1, 824 P.2d 1140, 72 Ed. Law Rep. 1128 (Ct. App. Div. 3 1992) (failure to perform in a workmanlike manner gives rise to tort action as the duty is implied in law rather than in contract).

[14]See Woodward v. Chirco Const. Co., Inc., 141 Ariz. 514, 687 P.2d 1269, 1271 (1984); Fuchs v. Parsons Const. Co., 166 Neb. 188, 88 N.W.2d 648, 656 (1958).

[15]See Watts Homes, Inc. v. Alonzo, 452 So. 2d 1331 (Ala. Civ. App. 1984); Stephens v. Creel, 429 So. 2d 278 (Ala. 1983) (contract statute of limitations governs action alleging failure to perform in a workmanlike manner); Cacace v. Morcaldi, 37 Conn. Supp. 735, 435 A.2d 1035, 1038, 32 U.C.C. Rep. Serv. 404 (Super. Ct. Appellate Sess. 1981) (essence of action alleging failure to perform in workmanlike manner is breach of contract); Gaybis v. Palm, 201 Md. 78, 93 A.2d 269, 272 (1952) (failure to perform with skill and care is breach of contract); Sims v. Ryland Group, Inc., 37 Md. App. 470, 378 A.2d 1, 4, 22 U.C.C. Rep. Serv. 967 (1977) (breach of warranty of workmanlike performance is contractual in

rejection of tort liability as a basis for pure economic loss as this remedy falls within the domain of contract.[16]

The situation is no more clear where the implied warranties involve "end-results" or outcome rather than conduct. On one hand, an implied warranty of a particular outcome might suggest a tort theory if the outcome is not specified in the parties' contract. Conceptually at least, it is possible that a contractor

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nature); Lochrane Engineering, Inc. v. Willingham Realgrowth Inv. Fund, Ltd., 552 So. 2d 228, 232 (Fla. 5th DCA 1989) (duty to deliver service in a workmanlike manner is contractual in nature).

[16]See §§ 19:6, 19:10 to 19:13. A common rationale for dismissing tort claims is based on the concept that, in the absence of personal injury or property damage, defective goods disappoint one's expectations, which is a contract interest. This reasoning is illustrated by the Illinois Supreme Court in Morrow v. L.A. Goldschmidt Associates, Inc., 112 Ill. 2d 87, 96 Ill. Dec. 939, 492 N.E.2d 181, 185 (1986):

> [P]laintiffs seek to recover only the costs of repairs to their homes caused by defendants' alleged faulty workmanship. . .. The plaintiffs here have not alleged a harm "above and beyond disappointed expectations." They do not complain that the defects caused an accident which resulted in physical injury or damage to other property. Indeed, contrary to the findings of the appellate court, nowhere in the plaintiffs' complaint is it alleged that the defects were a threat to health or safety. As such, the plaintiffs essentially are complaining that they did not receive the benefit of their bargain—a harm which is appropriately remedied by bringing an action for breach of contract. . .. Where the construction defects do not cause physical injuries or damage to other property, we are unwilling to impose tort liability on a builder for breach of his contract with the purchaser, even if the breach was willful and wanton.

See also J.L. Healy Const. Co. v. State, Dept. of Roads, 236 Neb. 759, 463 N.W.2d 813, 816-17 (1990) (breach of contract action asserting failure to perform will not give rise to tort action unless there are allegations of loss to property or person); Aronsohn v. Mandara, 98 N.J. 92, 484 A.2d 675, 683 (1984) (breach of workmanlike performance in absence of damage to other property or personal injury gives rise to contract action only); New Mea Const. Corp. v. Harper, 203 N.J. Super. 486, 497 A.2d 534, 540-41 (App. Div. 1985); Spillman v. American Homes of Mocksville, Inc., 108 N.C. App. 63, 422 S.E.2d 740 (1992); Warfield v. Hicks, 91 N.C. App. 1, 370 S.E.2d 689, 694 (1988) (economic loss rule precludes action in tort for improper performance where there is no damage to other property or injury to persons). But see Gilley v. Farmer, 207 Kan. 536, 485 P.2d 1284 (1971) (where negligence on part of contractor results in breach of an implied warranty, the breach may be tortious in origin, but also gives rise to cause of action ex contractu and, as a result, the contractee may proceed against the builder in either contract or tort; or he may proceed on both theories). But see Haysville U.S.D. No. 261 v. GAF Corp., 233 Kan. 635, 666 P.2d 192, 12 Ed. Law Rep. 957 (1983) (absent personal injury or property damage breach of implied warranty would be governed by contract concepts and, therefore, the comparative negligence and apportionment of fault statute would not apply); but see Corral v. Rollins Protective Services Co., 240 Kan. 678, 732 P.2d 1260, 3 U.C.C. Rep. Serv. 2d 1358 (1987) (breach of an implied warranty of workmanlike performance may give rise to both contract and tort actions). As can be seen from these Kansas cases consistent treatment of warranty actions is sometimes difficult to obtain even in the same jurisdiction.

could perform in a workmanlike manner and yet render a structure that, for whatever reason, is deemed uninhabitable. Under such circumstances, the breach of an implied duty of habitability would appear to be based in strict liability. It is little wonder that confusion reigns over the concept of warranty, particularly the less developed non-U.C.C. warranties.[17] Implied warranties relating to outcome or results generally place a heavier burden upon the warrantor than one involving conduct. As a result, these implied warranties have a more limited application.[18]

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[17]See Velotta v. Leo Petronzio Landscaping, Inc., 69 Ohio St. 2d 376, 23 Ohio Op. 3d 346, 433 N.E.2d 147 (1982) (confusing concepts of warranty of habitability with warranty of workmanlike performance); Franz v. Real Estate Marketing, Inc., 1993 WL 23593 (Ky. Ct. App. 1993), not to be published by operation of CR 76.28(4) and decision aff'd and remanded, 885 S.W.2d 921, 25 U.C.C. Rep. Serv. 2d 791 (Ky. 1994) (overruled by, Giddings & Lewis, Inc. v. Industrial Risk Insurers, 348 S.W.3d 729, Prod. Liab. Rep. (CCH) P 18640 (Ky. 2011)) (warranty of workmanlike performance encompassed within warranty of habitability to create hybrid of implied warranty of workmanlike construction using suitable materials); Hoye v. Century Builders, Inc., 52 Wash. 2d 830, 329 P.2d 474 (1958) (implied warranty of habitability attached to construction contracts); Omaha Pollution Control Corp. v. Carver-Greenfield Corp., 413 F. Supp. 1069 (D. Neb. 1976) (implied warranty of merchantability and fitness applied to design and construction of sewage treatment plant); Air Heaters, Inc. v. Johnson Elec., Inc., 258 N.W.2d 649, 23 U.C.C. Rep. Serv. 39, 5 A.L.R.4th 489 (N.D. 1977) (implied warranty of fitness for a particular purpose applied to construction contracts under circumstances where: (1) contractor holds himself out, expressly or by implication, as competent to undertake the work; (2) owner has no particular expertise in the kind of work contemplated; (3) owner furnishes no plans, designs or specifications; and (4) owner tacitly or specifically indicates reliance on the experience and skill of contractor); Kennedy v. Columbia Lumber and Mfg. Co., Inc., 299 S.C. 335, 384 S.E.2d 730, 736 (1989) (builder who was not a seller does not make an implied warranty of habitability, "[a] builder who contracts to construct a building impliedly warrants that the work undertaken will be performed in a careful, diligent, workmanlike manner. This is an implied warranty of workmanlike service, and is distinct from the implied warranty of habitability."); Carolina Winds Owners' Ass'n, Inc. v. Joe Harden Builder, Inc., 297 S.C. 74, 374 S.E.2d 897 (Ct. App. 1988) (rejected on other grounds by, Kennedy v. Columbia Lumber and Mfg. Co., Inc., 299 S.C. 335, 384 S.E.2d 730 (1989)) (implied warranty of habitability is not made by contractors or subcontractors who are not vendors of a new home).

[18]In the construction context, the implied warranty of habitability is generally applied to home builders. The U.C.C.-implied warranties, which are both result-oriented warranties, are often disclaimed by sellers. Implied result-oriented warranties have made little inroads in professional services. The Florida opinion in Audlane Lumber & Builders Supply, Inc. v. D. E. Britt Associates, Inc., 168 So. 2d 333, 335 (Fla. 2d DCA 1964), is apropos of such reasoning:

> With respect to the alleged "implied warranty of fitness," we see no reason for application of this theory in circumstances involving professional liability. . .. An

Express warranty claims usually do not give rise to characterization issues in the same way that implied warranties do. Express warranties arise out of contract. Nevertheless, similar conceptual issues may arise in connection with representations that form the basis of express warranties. It is not uncommon for plaintiffs to allege that the same representations that give rise to an express warranty also serve as the basis for the tort of misrepresentation. Sometimes these claims are dismissed on the ground that a "negligent misrepresentation claim cannot lie in an action stemming solely from promises in a contract."[19] Moreover, precontractual representations may also be subsumed by the contract.

In *Salt Lake City Corp. v. Kasler Corp.*,[20] a contractor sought to hold a concrete supplier strictly liable for breach of implied warranties. With respect to that claim the court held:

> . . . [the contractor] seeks to have [the supplier] held "strictly liable" for breaching its "implied warranties" by supplying "defective" goods which "proximately caused" [the contractor's] injury. These causes of action denote a tort-type claim for relief. Under Utah law, the analysis applied to a warranty claim is determined by "the nature of the action and not the pleading labels chosen." The term "warranty" as used in tort law is synonymous with strict liability. Under Utah law, the elements of a breach of an implied warranty and products liability are essentially the same. [The contractor's] strict liability claims are controlled by, and indistinguishable from, the products liability claim. The court has already determined that [the supplier's] actions do not constitute independent tort nor can they be grounds for a products liability cause of action. [The supplier's concrete was not "unreasonably dangerous"

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engineer, or any other so-called professional, does not "warranty" his service or the tangible evidence of his skill to be "merchantable" or "fit for an intended use." These are terms uniquely applicable to goods. Rather, in the preparation of design and specifications as the basis of construction, the engineer or architect "warrants" that he will or has exercised his skill according to a certain standard of care, that he acted reasonably and without neglect. Breach of this "warranty" occurs if he was negligent.

For an in-depth discussion of tort/contract dichotomy involving warranty claims see Taylor, Applicability of Strict Liability Warranty Theories to Serve as Transactions, 47 S.C. L. Rev. 231 (1996); Davis, The Elusive Warranty of Workmanlike Performance: Constructing a Conceptual Framework, 72 Neb. L. Rev. 981 (1993).

[19]See Salt Lake City Corp. v. Kasler Corp., 855 F. Supp. 1560, 1571, 24 U.C.C. Rep. Serv. 2d 518 (D. Utah 1994). Negligent misrepresentations in some jurisdictions are treated as an exception to that rule. See §§ 14:29 to 14:33.

[20]Salt Lake City Corp. v. Kasler Corp., 855 F. Supp. 1560, 24 U.C.C. Rep. Serv. 2d 518 (D. Utah 1994).

as required by products liability law.][21]

In dismissing a fraud claim brought in the context of a sale of goods transaction the Southern District of New York reasoned:

> Under New York law, one who makes a contractual promise "with the undisclosed intention not to perform it" can be held liable for fraud. Likewise, one who fraudulently induces another to enter into a contract can be liable under a fraud claim. However, where the complaint merely alleges, in essence, the non-performance of a contractual obligation, an action in fraud will not lie; "actionable fraud depends on more than a showing of non-performance," or a "mere breach of contract."
>
> Here, what [the plaintiff] is really complaining of is a breach of the contract for TD-27 underbody frames, and the terms of payment recited therein. Even though [the plaintiff] chooses to characterize his claim as one for fraud or "false representations," the Katalytic event of it was a breach of contract. As one New York court has stated "[I]n the instant case plaintiff's allegations of fraudulent misrepresentation relate only to the specific terms of the . . . contract and, therefore, plaintiff's theory of recovery is necessarily limited to a suit for breach of contract."[22]

Other courts have had less difficulty in allowing fraud actions

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[21]Salt Lake City Corp. v. Kasler Corp., 855 F. Supp. 1560, 1572, 24 U.C.C. Rep. Serv. 2d 518 (D. Utah 1994).

