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Consumer Service Transactions, Implied Warranty
and a Mandate for Realistic Reform

ANDY NORMAN*

INTRODUCTION

That court best serves the law which recognizes that the rules
of law which grew up in a remote generation may, in the fullness
of experience, be found to serve another generation badly, and
which discards the old rule when it finds that another rule of law
represents what should be according to the established and set-
tled judgment of society, and no considerable property rights
have become vested in reliance upon the old rule...1

This quote reflects the tenor of this article. The article is con-
cerned with achieving justice by discarding the outmoded rules of
law currently applied to consumer service transactions. An implied
warranty of results to be achieved by the rendition of a service is
not only just but in most cases is practical. This article proposes a
test that would take into account the complexity of each individual
service rendered to determine which results can be warranted and
which cannot be warranted from each service.

Application of the implied warranty doctrine to consumer ser-
vice transactions is long overdue. Consumer product transactions
have run the judicial gamut from caveat emptor through negli-
gence to implied warranty and strict liability.2 Each extension of
consumer protection has resulted from an increased judicial aware-
ness of the inability of consumers to protect themselves from de-
fects in products.3 The importance of extending the fullest possible
protection to consumers of products now has been recognized by

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2. The terms "products" and "goods" are used interchangeably during the course of this
article.

3. Comment, What Price Nobility?: The Recovery of Economic Loss in Texas After
Nobility Homes v. Shivers, 19 S. Tex. L.J. 292, 294 (1978) [hereinafter cited as Comment,
What Price Nobility?]
the judiciary.⁴ Paradoxically, consumers harmed by defective services have not been accorded similar protection by the judiciary. Only the negligence doctrine is available as a vehicle for recovery of damages resulting from the defective rendition of a service.⁵ It is the thesis of this article that consumers are no better able to protect their interests when purchasing services than when purchasing products. This inability justifies extending implied warranty protection to consumer service transactions.

This article will illustrate the lack of power of consumers in the marketplace and the ineffectiveness of the negligence doctrine to supply necessary consumer protection. It will outline the development of a public policy devoted to the protection of consumers and the specific policies which justify the reform of the law governing consumer service transactions. Finally, it will advocate a consumer-tort analysis of necessary reforms. At the center of these reforms will be a test for an implied warranty of results to be achieved from rendition of a service.

This article advocates a level of judicial activism which may be unacceptable to some authorities.⁶ However, it has been the courts which for more than a century have promoted and implemented a public policy devoted to protecting consumers.⁷ This level of activism has become a necessary part of the growth of consumer protection. Moreover, the judiciary constitutes the last bastion of justice in overseeing consumer transactions. As a matter of public policy the law must interpose itself in order to regulate a particular category of transactions which might otherwise result in inequity and oppression.⁸

⁴ See text accompanying notes 51-66, infra.

⁵ This is the only doctrine imposed by law. The parties to a transaction may, of course, be found to have imposed a higher standard of conduct upon themselves by contract or express warranty.

⁶ See, e.g., Titus, Restatement (Second) of Torts Section 402A and the Uniform Commercial Code, 22 Stan. L. Rev. 713, 775, 780 (1970); R. Keeton, Venturing To Do Justice: Reforming Private Law, 122-25 (1969). These authorities indicate that by taking an active role in the reform of consumer transactions the judiciary may, in some minds, engage in unwarranted judicial legislation. The view taken here is that judicial application of legislative principles by analogy constitutes a positive and legitimate approach to the role of the judiciary. See, Pound, Common Law and Legislation, 21 Harv. L. Rev. 383, 384 (1908).

⁷ See text accompanying notes 66-98 infra.

⁸ Singal, Extending Implied Warranties Beyond Goods: Equal Protection for Consumers of Services, 12 N. Esc. L. Rev. 859 (1977) [hereinafter cited as Singal].
A number of marketplace factors open the door to consumer disappointment with the services they procure. High expectations for results to be achieved from rendition of a service are often engendered by a one way flow of information about the service from the service-provider to the consumer. The lack of intra-class communication between consumers, coupled with the tendencies of consumers to take information at face value frequently result in the failure of consumers to temper their expectations in a realistic way. Furthermore, attempts made by consumers to assure quality in the services they procure and generally to protect their interests are frequently thwarted by their lack of bargaining power and their necessary reliance on the skill and honesty of their service-providers. Each of these factors, when analyzed individually, indicates a need for judicial protection of service-consumers. Indeed, these same marketplace factors brought about great changes in product liability law.

Consumer Expectations

One of the factors which has been most instrumental in the reformulation of product liability law is the need to protect consumer expectations for product quality. Implied warranty of the quality of products and strict products liability have flowed directly from the judicial perception that consumers purchase products with certain expectations of quality. Moreover, authorities on product liability law have recognized that consumer expectations for quality

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9. These factors have been recognized in consumer product transactions. "This is a question of consumer. Of helpless consumer. Of consumer who takes what he gets, because he does not know enough, technically, to test even what is before his eyes." Llewellyn, On Warranty of Quality, and Society: II, 37 COLUM. L. REV. 341, 404 (1937).
11. Id. at 1304-1311.
12. Singal, supra note 8, at 878-85.
13. Shapo, supra note 10, at 1113-1117, advocates the importance of a representational approach to consumer protection. From pages 1204 through 1286 he demonstrates through caselaw analysis the effect the representational context of a consumer transaction has on consumer expectations and the importance courts have attached to such representations.
14. The concepts of merchantability and strict products liability were introduced via the courts to focus on resulting product performance as expected by product purchasers.
in products are created in a vast number of ways. Consumer expectations are no less prevalent in service transactions than in product transactions. The efforts made by judges and other authorities to mold product liability so as to protect consumer expectations should be fully persuasive in attempts to reform the law governing service transactions.

In product liability law, the most basic expectation-oriented rule is the law of express warranty. Virtually all authorities recognize the creation of consumer expectations by promises of product quality made by sellers and advertisers. Any affirmations of fact by a product seller that become part of the "basis of the bargain" struck with a consumer are guaranteed by the law of express warranty. This is one manner in which the law of express warranty protects consumer expectations for product quality. Such affirmations of fact are also guaranteed by express warranty in service transactions. Thus, if a doctor promises that a cure of the consumer's disease will result from his method of treatment, the law of express warranty will protect the consumer's expectation of cure. To this extent, consumer expectations are protected equally in product and service transactions. However, it is when analysis transcends this basic rule of express warranty that the pervasiveness of consumer expectations can be discerned. An analysis of the great extent to which product liability law has been reformed to protect expectations illustrates the want of such reform in the law of service liability. Recognizing the broad range of communications which creates expectations, the courts have even extended the law of express warranty to include non-verbal promises made by sellers, such as when they silently exhibit product models and samples. When an automobile salesman shows, without any verbal communication, a car with power windows to a prospective purchaser, the law of express warranty will guarantee that the car subsequently purchased will have power windows if they were an

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16. Express warranty is found in its most well known form in section 2-313 of the Uniform Commercial Code.
17. W. PROSSER, LAW OF TORTS § 97 at 651 (4th ed. 1971) [hereinafter cited as PROSSER].
18. Id.
20. Uniform Commercial Code § 2-313(1)(c) and comment 6 thereto.
inducement to purchase. Moving beyond the farthest edges of express warranty, judges and other authorities have held that consumer expectations for quality are created merely by a product's presence on the market.\(^1\) Similarly, they have recognized that consumer expectations can be derived from a complex of nebulous messages and images that surround a consumer transaction. This extremely broad representational context includes, in service transactions, the image of competence and authority that is subconsciously portrayed by a lawyer's lavish office. In a similar manner, the holding out of one's self as an "attorney" or a "doctor" or even as a "mechanic" imparts to the consumer a message of competence to perform a service.