[22]Sherkate Sahami Khass Rapol (Rapol Construction Co.) v. Henry R. Jahn & Son, Inc., 531 F. Supp. 1048, 1061 (S.D. N.Y. 1982), aff'd in part, vacated in part on other grounds, rev'd in part on other grounds, 701 F.2d 1049, 35 U.C.C. Rep. Serv. 790 (2d Cir. 1983). See also Foodtown v. Sigma Marketing Systems, Inc., 518 F. Supp. 485, 489-490, 30 U.C.C. Rep. Serv. 1284 (D.N.J. 1980), wherein fraud and tortious misrepresentation claims alleged in the context of a sale of goods were dismissed as barred by the U.C.C. statute of limitations. The court noted:

> Counts 3 and 4 of plaintiff's complaint are based on fraud and tortious misrepresentation. Plaintiff contends that these actions must be considered separate and apart from the breach of contract claims and that therefore the 6-year limitations period contained in the catch-all provision of N.J.S.A. 2A:14-1 is applicable to these counts. While it is possible that a breach of contract also gives rise to an actionable tort, I find that plaintiff's allegations in these counts are an attempt to dress up a contract claim in a fraud suit-of-[clothes] and consequently these counts must be dismissed inasmuch as they seek to establish a separate tort cause of action. . .. In the case at bar, Foodtown alleges fraud and false representation commencing in August 1975, 6 months after the parties had entered into a written agreement. Paragraph 16 of plaintiff's complaint clearly states that the alleged misrepresentations "were made with the intent to deceive Foodtown and to induce Foodtown to pay for the merchandise at a price in excess of that in the agreement. . .." [Buyer was to purchase dinnerware at seller's cost and later discovered invoices were not based on seller's actual costs.] The fraud contemplated by plaintiff here does not seem to be extraneous to the contract, but rather a "fraudulent non-performance of the contract itself," since counts 3 and 4 referred to alleged misrepresentations and concealments made after the parties had entered into a contractual relationship, I find these allegations do not state separate tort claims for the purposes of applying the 6-year statute of limitations.

to be maintained based essentially on the same facts as those giving rise to a breach of express warranties. For example, in an action arising out of the failure of a 75-ton rooftop air conditioning unit, the Ohio Court of Appeals reasoned:

> The U.C.C. was not enacted to eliminate all common-law causes of action other than a U.C.C. cause of action. Principles of law and equity, including common-law fraud, supplement the provisions of the U.C.C. governing transactions in goods "[u]nless displaced by . . . particular provisions of [the U.C.C.] . . .. No provisions of the U.C.C. have displaced actions for fraud. In fact, unlike the exclusive remedy provisions of the old Uniform Sales Code, the U.C.C. provides that remedies for fraud include those remedies available under the U.C.C. sales provisions without making them exclusive. Accordingly, we hold that a cause of action for fraud is maintainable in addition to a U.C.C. cause of action. A plaintiff bringing an action for fraud is therefore not limited by the U.C.C. provisions governing warranties, warranty disclaimers and limitations of remedies, but is entitled to seek all damages incurred as a result of the fraud."[23]

The proper characterization of warranty claims is something more than mere academic interest. In many cases as either contract or tort, it will have significant ramifications on which statutes of limitations apply and whether fault-based defenses such as comparative fault or contributory negligence may limit recovery.[24] Characterizing warranty claims as contract or tort can also have an effect on the nature of the damages flowing from the

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See also Triangle Underwriters, Inc. v. Honeywell, Inc., 604 F.2d 737, 26 U.C.C. Rep. Serv. 1162 (2d Cir. 1979) (allegations of fraud before contract was entered into not dismissed but fraud claims premised upon allegations after contract was entered into time barred). But see ICI Australia Ltd. v. Elliott Overseas Co., 551 F. Supp. 265 (D.N.J. 1982) (buyer could maintain strict liability and tort claims in sale of goods transaction).

[23]Ohio Sav. Bank v. H.L. Vokes Co., 54 Ohio App. 3d 68, 560 N.E.2d 1328, 1331, 13 U.C.C. Rep. Serv. 2d 92 (8th Dist. Cuyahoga County 1989). The plaintiff in this case, a savings and loan, sought to introduce evidence to the trial court regarding what the air conditioner's representative told the engineers responsible for designing the system and that these engineers relied on the information in determining the specifications for the cooling system. The savings and loan also brought a warranty claim against the manufacturer premised on a third-party beneficiary theory between the engineer and the air conditioning manufacturer.

[24]See Interwest Const. v. Palmer, 886 P.2d 92, 100 (Utah Ct. App. 1994), aff'd, 923 P.2d 1350 (Utah 1996) (principles of comparative fault and assumption of risk apply to warranty claims); Foodtown v. Sigma Marketing Systems, Inc., 518 F. Supp. 485, 30 U.C.C. Rep. Serv. 1284 (D.N.J. 1980) (contract statute of limitations applied to warranty claims); In re Lone Star Industries, Inc., Concrete R.R. Cross Ties Litigation, 776 F. Supp. 206, 221, 16 U.C.C. Rep. Serv. 2d 301 (D. Md. 1991) (economic loss rule barred railroad's tort claims); Velotta v.

breach of the warranty.[25]

§ 9:5 Warranty as tort, contract, statutory or otherwise: Significance of characterization—Warranties implied-in-fact as distinct from implied-in-law

Warranties, like promises in general, can be implied as well as expressed. Implied warranties can arise in two different ways.

Leo Petronzio Landscaping, Inc., 69 Ohio St. 2d 376, 23 Ohio Op. 3d 346, 433 N.E.2d 147, 150-51 (1982) (application of statute of limitations); Securities-Intermountain, Inc. v. Sunset Fuel Co., 289 Or. 243, 611 P.2d 1158, 1159-60 (1980) (application of statute of limitations); Certain-Teed Products Corp. v. Bell, 422 S.W.2d 719, 721-22 (Tex. 1968) (application of statute of limitations); Haysville U.S.D. No. 261 v. GAF Corp., 233 Kan. 635, 666 P.2d 192, 200-201, 12 Ed. Law Rep. 957 (1983) (comparative negligence and implied comparative indemnity applicable to tort but not contract claims); Schneider Nat., Inc. v. Holland Hitch Co., 843 P.2d 561 (Wyo. 1992) (comparative fault applicable to tort but not contract claims).

There is considerable support for the rule that contributory negligence is not an appropriate consideration in a breach of contract claim. Fortier v. Dona Anna Plaza Partners, 747 F.2d 1324, 1337, 17 Fed. R. Evid. Serv. 612 (10th Cir. 1984) (stating that "contributory negligence has no place in contract and fraud actions"); Fresno Air Service v. Wood, 232 Cal. App. 2d 801, 43 Cal. Rptr. 276 (5th Dist. 1965) ("assumption of risk and contributory negligence . . . are not applicable as theories of law and defenses to actions . . . for breach of contract."); Rotman v. Hirsch, 199 N.W.2d 53, 56, 55 A.L.R.3d 658 (Iowa 1972) (noting that "contributory negligence would not be available as a defense to an action on contract"); Haysville U.S.D. No. 261 v. GAF Corp., 233 Kan. 635, 666 P.2d 192, 193, 12 Ed. Law Rep. 957 (1983) ("the use of the comparative negligence theory is not proper in breach of contract actions."); Broce-O'Dell Concrete Products, Inc. v. Mel Jarvis Const. Co., Inc., 6 Kan. App. 2d 757, 634 P.2d 1142, 1145, 32 U.C.C. Rep. Serv. 762 (1981) ("it is well settled that contributory negligence is no defense to a breach of contract."); Lee v. Andrews, 204 Mont. 527, 667 P.2d 919, 921 (1983) (finding use of "comparative negligence principles" in a contract case to be erroneous). See also Bollas, Note, Use of the Comparative Negligence Doctrine in Warranty Actions, 45 Ohio St. L. J. 763 (1984).

[25]See §§ 19:1 to 19:33. As a general rule, remedies for tort claims are more advantageous to plaintiffs than claims grounded in contract. See Prosser and Keeton on the Law of Torts (5th ed.) p 665 § 92 ("Generally speaking, the tort remedy is likely to be more advantageous to the injured party in the greater number of cases, if only because it will so often permit the recovery of greater damages. Under the rule of Hadley v. Baxendale, the damages recoverable from breach of contract are limited to those within the contemplation of the defendant at the time the contract was made."); Georgetown Realty, Inc. v. Home Ins. Co., 313 Or. 97, 831 P.2d 7, 11 (1992) (whether a claim lies in contract, tort or both determines the damages which may be recoverable and the applicable statute of limitations); Morrow v. L.A. Goldschmidt Associates, Inc., 112 Ill. 2d 87, 96 Ill. Dec. 939, 492 N.E.2d 181, 186 (1986) (punitive damages not recoverable in contract).

Warranties may be "implied-in-fact" or "implied-in-law."[1] The United States Supreme Court in *Hercules, Inc. v. U. S.*[2] discussed the difference in some detail in the course of examining whether the government had impliedly warranted its specifications for the manufacture of a defoliant known as "Agent Orange."[3] The Court explained the difference between the two types of obligations in the following terms:

> The distinction between "implied in fact" and "implied in law," and the consequent limitation [jurisdictional limitation to entertain only implied in fact claims under the Tucker Act], is well established in our cases. An agreement implied in fact is "founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." By contrast, an agreement implied in law is a "fiction of law" where "a promise is imputed to perform a legal duty, as to repay money obtained by fraud or duress."[4]

Most analysis on this subject, by both commentators and courts,

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[Section 9:5]

[1]See §§ 2:10, 2:11, 19:34 to 19:38.

[2]Hercules Inc. v. U.S., 516 U.S. 417, 116 S. Ct. 981, 134 L. Ed. 2d 47, 40 Cont. Cas. Fed. (CCH) ¶ 76894 (1996).

[3]The warranty-of-specifications discussed by the Supreme Court has its origins in the earlier decision of U.S. v. Spearin, 54 Ct. Cl. 187, 248 U.S. 132, 39 S. Ct. 59, 63 L. Ed. 166, 42 Cont. Cas. Fed. (CCH) ¶ 77225 (1918), where the government was found to have warranted the adequacy of its design under a situation where the government provided the contractor with detailed design documents and obligated the contractor to strictly comply with the documents in the performance of its work.

[4]Hercules Inc. v. U.S., 516 U.S. 417, 423, 116 S. Ct. 981, 986, 134 L. Ed. 2d 47, 40 Cont. Cas. Fed. (CCH) ¶ 76894 (1996) (citations omitted). Federal procurement jurisprudence contains numerous examples of this reasoning. The case of Barrett Refining Corp. v. U.S., 242 F.3d 1055 (Fed. Cir. 2001) is a good example of an implied-in-fact contract being reached for the supply of military jet fuel. The parties entered into a written agreement containing a standard price adjustment clause that was found to be unenforceable because it failed to comply with the Federal Acquisition Regulations. The Court of Federal Claims found that "[o]nce the unauthorized [price escalation] clause is struck out, . . . [the] express contract simply incorporates an implied-in-fact promise by the government to pay at least fair market value for the fuel delivered by Barrett under the contract." Barrett Refining Corp. v. U.S., 242 F.3d 1055, 1059 (Fed. Cir. 2001), citing Barrett Refining Corp. v. U.S., 45 Fed. Cl. 166, 170 (1999), decision aff'd in part and vacated in part on other grounds, 242 F.3d 1055 (Fed. Cir. 2001). The government objected to this holding on the grounds that the fuel supplier's claim relied on an implied-in-law contract. In rejecting the government's theory, the appellate court reasoned:

> Given that the price escalation clause was unauthorized and unenforceable, we agree with the Court of Federal Claims' implicit legal conclusion that there was no longer

pertains to the contract formation process.[5] In this regard, the focus is generally on whether the obligation in question arises out of an actual contract implied in fact or a "quasi-contract" implied in law. The expression "quasi-contract" denotes obligations that arise under restitutionary principles of unjust enrichment wholly unrelated to the parties' assent or agreement. In the words of one commentator:

> Quasi-contractual obligations are imposed by the courts for the purpose of bringing about a just result without reference to the intention of the parties. . .. Thus, it appears that the courts may in truth impose any obligation that justice demands; the only real limit to establishing that obligation as a quasi-contractual obligation is that it more closely resemble an obligation created by contract than one created by tort.[6]

The implication process becomes a bit more involved when applied to implied warranties. In construction cases where parties have entered into express contracts, but one of the parties claims that the express terms do not adequately express full intentions,[7] an implied warranty may become an issue. There are, however,

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any express clause covering price escalation, and thus, nothing to preclude an implied-in-fact agreement on the term. We also agree with the Court of Federal Claims' factual finding of a promise by the government to pay at least fair market value. . ..

The court has previously identified four requirements of an implied-in-fact contract: (1) mutuality of intent to contract; (2) consideration; (3) lack of ambiguity in offer and acceptance; and (4) actual authority in the government representative to bind the government. The first three requirements are clearly met in the light of the court's finding, which we have upheld, that the government intended to pay at least fair market value, and in light of the undisputed performance of the contract by both parties. Regarding the fourth requirement, there can be no dispute, and the parties raise none, that the government agent had the authority to bind the government to a contract paying at least fair market value.

Barrett Refining Corp. v. U.S., 242 F.3d 1055, 1060 (Fed. Cir. 2001)(citations omitted). See also Buesing v. U.S., 42 Fed. Cl. 679, 686-87, 99-1 U.S. Tax Cas. (CCH) ¶ 50246, 83 A.F.T.R.2d 99-543 (1999) (citing numerous cases for the proposition that the jurisdiction of the United States Court of Federal Claims, with respect to contracts, has been found to extend only to express or implied-in-fact contracts and does not include claims based upon contracts implied-in-law).

[5]See §§ 2:10, 2:11.

[6]1 Williston on Contracts (4th ed.) § 1:6.

[7]3 Corbin on Contracts § 561 ("In one kind of situation, the language of promise is entirely lacking, and courts find themselves dealing with 'implied contracts,' both contracts implied in fact and what are more accurately called quasi contracts. In another kind of situation, there are express promises for the court to look at, but it is claimed that they are inadequate to express the full intentions of the party or to ensure that their reasonable expectations are carried out, or for some other reason insufficient to achieve justice. Then the court has to deal with implied and constructive promises. It was the perception by some courts of the conceptual distinction between these two kinds of activities that lead them to announce the rule criticized in § 564 [the rule in question is

some twists when the issue is whether an implied warranty exists rather than whether an implied contract exists between the parties.[8] Perhaps the most significant twist is the tendency of many courts to shy away from inferring implied-in-fact obligations in situations where the parties have entered into an express contract.[9]

The United States Claims Court has cautioned against analyzing implied obligations, including warranties, in the same fashion as implied contracts generally:

> The [plaintiffs'] cause of action is not an implied contract for indemnity, but breach of an obligation that a contract imposes expressly or by implication. In other words, a contractor can be held liable to indemnify as the consequence of a breach, which is not creation of a contract by operation of law. An implied-in-fact contract similarly does not arise from a breach. Instead, a contract to indemnify that is implied in fact must be proved apart from any notion of breach.
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> The confusion between claims based on contract formation and breach is important. The former are subject to the Anti-Deficiency Act, which prevents the enforcement of contracts that obligate the

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the common judicial statement that where the parties have sought fit to make their agreement express, the court will not imply a contrary or different obligation by implication].").

[8]The subject of contract omission is discussed in Farnsworth, Disputes Over Omission in Contracts, 68 Colum. L. Rev. 860 (1968) where the author criticizes judicial approach of attributing to the parties hypothetical attitudes and reactions.

[9]See §§ 2:11, 19:6, 19:35. See also Oglesby-Barnitz Bank & Trust Co. v. Clark, 112 Ohio App. 31, 15 Ohio Op. 2d 415, 175 N.E.2d 98, 83 A.L.R.2d 1337 (1st Dist. Butler County 1959) ("We recognize that there is some truth in the often-made misleading statement that 'when the parties have made an express contract, the law will not imply one.' We do state the law to be, however, that, when the parties have made an express contract or agreement, the court should not find a different one by implication concerning the same subject matter, if the evidence does not justify at least an inference that they intended to make one."); Vetco Concrete Co. v. Troy Lumber Co., 256 N.C. 709, 124 S.E.2d 905 (1962) (where there is an express contract, the law will not "imply" one as to the same subject matter); A. J. Sweet of La Crosse, Inc. v. Industrial Commission, 16 Wis. 2d 98, 114 N.W.2d 141 (1962) ("We doubt if a promise is ever to be imported into a contract by implication where the parties by acts of practical construction have negated such an interpretation. This is because, if it is necessary, in interpreting a written contract, to resort to implication in order to find a particular unstated promise, the written agreement is ambiguous in this respect. In such a situation a court ordinarily will place the interpretation upon the terms of the contract which the parties by their conduct have adopted."). See also Corbin on Contracts § 564 (criticizing the concept that, where the parties have expressly reached agreement on a subject, there is not room for implied-in-fact promises).

> payment of funds [by the federal government] beyond appropriations; the latter are not, because they are based on contracts themselves that do not violate the Anti-Deficiency Act. Furthermore, imputing notions of contract formation into analysis of breach claims invites defendant to argue that breaches of warranty should be rejected because they impose obligations by operation of law, i.e., that they are proscribed contracts implied in law. Since most contractual warranties and duties are implied in law, defendant's argument would have the effect of immunizing the Government from standard claims for breach of implied warranties or duties attendant on contract performance.[10]

If the Claims Court's assessment that most implied warranty claims are implied in law is accurate, this truth goes largely unheralded. For the most part, this is because there is little or no analysis attached to the issue. In the typical case where an implied warranty is found to exist, the conclusion usually is reached without any substantive discussion on from whence it arises. Consider the *Spearin* warranty, which has attributes of both an implied-in-law and an implied-in-fact obligation. This warranty arose out of the simple fact that a sufficiently detailed design was provided by the owner to the contractor under a contractual arrangement requiring the contractor to follow the design in the performance of its work. Risk is allocated on the basis of the control of the owner and its design professional over the detailed design. There was little discussion regarding the parties' intentions. Indeed, the common expression of this warranty negates any contrary intentions arising from general "boiler

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[10]Johns-Manville Corp. v. U.S., 12 Cl. Ct. 1, 19, Prod. Liab. Rep. (CCH) ¶ 11320 (1987) (ruling that complaint, alleging that asbestos manufactured according to government specifications gave rise to implied warranty that asbestos-containing products would not increase manufacturers' costs of performance, including claims for third-party liabilities arising out of manufacturers' production of asbestos, stated claim for indemnity). But see Hercules Inc. v. U.S., 516 U.S. 417, 116 S. Ct. 981, 134 L. Ed. 2d 47, 40 Cont. Cas. Fed. (CCH) ¶ 76894 (1996) (rejecting implied indemnity claim in connection with a manufacturer of "Agent Orange"); GAF Corp. v. U.S., 932 F.2d 947, 37 Cont. Cas. Fed. (CCH) ¶ 76091, 15 U.C.C. Rep. Serv. 2d 785 (Fed. Cir. 1991) (rejecting *Spearin* implied warranty claim in connection with the manufacturer of asbestos insulation used on Navy vessels); Lopez v. A.C. & S., Inc., 858 F.2d 712, 35 Cont. Cas. Fed. (CCH) ¶ 75563, Prod. Liab. Rep. (CCH) ¶ 12058 (Fed. Cir. 1988) (rejecting *Spearin* warranty claim and implied-in-fact indemnity claim by manufacturers of asbestos products used in Navy vessels). Even though the United States Claims Court's holding in *Johns-Manville* with respect to the implied warranties that arise out of the government's procurement of asbestos products for use in shipyard construction is without support in the higher courts, its admonition against employing contract formation analysis to claims for breach of implied warranties still merits attention.

plate" or "standard" contract language.[11] On the other hand, seldom do the courts arrive at this implied warranty after a discussion of policy or other considerations that are typical in rulings involving constructive or implied-in-law obligations.[12]

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[11]See §§ 9:78 to 9:91. See also U.S. v. Spearin, 54 Ct. Cl. 187, 248 U.S. 132, 136, 39 S. Ct. 59, 63 L. Ed. 166, 42 Cont. Cas. Fed. (CCH) ¶ 77225 (1918) ("This implied warranty is not overcome by the general clauses requiring the contractor to examine the site, to check-up the plans, and to assume responsibility for the work until completion and acceptance."). This characterization of the warranty suggests, of course, that it arises out of operation of law, i.e., it is an implied-in-law obligation. As a general rule, courts will not find an implied-in-fact obligation where the parties have come to express terms on the subject. This is particularly the case where the express terms are contrary to the implied obligation. See also Clutts v. Southern Methodist University, 626 S.W.2d 334, 336, 2 Ed. Law Rep. 310 (Tex. App. Tyler 1981), writ refused n.r.e. (an "implication that would otherwise be reasonable should not be made when the contrary is indicated in clear and express words"); Rio Algom Corp. v. Jimco Ltd., 618 P.2d 497, 504 (Utah 1980) (where the parties have made an express contract, the court "should not find a different one by implication.").

[12]Case law discussing the "implied covenant of good faith and fair dealing" or the more fashionable discussion of the "good faith" obligation without the "implied covenant" trappings, contains numerous examples of cases discussing the policy reasons behind this obligation in its many manifestations. See Corbin on Contracts § 654A. Elsewhere in the Corbin Treatise, the authors nicely contrast the implied-in-fact and implied-in-law analyses:

> What is still called an "implied promise" is called that because that terminology became popular during the heyday of Holmesian objectivism. Objectivist theory would have it that society's values may be read into incomplete contract language so that what is missing may be supplied. This does not adequately take into account the possibility that agreement may have been intended by the parties in a way that society would not have expected; consequently, any theory that does not pursue an inquiry that has as its purpose the fulfillment of the reasonable expectations of the parties as they are capable of being discerned through evidence of the circumstances surrounding the contract's formation works counter to the parties' ability to strike a bargain with a minimum of interference from societal norms and pressures. Of course, society's *reasonable* expectations of contracting parties' conduct must still be considered, but not under implied promise analysis. This is the area where such theories as unconscionability, quasi-contract, adhesion contract analysis, and equitable estoppel arose in order that society's bounds might not be overstepped. Note that the reasonable expectations theory of contract law draws a line between superimposing society's expectations in terms of the parties' entire relationship, where it is more generally permissible, and within the terms of a formed and operative contract, where the parties' intentions are paramount.

3 Corbin on Contracts § 562. As a general rule, a constructive or implied-in-law obligation will not be swept away by contrary intentions. Yet, there is almost always some authority to the contrary. See Magnan v. Anaconda Industries, Inc., 193 Conn. 558, 479 A.2d 781, 117 L.R.R.M. (BNA) 2163, 101 Lab. Cas. (CCH) ¶ 55485 (1984) (obligation of good faith and fair dealing is a rule of construction intended to protect the reasonable expectations of the contracting parties but, unless the terms of the contract are contrary to public policy, this constructive term will not be applied to achieve a result contrary to the clearly expressed terms of the contract). This result may not be as surprising as it

The few courts that have examined the nature of the *Spearin* implied warranty of design in any detail find it to be in the nature of an implied-in-fact obligation.[13] Yet, even where the issue has been examined directly, there has been little discussion about the burden of proof for an implied-in-fact obligation: "mutuality of intent to contract, offer and acceptance, and that the officer whose conduct is relied upon had actual authority to bind the government in contract."[14] For example, in *Hercules*, the United States Supreme Court, as a matter of law, refused to extend the *Spearin*

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might first appear as the purpose of contract law in general is to enforce the reasonable expectations of the parties. Viewed from this perspective, while the obligation to act in good faith may not be eliminated through negotiation or disclaimers, the contours of the obligation may be influenced by the particular circumstances under which the parties reach agreement and the language employed by them to express their agreement. If, for example, the *Spearin* warranty were an implied-in-law obligation, it might well not be voidable through general disclaimers as these would be ineffective to alter the reasonable expectations of the contracting parties. More specific disclaimers or factual circumstances indicating that reliance on the adequacy of the design documents might be unwarranted, may, however be sufficient to alter the reasonable expectations of the parties in such a way that the constructive obligation does not arise in the first place (rather than arises but is effectively disclaimed). See VTR, Inc. v. Goodyear Tire & Rubber Co., 303 F. Supp. 773 (S.D. N.Y. 1969) (while one may not be able to disclaim the obligation of good faith and fair dealing, one "may by agreement determine the standards by which the performance of such obligation is to be measured if such standards are not manifestly unreasonable.").

[13]See Hercules Inc. v. U.S., 516 U.S. 417, 116 S. Ct. 981, 134 L. Ed. 2d 47, 40 Cont. Cas. Fed. (CCH) ¶ 76894 (1996) (noting that, in order for court to entertain *Spearin* warranty claim, it must be an implied-in-fact obligation and then proceeding to entertain the issue); Lopez v. A.C. & S., Inc., 858 F.2d 712, 35 Cont. Cas. Fed. (CCH) ¶ 75563, Prod. Liab. Rep. (CCH) ¶ 12058 (Fed. Cir. 1988) (concluding that *Spearin* warranty is an implied-in-fact obligation and therefore within the court's jurisdiction, although the court distinguishes between construction and supply contracts, finding that the warranty is more apt to arise in the former rather than the latter); GAF Corp. v. U.S., 932 F.2d 947, 37 Cont. Cas. Fed. (CCH) ¶ 76091, 15 U.C.C. Rep. Serv. 2d 785 (Fed. Cir. 1991) (concluding that it had jurisdiction over *Spearin* warranty claim as it was an implied-in-fact obligation, but rejecting jurisdiction on plaintiff's warranty of merchantability and fitness claims as these were implied-in-law obligations that fell outside of the jurisdiction conferred on the court by the Tucker Act). These rulings are in keeping with the *Spearin* decision itself, which, while it did not directly address this issue, awarded the contractor lost profits, thereby suggesting that the gravamen of the complaint lay in contract rather than some restitutionary remedial basis. See 1 Williston on Contracts (4th ed.) § 1:6 ("It should be noted, however, that the measure of damages appropriate to a true contractual obligation differs significantly from the measure of damages applicable to quasi-contracts. Quasi-contractual obligations are, typically, restitutionary in nature, with the goal of the courts being to award the plaintiff the reasonable value of any benefit conferred upon the defendant.").