Furthermore, it has been recognized that the collection of consumer experiences possessed by society as a whole lends to the creation of consumer expectations for product quality apart from any promises, messages or images sent by a service-provider.\(^2\) This social consensus about a product will indicate to an individual consumer a minimum performance he can expect from the product. Thus, because society collectively has had much experience with refrigerators and cars, the individual consumer will feel justified in expecting his refrigerator to keep his food cold and his car to have properly functioning brakes and transmission.\(^3\) The law of product liability has grown to reflect the numerous factors that go into the creation of expectations for product quality. It is apparent that a single product transaction may include specific verbal promises, specific non-verbal promises, general assurances, nebulous messages of competence and subconscious image portrayals, plus preconceived societal notions of what is to be expected from a service.

It is unfortunate for consumers of services that judicial solicitude for consumer expectations of results has not progressed beyond the narrow bounds of express warranty.\(^4\) The implied warranty of results advocated in this article would extend full protection of consumer expectations to service transactions. This

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22. Shapo, supra note 10, at 1240.
24. Since the doctrine of negligence focuses only upon the standard of care used by the service-provider in rendering the service, consumer expectations for results from the service are ignored by that doctrine.
protection is no less justified than in product transactions. Just as consumer expectations for the performance of a product create the incentive to purchase that product, it is consumer expectations for results from a service that create the incentive to procure that service.

In a manner similar to product transactions, the expectations for results can derive from any number of sources. Consumer expectations are created by the message of competence sent by a service-provider who undertakes, for a fee, to provide a service. As a corollary, when the service-provider holds himself out as an “attorney” or “mechanic”, a message of competence to achieve intended results is communicated to the consumer. Just as the consumer will expect his car to have properly functioning brakes and transmission, the consumer will expect his attorney to be able to draft a will or a title abstract accurately and his mechanic to be able to make his car run adequately. The collection of consumer service experiences creates a social consensus about the results to be expected from procurement of an attorney’s or a mechanic’s service. Furthermore, consumer expectations may be enhanced by the image of competence and authority portrayed, for example, by the lawyer’s lavish office. Recognition of the existence of consumer expectations for results from services should indicate to courts the need for a service-provider’s implied warranty of results.

One-Way Flow of Information

The need for an implied warranty of results from a service is further necessitated by the one-way flow of information about the service from service-provider to consumer. In most cases it is the service-provider who sets the stage upon which his service is por-

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25. When a consumer procures a service, he expects results to be achieved from the service. Thus, when the consumer brings his car in for a tune-up he expects his car to accelerate well, get good mileage and not die at stops. His mind is geared to these results. He does not think in terms of reasonable care or prudence in tuning the car. It is true that in complex service transactions he will have doubts in his mind as to whether certain results can realistically be accomplished. A consumer with a disease cannot usually be sure that a particular medical treatment will cure his disease. However, his focus is not on his doctor's ordinary care but on the achievement of a cure tempered by the complexity of the situation. The implied warranty of results advocated in this article takes exactly this approach. It begins with a result-oriented focus and temters the extent of implied warranty with the complexity involved in achieving the result.

26. Thus, in the same manner in which a consumer will expect certain minimum results from his car or refrigerator, he will expect certain minimum results from services provided by furniture movers, camera repairers, doctors, and landscapers.
trayed and who arranges the lighting.\textsuperscript{27} Thus, to a large degree consumers will be cue responsive, that is, their marketplace decisions will be influenced by the flow of information from the service-provider.\textsuperscript{28} Consistent with this analysis is the growing dissatisfaction with the utilitarian model in which the consumer procures a service after weighing his need for it against the cost of its procurement.\textsuperscript{29} The pervasive influence of advertising and fads in general in our affluent society further suggests great consumer cue responsiveness. The danger arising out of this one-way flow of information is that the consumer may not fully and accurately perceive the risks of disappointment he runs when procuring the service. Any incompatability between the service-provider’s profit motive and the consumer’s interest in receiving a quality service is likely to adversely affect the consumer.