[14]Hoffmann v. U.S., 53 F. Supp. 2d 483, 488 (D.D.C. 1999), aff'd in part,

warranty to claims brought against government contractors by servicemen claiming to have been harmed as a result of the use of Agent Orange in the Vietnam war.[15] It did so not because of any particular facts (or the absence thereof) surrounding the parties' negotiations but rather on an inherent notion of what the government likely would have agreed to under such circumstances.[16]

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vacated in part on other grounds, 17 Fed. Appx. 980 (Fed. Cir. 2001), quoting Ysasi v. Rivkind, 856 F.2d 1520, 1525 (Fed. Cir. 1988) (quoting in turn H.F. Allen Orchards v. U.S., 749 F.2d 1571, 1575 (Fed. Cir. 1984)).

[15]Hercules Inc. v. U.S., 516 U.S. 417, 425, 116 S. Ct. 981, 986, 134 L. Ed. 2d 47, 40 Cont. Cas. Fed. (CCH) ¶ 76894 (1996).

[16]The Court's discussion is nothing more than hypothetical reasoning:

> It is quite logical to infer from the circumstance of one party providing specifications for performance that the party warrants the capability of performance. But this circumstance alone does not support a further inference that would extend the warranty beyond performance to third-party claims against the contractor. In this case, for example, it would be strange to conclude that the United States, understanding the herbicide's military use, actually contemplated a warranty that would extend to sums a manufacturer paid to a third party to settle claims such as are involved in the present action. It seems more likely that the Government would avoid such an obligation, because reimbursement through contract would provide a contractor with what is denied to it through tort law.

Hercules Inc. v. U.S., 516 U.S. 417, 425, 116 S. Ct. 981, 134 L. Ed. 2d 47, 40 Cont. Cas. Fed. (CCH) ¶ 76894 (1996). The fact that the court ruled "as a matter of law" that the *Spearin* warranty would not extend to postperformance third-party costs is even more suggestive of the fact that the Court is not involved in examining intention but setting policy. Hercules Inc. v. U.S., 516 U.S. 417, 428 n.8, 116 S. Ct. 981, 988 n. 8, 134 L. Ed. 2d 47, 40 Cont. Cas. Fed. (CCH) ¶ 76894 (1996) ("[W]e hold in this case that the *Spearin* claims made by both petitioners do not extend to postperformance third-party costs as a matter of law.").

Even where a court finds that the implied-in-fact warranty is established, the factual predicate expresses more policy than shared understanding. In Johns-Manville Corp. v. U.S., 12 Cl. Ct. 1, 18, Prod. Liab. Rep. (CCH) ¶ 11320 (1987), an asbestos manufacturer asserted indemnity and warranty claims against the government, arising out of claims brought against it by shipyard workers injured as a result of coming into contact with asbestos particles while working on Navy ships. The manufacturer set forth detailed proposed findings upon which its claims were grounded. These included:

> (a) the mandatory and compulsory nature of the obligations imposed by the Government on Johns-Manville . . . (b) the Government's controls over asbestos fiber and the products which contain such fiber . . . (c) the Government's development, promulgation, and enforcement of strict specifications which require that the products described therein contain asbestos fiber . . . (d) the Government's control over the shipyards in this country, including the methods, procedures and precautions to be taken in handling and using asbestos-containing products in the construction and repair of ships . . . (e) the Government's knowledge long before World War II of the potential danger of asbestosis in shipyard workers and of the means to prevent it . . . (f) the Government's statements, warranties and representations that it was enforcing and ensuring compliance with its asbestos health and safety requirements in the

There is no reason why a *Spearin*-type warranty could not, under certain circumstances, be implied-in-fact and in other circumstances arise by operation of law. The United States Court of Appeals for the Federal Circuit suggested as much in rejecting an implied-in-law *Spearin*-type warranty in yet another asbestos case:

> The counsel for asbestos suppliers here seemed to think it is enough for a *Spearin* warranty that the government specified any characteristic at all in the merchandise it purchased. They do not know and cannot tell us whether the government specifications differed at all from those of private customers . . ., or if they did, whether the difference related to the asbestos content of the materials supplied. We know, as a matter of judicial notice today, that all insulation material containing asbestos is hazardous, that supplied to government and private customers alike. . .. In the absence of allegation or showing of circumstances requiring a conclusion that a *Spearin* warranty was implied, the asserted warranty would be, if it had judicial approval, implied at law, not fact, and a Tucker Act court would lack jurisdiction to imply it. As a matter of an implication of fact, an implied warranty relating to the use by the buyer after delivery, and warranting it would not harm the seller is novel, and no reason is shown why anyone could have so supposed at the date of sale by any inference from the circumstances. It would be just as reasonable for the parties to the sale to have implied a warranty by the seller, that apart from dangers the seller warned of, the insulation would not endanger the buyer or its employees. Either way it would be a warranty implied in law, not fact.[17]

While there may be confusion and uncertainty over the distinc-

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shipyards, and that shipyard conditions were not hazardous . . . (g) Johns-Manville's compliance with all obligations imposed upon it by the Government's contracts, orders, directives, regulations and statutes and its wholehearted cooperation above and beyond its written contract duties . . . (h) the Government's "unique" ability to foresee the potential catastrophic liabilities to Johns-Manville as a direct result of the Government's acts and omissions . . . and (i) the Government's assurances that contractors were to be treated fairly and that compliance with its demands during World War II would not subject them to the risk of economic harm as a result of their performance of wartime contracts . . ..

With the possible exception of the last proposed finding (which is in the nature of an express promise), this litany suggests more of an estoppel argument than an implied-in-fact understanding. The court appears to acknowledge this: "[t]his formulation of the implied warranty is . . . based on the parties' shared knowledge of the risks inherent in the production of asbestos-containing products according to government specifications." Johns-Manville Corp. v. U.S., 12 Cl. Ct. 1, 28, Prod. Liab. Rep. (CCH) ¶ 11320 (1987).

[17]Lopez v. A.C. & S., Inc., 858 F.2d 712, 716, 35 Cont. Cas. Fed. (CCH) ¶ 75563, Prod. Liab. Rep. (CCH) ¶ 12058 (Fed. Cir. 1988). Of course, to the extent that the "parties to the sale" implied such a warranty, then it would probably best be described as "implied in fact" rather than as a court chose to characterize it, "implied in law." Nonetheless, the primary point of the discussion remains undiluted. It is quite possible for circumstances to be such that a

tion between implied-in-fact and implied-in-law warranties, there is little room for disagreement over the importance of the distinction. A number of significant ramifications flow from characterizing an implied warranty in one way or the other. As a general rule, those asserting implied warranties are better served by characterizing the nature of the obligation as one implied in fact. The reasons for this are numerous:

- **Jurisdiction:** Jurisdiction will not lie in the United States Court of Federal Claims for claims premised upon implied-in-law obligations.[18] As noted above, if the claimant is performing work for the federal government, its only real avenue to press an implied warranty claim is to do so under a contract theory.
- **Sovereign immunity:** Closely related to jurisdiction is the issue of sovereign immunity. It is common for governmental entities to provide broader immunity waivers for contract claims than for those sounding in tort or upon some other legal theory.[19]
- **Nature of damages:** Implied-in-fact warranties, as a spe-

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Spearin-type warranty may be implied in fact or implied in law.

Whether the same can be said of other "implied warranties" requires further analysis. The commonly referred to "warranty of workmanlike performance" may be, in many circumstances, nothing more than another way of claiming a breach of contract:

> The shipowner here holds petitioner's uncontroverted agreement to perform all of the shipowner's stevedoring operations at the time and place where the cargo in question was loaded. That agreement necessarily includes petitioner's obligation not only to stow the pulp rolls, but to stow them property and safely. Competency and safety of storage are inescapable elements of the service undertaken. This obligation is not a quasi-contractual obligation implied in law or arising out of a noncontractual relationship. It is of the essence of the petitioner's stevedoring contract. It is petitioner's warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product. The shipowner's action is not changed from one for a breach of contract to one for a tort simply because recovery may turn upon the standard of the performance of the petitioner's stevedoring service.

Ryan Stevedor. Co. v. Pan-Atlantic Steam. Corp., 350 U.S. 124, 133-34, 76 S. Ct. 232, 237-38, 100 L. Ed. 133, 1956 A.M.C. 9 (1956). The same may be true for the implied warranty of cooperation and noninterference. See 3 Corbin on Contracts §§ 570, 571 (most cases citing these sections do so for the rule that it is ordinarily a breach of contract for one party to hinder the other's performance).

[18]The Tucker Act, 28 U.S.C.A. § 1491, as amended, provides:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

[19]See Buesing v. U.S., 42 Fed. Cl. 679, 685, 99-1 U.S. Tax Cas. (CCH) ¶ 50246, 83 A.F.T.R.2d 99-543 (1999) (while related to jurisdiction, "individual

cies of contract, permit recovery on a *quantum meruit* basis. This recovery is measured by the value of the service rendered. Implied-in-law obligations generally entitle one to restitutionary relief on the basis of unjust enrichment. This measure of recovery is based upon the actual benefit realized and retained by the recipient. Depending upon the facts, these two different measures of recovery may net very different damages. In most instances, quantum meruit or breach of contract damages will yield a higher recovery than restitution.[20]

- **Exhaustion of other remedies:** It has been held that

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claimants, . . . must look beyond the jurisdictional statute for a waiver of sovereign immunity."); St. Louis Air Cargo Services, Inc. v. City of St. Louis, 929 S.W.2d 821 (Mo. Ct. App. E.D. 1996) (municipal government's defense of sovereign immunity was rejected as the plaintiff's breach of warranty claim sounded in contract rather than tort).

[20]See §§ 19:14 to 19:31 (classical contract remedies) and §§ 19:34 to 19:42 (classical restitution remedies). The Supreme Court of Idaho's decision in Peavey v. Pellandini, 97 Idaho 655, 551 P.2d 610, 614-15 (1976), expresses this proposition quite well:

> Pellandini further quotes an excerpt from an editorial comment found in the Restatement of the Law of Restitution, § 107 at 449 (1936). The excerpt points to a distinction between an action based upon a promise, whether it be express or implied in fact, and an action based upon unjust enrichment. While Pellandini cites the excerpt as support for their contention that the measure of recovery should have been predicated on value of benefit to recipient, they seemingly ignore the proposition that the relief allowed here was not in restitution, but in *quantum meruit*, predicated upon the implied in fact promise to pay which the law supplies from the conduct of the parties. . ..
>
> [An actual contract exists where] there is a real promise, whether express or implied in fact, to pay the reasonable value of goods and services. . .. In such cases and on a fair interpretation of the parties' contract, if there is a market value for what the plaintiff is requested to furnish, that value is the measure of the promised price; if there is no market price, the measure is at least the cost or worth from the plaintiff's standpoint, not limited by the fact that the value of the benefit which accrues to the defendant, is a less sum.

See also 1 Williston on Contracts (4th ed.) § 1:6 ("It should be noted, however, that the measure of damages appropriate to a true contractual obligation differs significantly from the measure of damages applicable to quasi contracts. Quasi contractual obligations are, typically, restitutionary in nature, with the goal of the courts being to award the plaintiff the reasonable value of any benefit conferred upon the defendant. . .. Quasi contractual obligations are generally based on unjust enrichment or unjust benefit conferred, but this is neither universally nor necessarily so. Many cases exist where the law enforces in a contractual action a duty to restore the plaintiff to his previous status, not merely to surrender the benefit which the defendant has received."); Commerce Partnership 8098 Ltd. Partnership v. Equity Contracting Co., Inc., 695 So. 2d 383, 387 (Fla. 4th DCA 1997), as modified on clarification, (June 4, 1997) ("The blurring of the distinction between contract implied in fact and quasi contract has been exacerbated by the potential for both theories to apply to the same factual setting. For example, a common form of contract implied in fact is where

where one's recovery is based upon equitable principles, no remedy will be allowed if there is an adequate remedy at law.[21] This rule has been extended to deny recovery where the plaintiff has failed to avail itself of its legal remedies. For example, unjust enrichment or other restitutionary remedies have been denied lien claimants who failed to avail themselves of their statutory rights.[22]

- **Economic loss rule:** Many jurisdictions uphold the doctrine that pure economic losses are not recoverable in tort.[23] To the extent that an implied warranty is viewed in the nature of an implied-in-fact obligation, there should be little difficulty with the economic loss rule applying to bar recovery. If, on the other hand, the nature of the implied warranty is implied-in-law, the outcome becomes much more difficult to predict.[24]
- **Disclaimers:** As a general rule, implied-in-law obligations are more difficult to disclaim than implied-in-fact promises. Implied-in-law warranties or promises are imposed upon parties in order to ensure that their reasonable expectations are not jeopardized. These obligations are intended to counteract the consequences of unfair bargaining or otherwise correct injustice. It would be counterproductive to

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one party has performed services at the request of another without discussion of compensation. These circumstances justify the inference of a promise to pay a reasonable amount of the service. The enforceability of this obligation turns on the implied promise, not on whether the defendant has received something of value. A contract implied in fact can be enforced even where a defendant has received nothing of value. However, where there is no enforceable express or implied-in-fact contract but where the defendant *has* received something of value, or has otherwise benefited from the service supplied, recovery under a quasi contractual theory may be appropriate.").

[21]See § 19:35.

[22]See Southtown Plumbing, Inc. v. Har-Ned Lumber Co., Inc., 493 N.W.2d 137 (Minn. Ct. App. 1992); Season Comfort Corp. v. Ben A. Borenstein Co., 281 Ill. App. 3d 648, 211 Ill. Dec. 682, 655 N.E.2d 1065 (1st Dist. 1995). But see Commerce Partnership 8098 Ltd. Partnership v. Equity Contracting Co., Inc., 695 So. 2d 383, 389-90 (Fla. 4th DCA 1997), as modified on clarification, (June 4, 1997) (all implied contract actions in Florida derive from the action of assumpsit, which was an action at law under the common law and, therefore, a claimant could seek unjust enrichment even though it did not pursue its mechanics' lien rights).

[23]See Seely v. White Motor Co., 63 Cal. 2d 9, 45 Cal. Rptr. 17, 403 P.2d 145, 2 U.C.C. Rep. Serv. 915 (1965).

[24]See Professional Lens Plan, Inc. v. Polaris Leasing Corp., 234 Kan. 742, 675 P.2d 887, 38 U.C.C. Rep. Serv. 69 (1984) (providing detailed examination of implied warranty and economic loss concepts in the context of the implied warranty of fitness). See also § 9:51.

permit a party to avoid these constructive obligations simply by incorporating magic language into its express agreements.[25] Implied-in-fact warranties, on the other hand, being grounded in mutual assent, are much more easily disclaimed.[26]

- **Constitutional matters:** As a general rule, the Contract Clause of the United State Constitution does not apply to quasi contracts.[27] Implied-in-fact contracts, as a species of real contractual obligations, are covered by the constitutional protections of the clause.
- **Fault-based defenses:** Where warranties are viewed as a species of tort as opposed to implied-in-fact obligations, it is more likely that defenses based on comparative fault or contributory negligence may limit recovery.[28] It is not entirely clear whether, and under what circumstances, a court might jump the gap between a warranty implied in law and one grounded in tort.[29] Of course, the migration from implied-in-law to tort-based warranties raises a host of other issues such as whether tort damages are recoverable, including punitive damages.[30]
- **Statute of limitations:** Implied-in-fact obligations or warranties are treated for the most part as normal contracts when applying a statute of limitations bar. Where the warranty is considered to be implied-in-law, the applicable statute of limitations becomes more difficult to determine.[31]

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[25]See Corbin on Contracts § 654A.

[26]See Thurston v. Cedric Sanders Co., 80 S.D. 426, 125 N.W.2d 496 (1963) (where the parties expressly agreed to a matter through the terms of their contract, the law would not "imply" a different obligation). U.C.C. § 2-316(2) also authorizes disclaimers of implied warranties.

[27]See Kauper, What is a "Contract" Under the Contract Clause of the Federal Constitution? 31 Mich. L. Rev. 187 (1932).

[28]See Interwest Const. v. Palmer, 886 P.2d 92 (Utah Ct. App. 1994), aff'd, 923 P.2d 1350 (Utah 1996) (principles of comparative fault and assumption of risk apply to warranty claims); Haysville U.S.D. No. 261 v. GAF Corp., 233 Kan. 635, 666 P.2d 192, 200-01, 12 Ed. Law Rep. 957 (1983) (comparative negligence and implied comparative indemnity applicable to tort but not contract claims).

[29]See § 9:3.

[30]See Prosser and Keeton on the Law of Torts (5th ed.) p 665 § 92 (discussing the differences between tort and contract remedies).

[31]See Velotta v. Leo Petronzio Landscaping, Inc., 69 Ohio St. 2d 376, 23 Ohio Op. 3d 346, 433 N.E.2d 147 (1982) (discussing the application of statute of limitations to warranty claims); Securities-Intermountain, Inc. v. Sunset Fuel Co., 289 Or. 243, 611 P.2d 1158 (1980) (same).

§ 9:6 Warranty as tort, contract, statutory or otherwise: Significance of characterization—Contrasting breach of express warranty and product defect liability

The Nebraska Supreme Court's decision in *Hillcrest Country Club v. N.D. Judds Co.*.[1] illuminates some of the salient differences between product liability claims and breach of express warranty actions. A country club, its contractor and a distributor claimed that Georgia-Pacific, a manufacturer of paint applied to the club's galvanized steel roof system, was liable under an express warranty theory for the steel roof's failure to retain its painted finish.[2] The roof system manufacturer in turn sought indemnity from the manufacturer of an acrylic paint used to coat roof system members. Georgia-Pacific had manufactured the acrylic paint that was sold to and applied by the roof system manufacturer to the galvanized steel of the roof system. Georgia-Pacific had prepared a "spec-data" sheet to advertise its acrylic finish product under the proprietary name "Korad." The "spec-data" sheet described the product and its uses as well as provided information regarding a 20-year warranty.[3] The "spec-data" sheet was attached to the roof system manufacturer's brochure upon which the owner and contractor relied in selecting the roof system. The court concluded that the information provided by the acrylic finish manufacturer amounted to an express warranty. Georgia Pacific did not, however, breach any express warranty because its paint was not proven to have been the cause of the paint delamination from the steel. The court's analysis delved into what was necessary to establish the breach of an express product warranty in contrast to a defective roof system claim:

> The parties' [owner, contractor and distributor] questioning of the trial court's resolution of this issue focuses on that court's use of

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[Section 9:6]

[1]Hillcrest Country Club v. N.D. Judds Co., 236 Neb. 233, 461 N.W.2d 55, 12 U.C.C. Rep. Serv. 2d 990 (1990). See also § 9:16.

[2]The roof manufacturer declared bankruptcy and, accordingly, all proceedings with respect to it were stayed pursuant to the bankruptcy code.

[3]Hillcrest Country Club v. N.D. Judds Co., 236 Neb. 233, 461 N.W.2d 55, 59-60, 12 U.C.C. Rep. Serv. 2d 990 (1990). With respect to the warranty the "spec-data" sheet stated the following:

> **Guarantee/Warranty**
>
> A 20-year warranty for both KORAD(r)2 and KORAD(r) is available from panel and building component manufacturers. For warranty information, contact your panel supplier or KORAD Incorporated.

the term "defect," and contend that the only defect the product [acrylic finish] need have is its failure to meet the express warranty; indeed, contrary to Georgia-Pacific's view, we held so in [Delgado v. Inryco, Inc., 230 Neb. 662, 433 N.W.2d 179, Prod. Liab. Rep. (CCH) ¶ 12014 (1988)]. Therein, plaintiff's fingers were amputated when a hydraulic jack the defendant had furnished allegedly slipped. Plaintiff claimed that the slippage constituted a breach of the defendant supplier's warranty that the jack was merchantable and fit for the activity for which it was used. In affirming the trial court's dismissal of plaintiff's action, we observed that if in fact the jack had slipped, there was no evidence as to what caused it to do so. We explained:

> In order for a plaintiff to recover on a breach of express warranty, he must show, among other things, that "the goods did not comply with the warranty, that is, that they were defective, and that his injury was caused by the defective nature of the goods."

Thus, the only defect needed to establish a breach of express warranty is the failure of the goods to conform to the terms of the warranty. The parties' focus on the word "defect" in these cases is misleading; the trial court's use of the term must be read in context with its findings that there was "no evidence that the Korad film . . . would not wear for the length of time represented if properly applied" and that "the defect in the bonding of the Korad film was present when the panels left the control of [the roof system manufacturer which laminated the steel for the roof with the Korad paint]." Thus, when the trial court wrote that there was no evidence of a defect in the Korad, it meant that there was no evidence that the delamination was attributable to the Korad itself. In other words, it was not the Korad itself which failed, but, rather the bonding or laminating process.

The real issue that is being argued is not whether a "defective product" needed to be shown, but, rather, what exactly Georgia-Pacific warranted. If the warranty is only of the performance of the Korad itself, or properly laminated Korad, then [the owner, contractor and roof system distributor] must show that the delamination was proximately caused by the Korad. If it was the performance of the bonded Korad, or Korad-coated steel, that was warranted, then the bonding would be a part of the warranty, and the failure of the bond would be sufficient to establish a breach.[4]

§ 9:7 Warranty as tort, contract, statutory or otherwise: Significance of characterization—Warranties as distinct from rights of rejection and revocation

A buyer's rights to recover under U.C.C. warranties, whether express or implied, are separate and distinct from its rejection

[4]Hillcrest Country Club v. N.D. Judds Co., 236 Neb. 233, 461 N.W.2d 55, 65, 12 U.C.C. Rep. Serv. 2d 990 (1990).

and revocation rights.[1] Nor is revocation of acceptance a prerequisite to recovering under an express warranty.[2] To understand the difference, the decision of *Bowen v. Foust*[3] is worthwhile reviewing. The defendant supplied and installed an HVAC system in plaintiffs' home. The system did not work properly, but plaintiffs did not discover this until after the equipment was installed. Upon discovery of the problem, they sought to revoke their acceptance of the HVAC system and recover its purchase price. The HVAC supplier complained that the plaintiffs had not established that they had suffered any damages. The court nevertheless determined that, under the circumstances, the revocation was timely. As a consequence, the plaintiffs were relieved of the responsibility of proving actual damages for breach of warranty because, under the U.C.C., the remedy for revocation is recovery of the purchase price paid. By contrast, if a warranty theory had been employed, the plaintiffs would have been required to prove damages either in the nature of cost of repairs or diminution in the value of their home.

§ 9:8 Warranty as tort, contract, statutory or otherwise: Significance of characterization—Warranties as distinct from certifications

There can sometimes be a fine line between what is a warranty and what is a certification. Both are representations. The difference is more one of degree than of kind. Design professionals often make "certifications."[1] Design professionals rarely, at least

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[Section 9:7]

[1]See Ford Motor Credit Co. v. Harper, 671 F.2d 1117, 33 U.C.C. Rep. Serv. 921 (8th Cir. 1982); Wendt v. Beardmore Suburban Chevrolet, Inc., 219 Neb. 775, 366 N.W.2d 424, 40 U.C.C. Rep. Serv. 1659 (1985); Warner v. Reagan Buick, Inc., 240 Neb. 668, 483 N.W.2d 764, 17 U.C.C. Rep. Serv. 2d 746 (1992).

[2]See Warner v. Reagan Buick, Inc., 240 Neb. 668, 675, 483 N.W.2d 764, 770, 17 U.C.C. Rep. Serv. 2d 746 (1992); Matter of Barney Schogel, Inc., 12 B.R. 697, 713, 34 U.C.C. Rep. Serv. 29 (Bankr. S.D. N.Y. 1981).

[3]See Bowen v. Foust, 925 S.W.2d 211, 29 U.C.C. Rep. Serv. 2d 825 (Mo. Ct. App. S.D. 1996).

[Section 9:8]

[1]Design professionals typically render the following certifications:

1. The existing construction work generally conforms to the plans and specifications as of the date of the designer's site visit. The designer certifies that based on on-site observations, the construction work is generally being performed in a manner consistent with the plans and specifications. The certification is usually accompanied by language limiting the certification. See AIA Document B141-1987, Owner-

intentionally, provide express warranties.[2] Nor does the common law impose an implied warranty upon design professionals that the plans and specifications they prepare are free from inherent defects.[3]

While certifications, like warranties, are representations regarding some condition or event, they vary in some significant respects. Certifications are often qualified with language to the extent that the certifications given "to the best of the architect's knowledge, information and belief."[4] Certifications often are coupled with limiting language indicating just what is not being certified. For example, with respect to payment certifications, it is common for the architect to indicate that the issuance of the certificate is not a representation that the architect has (1) made exhaustive or continuous on-site inspections to check the quality or quantity of the work; (2) reviewed construction means, methods, techniques, sequences or procedures; (3) reviewed copies of requisitions received from subcontractors and material suppliers and other data requested by the owner to substantiate the

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Architect Agreement ¶¶ 2.65 and 2.66.

2. A certification that the work has progressed to a point indicated and the quality of the work is in accordance with the plans and specifications for purposes of approving payment applications. See AIA Document B141-1987, Owner-Architect Agreement ¶¶ 2.6.9, 2.6.10 and 2.6.14.
3. A certification that substantial completion has been achieved based upon on-site inspections. See AIA Document B141-1987, Owner-Architect Agreement ¶ 2.6.14.
4. A certification that the owner has sufficient cause to hold the contractor in default and to terminate the contract. See AIA Document A201-1987, General Conditions of the Contract for Construction ¶¶ 14.2.1 and 14. 2.2.

[2]Express warranty liability in excess of negligence liability typically is excluded from coverage under design professionals liability insurance policies. For this and other reasons, design professionals are careful to certify but not warrant facts, and to carefully qualify their certificates. For an example of warranty problems a design professional can get into by rendering unqualified statements of fact, see City of Mounds View v. Walijarvi, 263 N.W.2d 420 (Minn. 1978).

[3]See § 9:82. See also Ryan v. Morgan Spear Associates, Inc., 546 S.W.2d 678, 682 (Tex. Civ. App. Corpus Christi 1977), writ refused n.r.e., (June 1, 1977) ("The contract between the plaintiffs and the defendant architectural corporation does not contain any special guarantees or warranties. There is no implied warranty on the part of the defendant to the plaintiffs that the plans and specifications for the foundation of the building were free from alleged inherent defects. The contract is set out in general terms such that the only implication arising from the terms is that the architect will use reasonable care in preparation of the plans and supervision of the construction of the project.").

[4]See AIA Document A201-1987, General Conditions of the Contract for Construction ¶ 9.4.2 (pertaining to certificates for payment).

contractor's right to payment; or (4) made examination to ascertain how or for what purpose the contractor has used money previously paid on account of the contract sum."[5] Certifications may also be couched in terms of a professional standard of care. Because certifications are generally limited or qualified they rarely rise to the level of an express warranty.[6]

This is not to say, of course, that a design professional is immune from liability for an incorrect representation merely because it is deemed a certification rather than a warranty. The proof, however, is quite different. To prove a breach of express warranty, an owner would have to establish that such a warranty was made, that it was breached and that damages flowed therefrom. A claim of wrongful certification, on the other hand, is either a breach of contract or is grounded in professional negligence. In either case, the owner must establish that the design professional breached a duty of care. As is particularly so where the certification is couched in terms of a standard of care. A critical difference between warranty and professional negligence is that the latter requires some finding of fault whereas the former does not.

§ 9:9 Warranty as tort, contract, statutory or otherwise: Significance of characterization—Warranty liability and state consumer protection laws

The relatively recent development of consumer fraud or consumer protection acts has in some instances provided plaintiffs with additional recovery sources.[1] Often the same representations that underlie a plaintiff's express warranty claim

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[5]See AIA Document A201-1987, General Conditions of the Contract for Construction ¶ 9.4.2.

[6]See Industrial Development Bd. of Town of Section, Ala. v. Fuqua Industries, Inc., 523 F.2d 1226, 1242 (5th Cir. 1975).

[Section 9:9]

[1]As a general rule, warranty claims do not make out liability under most state consumer protection/trade practice laws. With that said, there is a potential for liability where aggravating circumstances exist:

> A claim under the NJCFA [New Jersey Consumer Fraud Act] requires more than merely a breach of warranty. A plaintiff must allege "substantial aggravating circumstances . . . . Naporano further alleges that defendants intentionally and knowingly omitted material information in connection with their products. Moreover, Naporano alleges throughout his complaint that the alleged defects in the crane created a hazardous condition. Taking all of the allegations contained in the Complaint as true and drawing all reasonable inferences in Naporano's favor, this Court finds that Naporano has alleged more than a simple breach of warranty. If proven, the above allegations could constitute the substantial aggravating factors necessary to prove a violation of the NJCFA. Therefore, Defendant's motion to dismiss Count III on this basis is

will also form the basis for fraud and Consumer Protection Act claims.[2] Many of these acts are construed quite broadly to encompass not only consumers but any person involved in the purchase of a product or service,[3] and often provide for additional recoveries such as attorneys fees that are not otherwise available under the common law.[4] As a result, consumer protection claims arising out of construction activities are not uncommon.

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denied.

Naporano Iron & Metal Co. v. American Crane Corp., 79 F. Supp. 2d 494, 507-08, 41 U.C.C. Rep. Serv. 2d 483 (D.N.J. 1999). See also Fousel v. Ted Walker Mobile Homes, Inc., 124 Ariz. 126, 602 P.2d 507, 27 U.C.C. Rep. Serv. 416 (Ct. App. Div. 2 1979) (mobile home dealer warranted that unit sold met certain specifications when the dealer knew that this was not the case, thus allowing a rescission of the contract and recovery of punitive damages); Practices forbidden by state deceptive trade practice and consumer protection acts, 89 A.L.R.3d 449 (sec. 26 superseded in part Practices Forbidden by State Deceptive Trade Practice and Consumer Protection Acts--Pyramid or Ponzi or Referral Sales Schemes, 48 A.L.R.6th 511, and sec. 27 superseded in part Validity, Construction and Application of State Laws Concerning, Relating to, or Encompassing Disclosure of and Tampering with Motor Vehicle Odometer--Validity of Statutory Provisions, Construction of Statute and Particular Terms, and Remedies, 66 A.L.R.6th 351, and Validity, Construction, and Application of State Laws Concerning, Relating to, or Encompassing Disclosure of and Tampering with Motor Vehicle Odometer--Statutes of Limitation, Parties to Action, Evidentiary Matters, and Particular Violations of Statute, 67 A.L.R.6th 209)., § 10 (identifying numerous cases making out consumer protection act violations in connection with representations made in the course of selling goods).

[2]See Dreier Co., Inc. v. Unitronix Corp., 218 N.J. Super. 260, 527 A.2d 875, 3 U.C.C. Rep. Serv. 2d 1728, 90 A.L.R.4th 283 (App. Div. 1986) (Defendant's representations regarding sale of malfunctioning computer equipment served as a basis for claims of breach of express and implied warranties, Consumer Fraud Act claims and common-law fraud. Plaintiff sought compensatory damages, treble damages under the Consumer Fraud Act, and punitive damages for common law fraud.).

[3]See Minn. Stat. Ann. § 325F.69 (Minnesota Consumer Protection Act); Todd v. McMurtry, "Home Construction a Consumer Transaction Protection Act?" 24 N. Ky. L. Rev. 309 (Spring 1997) (discussing how the Kentucky Consumer Protection Act is to be broadly construed); LaPrairie, Taking The Plain Language Movement Too Far: The Michigan Legislature's Unnecessary Application of the Plain Language Doctrine to Consumer Contracts, 45 Wayne L. Rev. 1927 (Winter 2000) (stating that Michigan courts have concluded the Consumer Protection Act is remedial in nature and thus must be broadly construed).

[4]See Ly v. Nystrom, 615 N.W.2d 302 (Minn. 2000) (Minnesota private attorney general statute does not permit an award of attorney fees in claims arising under the Consumer Fraud Act (CFA) unless the plaintiff can demonstrate that the cause of action was of benefit to the public; overruling on this point Church of the Nativity of Our Lord v. WatPro, Inc., 491 N.W.2d 1, 18 U.C.C. Rep. Serv. 2d 1017 (Minn. 1992) (overruled by, Ly v. Nystrom, 615 N.W.2d 302 (Minn. 2000))).

The decision of the United States Court of Appeals for the first circuit in *Eastern Mountain Platform Tennis, Inc. v. Sherwin-Williams Co., Inc.,*[5] is illustrative of the reach of some of these statutes. The First Circuit interpreted the scope of New Hampshire's Consumer Protection Act to cover the sale of a paint system to a commercial enterprise. The jury awarded the plaintiff in excess of a million dollars. In upholding the verdict, the court remarked:

> In short, Sherwin-Williams argues that the Consumer Protection Act was intended to redress the discrepancies between a knowledgeable commercial seller and a consumer who was placed in the position of relying on the representations of that seller. The provisions of the Act, Sherwin-Williams argues, have no application where, as here, a commercial buyer acquires a product for use in the manufacture of another product in which its expertise may easily be greater than that of the seller. . .. We begin, and could easily conclude, our assessment of this argument by considering the plain meaning of the words of the statute. We must glean the intention of the legislature as to the scope of the Act "from its construction as a whole, not by examining isolated words and phrases." A thorough reading of the entire statute provides no direct support for Sherwin-Williams's contention that the Act applies only to transactions with ultimate consumers.[6]

The unfair and deceptive practices prohibited by the CPA appear to include transactions between business competitors as well as those involving ultimate consumers. There are no provisions which limit the Act's protection to ultimate "consumers" alone. Indeed, there is no definition of a consumer, a consumer good, or a consumer transaction, although such definitions would be critical if the act were intended to be limited in the way that Sherwin-Williams suggest. Moreover, the statute specifies "exempt transactions" and does not include among them the kind of "commercial transactions" that defendant would delete from the

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[5]See Eastern Mountain Platform Tennis, Inc. v. Sherwin-Williams Co., Inc., 40 F.3d 492, 25 U.C.C. Rep. Serv. 2d 48 (1st Cir. 1994).

[6]The statute, N.H. Rev. Stat. Ann. 358-A:1 (1993) defines a "person" and "trader of commerce" broadly:

> I. "Person" shall include, where applicable, natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entity.
>
> II. "Trade" and "Commerce" shall include the advertising, offering for sale, sale or distribution of any services and property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this state.

N.H. Rev. Stat. Ann. 358-A:1 (1993). But see U.W. Marx, Inc. v. Bonded Concrete, Inc., 7 A.D.3d 856, 776 N.Y.S.2d 617 (3d Dep't 2004) (concrete supplier not liable on Deceptive Business Practice claim as it and general contractor were sophisticated and involved in a complex business transaction).

purview of the statutory provisions.[7]

In some cases a consumer fraud violation does not even require one to prove fraud or deceit. In *Falcon Assocs., Inc. v. Cox*,[8] Illinois Consumer Fraud Act applied to grossly defective new home construction even though the jury found that the developer did not intentionally conceal or misrepresent that the house was built in violation of building codes.

The highly advantageous remedial nature of these statutes is demonstrated by Tennessee's Consumer Protection Act at issue in *Scott v. Noland Co.,*[9] where homeowners purchased an aqua solarium based upon a brochure they had received from the unit's distributor. The brochure described the unit as having a sun lamp feature which was not included in the unit delivered. Tennessee's act makes it a violation to represent "that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship approval, status, affiliation or connection that such person does not have."[10] As the distributor's brochure contained an affirmation that the unit would have a sun lamp element that was not present at the time the unit was delivered, the plaintiffs made out a claim under the state's consumer protection act.[11] As such, the plaintiffs were entitled to treble damages and their attorney's fees.[12]

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[7]See Eastern Mountain Platform Tennis, Inc. v. Sherwin-Williams Co., Inc., 40 F.3d 492, 497, 25 U.C.C. Rep. Serv. 2d 48 (1st Cir. 1994). Sherwin-Williams also argued that it was error to refuse to instruct the jury on "plaintiff misconduct" or comparative fault in connection with plaintiff's warranty claims. The First Circuit found no error noting that New Hampshire case law does not admit of any warranty cases where comparative fault was a defense except in instances involving personal injury or those arising on dual theories of strict liability in tort and breach of an implied warranty of merchantability. But see Prudential Ins. Co. of America v. Jefferson Associates, Ltd., 896 S.W.2d 156 (Tex. 1995) (jury verdict under Texas Deceptive Trade Practices Act reversed as court enforced contract's "as is" clause where both parties were sophisticated).

[8]See Falcon Associates, Inc. v. Cox, 298 Ill. App. 3d 652, 232 Ill. Dec. 756, 699 N.E.2d 203 (5th Dist. 1998). See also State v. Weinschenk, 2005 ME 28, 868 A.2d 200 (Me. 2005) (a builder's repeated construction of defective homes constitutes an unfair trade practice under Maine's Unfair Trade Practices Act).

[9]Jackie Scott, Carol Scott v. Noland Company, Aqua Glass Corporation, 1995 WL 440375 (Tenn. Ct. App. 1995).

[10]See Tenn. Code. Ann. § 47-18-104(5).

[11]See Scott v. Noland Co., 1995 WL 440375 at 6 (Tenn. App.).

[12]See Tenn. Code. Ann. § 47-18-109(a)(3), (4) (trouble damages) and § 47-18-109(e)(1) (attorney's fees).

The same operative facts, i.e., the statements in the brochure and the

These "consumer" acts differ from jurisdiction to jurisdiction. For example, it was a question of fact whether exploratory and demolition services rendered by a contractor were "consumer goods or services" for purposes of Connecticut's Home Solicitation Sales Act.[13] Similarly, Massachusetts' Consumer Protection Act, unlike New Hampshire's, does not extend to transactions between businesses.[14] Similarly, Maryland's act has been inter-

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lack of the sunlamp in the delivered item also gave rise to a breach of an express warranty. The warranty claim, however, was not nearly as remunerative as the consumer protection claim.

[13]See Craftsmen, Inc. v. Young, 18 Conn. App. 463, 557 A.2d 1292 (1989).

[14]See Mass. Gen. Laws. Ann. ch 93A. The potentially explosive nature of consumer protection/unfair business practices statutory claims is demonstrated in the protracted case of Alcan Aluminum Corp. v. Carlton Aluminum of New England, Inc., 35 Mass. App. Ct. 161, 617 N.E.2d 1005, 24 U.C.C. Rep. Serv. 2d 66 (1993). This case started out as a routine collection matter when Alcan, a manufacturer of aluminum siding, brought suit against Carlton to collect $23,000 for goods sold and delivered. Carlton counterclaimed for breach of express warranty, breach of implied warranties and violation of Massachusetts's unfair business practices statutes, Mass. Gen. Laws. Ann. ch 93A. Eleven years after litigation was commenced, Alcan was confronted by a final judgment awarding Carlton more than $3,000,000 in damages, interest, attorney's fees and costs on its unfair business claim. The problem with the aluminum siding lay in the finish paint supplied by Sherwin-Williams and applied to its white "deluxe" siding. Alcan Aluminum Corp. v. Carlton Aluminum of New England, Inc., 35 Mass. App. Ct. 161, 617 N.E.2d 1005, 1007, 24 U.C.C. Rep. Serv. 2d 66 (1993). The paint problem produced excessive chalking on the surface of the aluminum siding. This became known to the manufacturer sometime in 1975 due to a steadily increasing volume of complaints regarding the problem. Alcan, however, did not terminate production of the defective siding until 1979. Alcan Aluminum Corp. v. Carlton Aluminum of New England, Inc., 35 Mass. App. Ct. 161, 617 N.E.2d 1005, 1008, 24 U.C.C. Rep. Serv. 2d 66 (1993). Carlton, as a siding installer, purchased roughly $375,000 of such siding between 1976 and 1979.

Alcan provided warranties to Carlton's customers that the siding would be free from defects for 30 years. Alcan Aluminum Corp. v. Carlton Aluminum of New England, Inc., 35 Mass. App. Ct. 161, 617 N.E.2d 1005, 24 U.C.C. Rep. Serv. 2d 66 (1993). Carlton also offered a 20-year written, unconditional guarantee with respect to the siding, based on Alcan's reputation and its warranties to Carlton's customers. The court also concluded that, through its sales representatives, Alcan provided an express warranty to Carlton that "it would back up its materials 100%." Alcan Aluminum Corp. v. Carlton Aluminum of New England, Inc., 35 Mass. App. Ct. 161, 617 N.E.2d 1005, 1009, 24 U.C.C. Rep. Serv. 2d 66 (1993). While statements such as this one often are considered to be "seller's talk" or "puffing," the court in this instance found that it "filled the gap between Alcan's prorated liability to Carlton's customers and Carlton's unlimited liability to its customers, leaving Carlton without exposure except with regard to its own labor in installing the siding." Alcan Aluminum Corp. v. Carlton Aluminum of New England, Inc., 35 Mass. App. Ct. 161, 617 N.E.2d 1005, 24 U.C.C. Rep. Serv. 2d 66 (1993) In other words, this representation

preted to apply only to sales to consumers and that a class action brought by homeowners for allegedly defective roof product would not lie under the act because the advertisements giving rise to the deceptive trade practice were directed to builders—not consumers.[15] These statutory claims, when coupled with claims for breach of express and implied warranties, further muddy an already murky picture.[16]

Manufacturers cannot sell their products without giving the

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could reasonably be understood by Carlton to mean that as between Alcan and Carlton, Alcan gave its full, unlimited warranty with regard to the aluminum siding sold to Carlton. It was on such an understanding that Carlton then gave its unconditional warranty to its customers. Additionally, the court found that Alcan had breached an implied warranty of merchantability.

Interestingly, the court noted that a breach of an implied warranty of merchantability is a violation of the state's Unfair Business Practice Act. Alcan Aluminum Corp. v. Carlton Aluminum of New England, Inc., 35 Mass. App. Ct. 161, 617 N.E.2d 1005, 1009, 24 U.C.C. Rep. Serv. 2d 66 (1993). See also Burnham v. Mark IV Homes, Inc., 387 Mass. 575, 441 N.E.2d 1027 (1982); Maillet v. ATF-Davidson Co., Inc., 407 Mass. 185, 552 N.E.2d 95 (1990). This rather startling conclusion is not expounded upon. The court did, however, note that there was sufficient justification in the record below to uphold the trial court's conclusion that the manufacturer's deliberate sale of materially defective siding to Carlton until early in 1979, when Alcan at least as early as 1975 had a good reason to know that its product was defective, was adequate to support the conclusions that "Alcan had committed a breach of its implied and express warranties to Carlton, thereby violating Mass. Gen. Laws. Ann. ch. 93A § 2 and that these deliberate breaches by Alcan constituted willful violations of c. 93A § 2." The Michigan Court of Appeals, however, has reluctantly determined that a contractor is subject to its consumer protection law, resulting in personal liability for the principal and sole owner of the construction company. See Hartman & Eichhorn Building Company, Inc. v. Dailey, 266 Mich. App. 545, 701 N.W.2d 749 (2005) (overruled by, Liss v. Lewiston-Richards, Inc., 478 Mich. 203, 732 N.W.2d 514 (2007)) and opinion vacated, 478 Mich. 891, 732 N.W.2d 108 (2007).

[15]See Morris v. Osmose Wood Preserving, 340 Md. 519, 667 A.2d 624, Prod. Liab. Rep. (CCH) ¶ 14444, 29 U.C.C. Rep. Serv. 2d 170 (1995).

[16]The Illinois Supreme Court's decision in Connick v. Suzuki Motor Co., Ltd., 174 Ill. 2d 482, 221 Ill. Dec. 389, 675 N.E.2d 584, 30 U.C.C. Rep. Serv. 2d 709 (1996) is a case in point. The plaintiffs in this case brought suit on behalf of owners and lessees of the Suzuki Samurai claiming economic losses in the nature of diminished value of their vehicles resulting from adverse publicity regarding the Samurai's propensity to roll over under normal driving conditions. The plaintiffs alleged breach of express and implied warranties, common law fraud and violations of the Illinois and Pennsylvania consumer fraud acts. The court allowed only the Illinois Consumer Fraud Act claims to stand, agreeing with the lower appellate court that under the Pennsylvania act the plaintiffs were required to allege that they purchased or leased their vehicles "primarily for personal, family or household purposes." Connick v. Suzuki Motor Co., Ltd., 174 Ill. 2d 482, 221 Ill. Dec. 389, 675 N.E.2d 584, 591, 30 U.C.C. Rep. Serv. 2d 709 (1996). The Illinois consumer fraud count applied only to the allegation arising out of a 1986 Car & Driver article that contained information provided

public information about the nature and quality of the goods. Manufacturers typically believe that making misrepresentations about their products exposes them to potential express warranty claims. And this, indeed, is appropriate. If goods are represented to have a certain quality or performance characteristics, and the goods in question do not comply with these express requirements, a buyer might well be able to claim that the manufacturer breached its express warranty in this regard.

Yet, one does not have to look very far to find instances where a manufacturer's representations about its products results in liability far in excess of what would have been the case if it had been held accountable only for a breach of warranty. For example,

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by Suzuki and only to the extent that the claim alleged Suzuki's concealment of material facts regarding the Samurai's safety risk. Connick v. Suzuki Motor Co., Ltd., 174 Ill. 2d 482, 221 Ill. Dec. 389, 675 N.E.2d 584, 591, 595, 30 U.C.C. Rep. Serv. 2d 709 (1996). The court declined to reinstate the consumer fraud counts that were based upon dealer statements, Suzuki statements made after the dates of purchase or upon Suzuki's owner's manual. Connick v. Suzuki Motor Co., Ltd., 174 Ill. 2d 482, 221 Ill. Dec. 389, 675 N.E.2d 584, 594, 30 U.C.C. Rep. Serv. 2d 709 (1996). The court also dismissed the plaintiffs' U.C.C. warranty claims, agreeing with the manufacturer that the plaintiffs had not alleged adequate notice of Suzuki's breach as required by U.C.C. § 2-607(3)(a). Connick v. Suzuki Motor Co., Ltd., 174 Ill. 2d 482, 221 Ill. Dec. 389, 675 N.E.2d 584, 593, 30 U.C.C. Rep. Serv. 2d 709 (1996) The court rejected the plaintiffs' argument that Suzuki's independent knowledge of the Samurai's defects received from news sources and other third parties were sufficient to satisfy the notice requirement. Connick v. Suzuki Motor Co., Ltd., 174 Ill. 2d 482, 221 Ill. Dec. 389, 675 N.E.2d 584, 593, 30 U.C.C. Rep. Serv. 2d 709 (1996). The filing of the lawsuit was insufficient notice as only cases involving personal injury may satisfy the notice requirement by filing. Connick v. Suzuki Motor Co., Ltd., 174 Ill. 2d 482, 221 Ill. Dec. 389, 675 N.E.2d 584, 593, 30 U.C.C. Rep. Serv. 2d 709 (1996). Nor did the plaintiffs allege either direct notice or actual knowledge that the plaintiffs' "particular transactions were troublesome" so as to permit the action to proceed without actual notice. Connick v. Suzuki Motor Co., Ltd., 174 Ill. 2d 482, 221 Ill. Dec. 389, 675 N.E.2d 584, 593, 30 U.C.C. Rep. Serv. 2d 709 (1996).

Interestingly, the lower Illinois appellate court dismissed the Illinois plaintiffs' implied warranty of merchantability claim on privity grounds. Under Illinois law, recovery of economic loss under a U.C.C. warranty claim requires privity. Connick v. Suzuki Motor Co., Ltd., 275 Ill. App. 3d 705, 212 Ill. Dec. 17, 656 N.E.2d 170, 180, 28 U.C.C. Rep. Serv. 2d 1152 (1st Dist. 1995), aff'd in part, rev'd in part, 174 Ill. 2d 482, 221 Ill. Dec. 389, 675 N.E.2d 584, 30 U.C.C. Rep. Serv. 2d 709 (1996). The lower appellate court allowed the Pennsylvania plaintiffs' implied warranty claims to survive as Pennsylvania no longer required privity for such claims. ae note: leave as isConnick v. Suzuki Motor Co., Ltd., 275 Ill. App. 3d 705, 212 Ill. Dec. 17, 656 N.E.2d 170, 180, 28 U.C.C. Rep. Serv. 2d 1152 (1st Dist. 1995), aff'd in part, rev'd in part, 174 Ill. 2d 482, 221 Ill. Dec. 389, 675 N.E.2d 584, 30 U.C.C. Rep. Serv. 2d 709 (1996). Thus, in the words of Professor Prosser, "although shaken from repeated assaults, portions of the Citadel still stand."

the *Wall Street Journal*, on April 6, 2006, reported on a jury verdict that was rendered in a New Jersey courtroom regarding Merck's pain drug, Vioxx:

> A jury here found that Merck & Co. failed to warn consumers of Vioxx's safety problems and held the drug manufacturer liable for the heart attack of one of two plaintiffs, awarding him $4.5 million in compensatory damages.
>
> The jury also found Merck committed consumer fraud in both cases by making misrepresentations to doctors concerning the drug's cardiovascular risks, and that it intentionally hid or omitted material information when marketing the drug. . . . The jury concluded that the drug was responsible for only Mr. McDarby's heart attack. It awarded him $3 million in compensation for pain and suffering, and gave his wife $1.5 million for her loss of "society and services of her husband." In addition, both men [even the plaintiff for whom the jury found Vioxx did not cause his heart attack] will be reimbursed for their attorney's fees and their out-out-of-pocket costs for Vioxx—a sum that's tripled under New Jersey consumer-fraud law.[17]

In addition to the compensatory and statutory damages awarded against Merck, the manufacturer is exposed to an award of punitive damages in favor of the plaintiff whose heart attack it found was caused by Vioxx.

While the Vioxx example is an extreme one, it is not uncommon for manufacturers to be sued for violations of a state's consumer protection law because of alleged misrepresentations regarding their products. Together with the District of Columbia, every state has codified some form of consumer protection legislation.[18] Although these statutes vary widely from state to state, they typically target fraudulent or deceptive acts and evolved, in one way or another, from the Federal Trade Commission Act.[19] Unlike the FTC Act, however, most of these "little FTC acts" authorize private causes of action—in other words, consumers can directly sue manufacturers under the state acts.

There are probably as many variations of consumer protection statutes as there are states.[20] In fact, it is not uncommon for a state to enact more than one act regulating consumer fraud, often

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[17]Wall Street Journal, April 6, 2006.

[18]For a very helpful article comparing the various Consumer Protection statutes, see Alan S. Brown and Larry E. Hepler, Comparison of Consumer Fraud statutes Across the 50 States, 55 Fed'n Def. & Corp. Couns. Q 263 (2005).

[19]15 U.S.C.A. §§ 41 to 77 .

[20]The various state consumer fraud acts are often modeled on the Uniform Deceptive Trade Practices, Uniform Sales Practices Acts, the Federal Trade

with conflicting elements and remedies. For example, Minnesota has enacted a: (1) Deceptive Trade Practices Act,[21] and (2) a Consumer Fraud Act.[22] Attorney's fees are available under both the DTPA and CFA. The DTPA also permits injunctive relief.

A common DTPA claim is that a manufacturer's "goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have."[23] A common Consumer Fraud Act claim involves an allegation that a supplier (meaning any seller who regularly engages in consumer transactions) made representations that "the subject of a consumer transaction (*i.e.*, the good) is of a particular standard, quality, grade, style, or model, if it is

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Commission Act, or Consumer Fraud Acts, including: **Alabama**: Ala. Code § 8-19-5; **Alaska**: Alaska Stat. § 45.50.471; **Arizona**: Ariz. Rev. Stat. Ann. § 44-1522; **Arkansas**: Ark. Code Ann. § 4-88-108; **California**: Cal. Civ. Code § 1770; Cal. Bus. & Prof. Code § 17200; **Colorado**: Colo. Rev. Stat. Ann. § 6-1-105; **Connecticut**: Conn. Gen. Stat. Ann. § 42-110b; **Delaware**: Del. Code Ann. tit 6, § 2513; Del. Code Ann. tit. 6, §§ 2531 to 2536; **District of Columbia:** D.C. Code Ann. § 28-3904; **Florida**: Fla. Stat. Ann. § 501.204; **Georgia**: Ga. Code Ann. §§ 10-1-370 to 10-1-375; Ga. Code Ann. § 10-1-391; **Hawaii**: Haw. Rev. Stat. Ann. § 480-2; Haw. Rev. Stat. Ann. § 481A-3; **Idaho**: Idaho Code § 48-601; **Illinois**: 815 Ill. Comp. Stat. 505/2; 815 Ill. Comp. Stat. 510/2; **Indiana**: Ind. Code Ann. § 24-5-0.5-4; **Iowa**: Iowa Code § 714.16; **Kansas**: Kan. Stat. Ann. § 50-623; **Louisiana**: La. Rev. Stat. Ann. § 1405; **Maine**: Me. Rev. Stat. Ann. tit. 5, § 107; Me. Rev. Stat. Ann. tit. 10, § 1213; **Maryland**: Md. Code Ann. Com. Law II § 13-301; **Massachusetts**: Mass. Gen. Laws Ann. ch. 93A § 1; **Michigan**: Mich. Comp. Laws Ann. § 445.901; **Minnesota**: Minn. Stat. Ann. § 325F.69; **Mississippi**: Miss. Code Ann. §§ 75-24-1 to 75-24-27; **Missouri**: Mo. Ann. Stat. § 407.020; **Montana**: Mont. Code Ann. § 30-14-103; Mont. Code Ann. §§ 30-14-103, 30-14-04; **Nebraska**: Neb. Rev. Stat. §§ 59-1601 to 59-1623; Neb. Rev. Stat. §§ 87-302 to 87-306; **New Jersey**: N.J. Stat. Ann. 56:8-2; **New York**: N.Y. Gen. Bus. Law § 349; **North Carolina**: N.C. Gen. Stat. § 75-1.1; **North Dakota**: N.D. Cent. Code § 51-15-02; **Ohio**: Ohio Rev. Code Ann. § 1345.02; Ohio Rev. Code Ann. § 1345.03; **Oklahoma**: Okla. Stat. Ann. tit. 15 § 753; **Oregon**: Or. Rev. Stat. § 646.608; **Pennsylvania**: Pa. Stat. Ann. tit. 73 § 201-3; **Rhode Island**: R.I. Gen. Laws § 6-13.1-2, 1-3; **South Carolina**: S.C. Code Ann. § 39-5-20; **South Dakota**: S.D. Codified Laws § 37-24-6; **Tennessee**: Tenn. Code Ann. §§ 47-18-101 to 47-18-125; **Texas**: Tex. Bus. & Com. Code Ann. § 17.46; **Utah**: Utah Code Ann. §§ 13-11-1 to 13-11-23; **Vermont**: Vt. Stat. Ann. tit. 9, §§ 2451, 2453; **Virginia**: Va. Code Ann. § 12.2-216; Va. Code Ann. § 59.1-68.3; Va. Code Ann. § 59.1-200; **Washington**: Wash. Rev. Code § 19.86.920; **West Virginia**: W. Va. Code §§ 46A-6-101 to 46A-6-110; **Wyoming**: Wyo. Stat. Ann. § 40-12-101.

[21]Minn. Stat. § 325D.44.

[22]Minn. Stat. § 325F.69.

[23]Uniform Deceptive Trade Practices Act, § 2(5).

not."[24]

These consumer protection claims, of course, sound very much like standard garden-variety warranty claims. That is, the nature or quality of the goods are contrary to that represented by the manufacturer. Nevertheless, because they are styled as consumer protection violations, the consequences can be much different and more problematic for the manufacturer.

Determining the consequences of misrepresenting the nature or quality of one's goods for consumer protection purposes depends largely on which state's law applies. In general terms, the consumer protection laws have a bearing on both entitlement and damages. In other words, these laws, even though they vary from state to state, uniformly relax one or more of the standards required to establish common law fraud. Moreover, these laws almost always provide a disappointed buyer with greater remedies than available under the common law.

Common law fraud is difficult to prove. In many cases, the standard of proof is higher (a plaintiff may have to establish proof by compelling evidence, rather than simply preponderance of the evidence). Its elements are rigorous and unyielding: an intentional misrepresentation of material fact; reliance by the recipient; causation and damages. Yet, many of these elements are omitted from consumer fraud statutes. While most statutes require some aspect of willfulness, some do not. Reliance by the consumer is relaxed in many states, or in some cases eliminated entirely. Perhaps the most famous of the consumer fraud statutes, California's Unfair Competition Law (widely known as § 17200) has no standing requirement, and does not even require a plaintiff to have been affected by the defendant's conduct.[25] Rather, it is enough for the plaintiff to allege and prove that the public was likely to be deceived by the conduct in question.

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[24]Uniform Consumer Sales Practices Act, § 3(b)(2). Common construction disputes can morph into consumer fraud actions. See Falcon Associates, Inc. v. Cox, 298 Ill. App. 3d 652, 232 Ill. Dec. 756, 699 N.E.2d 203 (5th Dist. 1998) (poor construction could expose home builder to consumer fraud liability even without an intent to deceive); Grove v. Huffman, 262 Ill. App. 3d 531, 199 Ill. Dec. 830, 634 N.E.2d 1184 (4th Dist. 1994) (breach of implied warranty of habitability claim also could expose builder to consumer fraud liability); Branigan v. Level on the Level, Inc., 326 N.J. Super. 24, 740 A.2d 643 (App. Div. 1999) (contractor's failure to set forth starting and completion dates in contract violated consumer fraud regulation); Milltex Properties v. Johnson, 36 Conn. L. Rptr. 780, 2004 WL 615748 (Conn. Super. Ct. 2004) (unpublished opinion) representation that defendant was highly skilled in the area of wastewater treatment construction could give rise to unfair trade practice claim).

[25]Cal. Bus. & Prof. Code § 17200.

Disclaiming liability or limiting one's remedies for warranty breaches is also easier to do than avoiding the grasp of a state's consumer protection law.

The softening of the proof required under common law fraud is only part of the attractiveness of these statutes. In addition to making entitlement easier to establish, these laws often provide enhanced remedies. As the *Wall Street Journal* article noted, New Jersey's consumer fraud statute allows for the recovery of treble damages. Punitive damages (or damages based not on a plaintiff's loss, but upon the premise that the defendant's conduct mandates punishment) are also a feature of some of these laws. For example, states such as California, Connecticut, Illinois, Maine, Missouri, and Nevada permit punitive damages to be recovered (at least in some circumstances). Some states invoke a cap on punitive damages. In California, for example, punitive damages are limited to $5,000 if the act is against a senior citizen or disabled person and the trier-of-fact makes special findings. Other states require additional findings to recover punitive damages. For example, Delaware allows these damages where the fraud was gross, oppressive, or aggravated, or if there was a breach of trust and the plaintiff also received compensatory damages. Nevada requires clear and convincing proof of suppression, fraud, or malice. The situation with regard to treble damages also varies from state to state. In New Jersey and Ohio, the award of treble damages is mandatory. In other jurisdictions, treble damages are only awarded in situations where the plaintiff is disabled or elderly. A number of jurisdictions limit these damages to intentional, willful, bad-faith, or knowing violations. Other states impose a cap on the recovery of treble or enhanced damages.

A common feature of consumer protection laws is the ability of the successful plaintiff to recover his or her attorney's fees. There is variation among the statutes, even with respect to the availability of attorney's fees. Some states, such as North Carolina, permit fees only where the conduct is willful and there is an unwarranted refusal to settle. Other states permit fees only where the defendant knowingly violates the statute or its conduct was egregious or intentional. A few states even permit a successful defendant to recovery attorney's fees (*e.g.*, North Carolina and Texas).

There are other reasons why consumer protection laws are of interest to disappointed consumers. Some states' acts permit litigants to bring class actions, although multi-jurisdictional or nationwide class actions are difficult to certify, given the varying

nature of these laws.[26]

In summary, while these acts are labeled as "consumer" legislation, in a number of jurisdictions the term "consumer" is broadly defined to encompass businesses and sophisticated purchasers. Similarly, while a number of these laws are characterized as "anti-fraud" acts, these statutes do not necessarily require the plaintiff to make a showing with regard to knowing intent (scienter) to violate the law, or demonstrate that the defendant knew its conduct was deceptive. (These "non-scienter" statutes are in the minority, as most states require a plaintiff to prove a knowing or intentional violation of the statute.) In some cases, civil violation can be parlayed into a criminal violation. For example, in Missouri, a knowing and intentional violation becomes a Class D felony.[27] Therefore, while there is a great deal of variation among these laws, in some instances "consumer fraud" does not have to involve either a "consumer" or constitute "fraud" as that term is used in the common law.

§ 9:10 Applicability of Uniform Commercial Code

As the statute governing the sale of "goods", Article 2 of the Uniform Commercial Code, is the basic law regulating warranties given by manufacturers and suppliers of construction materials and equipment. The U.C.C. is a compilation of a number of laws relating to commercial transactions. The U.C.C. has application to construction projects, because it governs commercial transactions involving the sale of goods by suppliers and manufacturers to construction projects. It does not govern the relationship between the owner and the contractor.[1] Because contractors, while providing goods and materials in the course of constructing a project, primarily provide a "service," and the U.C.C. does not govern service transactions. In concluding that a contractor responsible to "furnish and erect . . . structural steel" for a bridge provided a service outside the purview of the U.C.C., a New York court held:

If service predominates and the transfer of title to personal prop-

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[26]See Alan S. Brown and Larry E. Hepler, Comparison of Consumer Fraud Statutes Across the Fifty States, 55 Fed.n Def. & Corp. Couns. Q 263-289 (2005) (discussing the statutory bases for multi-jurisdictional class actions).

[27]Mo. Ann. Stat. § 407-436(1).

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[1]See Olson and Rosenstiel, Predicting When Construction Contracts are Subject of Article 2 of the U.C.C., 21 The Construction Lawyer 22 (Winter 2001) (authors discuss the various tests the courts have applied to determine whether the U.C.C. applies).