The often unthinking and credulous tendencies of many consumers compound the likelihood that they will be frustrated by a lack of quality in the services they procure.\textsuperscript{30} Contrary to the “reasonable man” standard, the ordinary consumer does not always temper his expectations in a realistic way. An implied warranty of results would reflect that, unlike ordinary business-buyers, consumers tend to be careless or negligent by ordinary standards in making marketplace decisions.\textsuperscript{31} When such class-wide tendencies become apparent, it is the duty of the law to account for them.\textsuperscript{32}

\textbf{Unequal Market Power}

The most compelling justification for protecting consumer expectations arises out of consumer’s lack of marketplace power to protect their expectations. In product transactions, the imposition of implied warranty and strict products liability has been justified in part by the consumer’s lack of knowledge about the process of product manufacture.\textsuperscript{33} Quality control in the manufacture and distribution of products is left to the seller’s supervision. Thus, consumers are forced to rely on the skill and honesty of product

\begin{footnotesize}
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\item 27. Shapo, \textit{supra} note 10, at 1161, referring to product transactions.
\item 29. Shapo, \textit{supra} note 10, at 1151-52.
\item 30. Id. at 1305-11.
\item 32. Florence Mfg. Co. v. J.C. Dowd & Co., 178 F. 73, 75 (2d Cir. 1910).
\end{itemize}
\end{footnotesize}
sellers in providing quality products. In service transactions, this reliance factor is even greater. An inherent lack of consumer knowledge about the process of providing a service is compounded by the fact that services require, in most cases, the utilization of extraordinary skills. Furthermore, unlike with a tangible product, a consumer cannot pick up a service and examine it or get a feel for how it works.

Even when the consumer understands the process, the lack of consumer bargaining power adds to the consumer's necessary reliance on his service-provider. He usually is forced to procure services on a take-it-or-leave-it basis. To the consumer, freedom of contract usually means subjugation by adhesion contract. When a transaction breaks down, consumer expectations are frequently left by the wayside. Although some authorities contend that consumer bargaining power exists in the right to refuse to contract, the lack of consumer communication about the differences in the cost and competence of competing service-providers reduces the effectiveness of this power. Similarly, standardized mass contracts tend to be the rule among many competing service-providers.

The coexistence of consumer expectations for results from services with the service-provider's ability to achieve many of those results provides the basis for a standard of service liability that guarantees those results which are achievable. The need for such a standard of liability is accentuated by the one-way flow of information from service-provider to consumer and by the consumer's inability to assure that achievable results are in fact achieved. However, because of a long recognized distinction between products and services, service consumers are denied many protections afforded the product consumer.

THE ARTIFICIAL JUDICIAL DISTINCTION BETWEEN PRODUCTS AND SERVICES LEADS TO ANOMOLOUS RESULTS FOR DAMAGED CONSUMERS

The judicial distinction between products and services that exists today was recognized prior to the widespread acceptance of

35. See, e.g., J. WHITE AND R. SUMMERS, Uniform Commercial Code, § 4-4 at 119 (1972) [hereinafter cited as J. WHITE AND R. SUMMERS].
37. The existence of such contracts is promoted by organizations of product and service-providers such as the Texas Automobile Dealers Association and the Texas Apartment Association.
consumer protection policy. It is unfortunate for consumers that by the time consumer protection began its headway into the marketplace the distinction between products and services had become ossified. The logical similarities between product and service transactions have been, and continue to be, overlooked. Reasonable consumer expectations coupled with the consumer's inability to protect his interests in the marketplace have been the justifications for great changes in the law of product transactions. These same qualities, however, have engendered little modification of the law governing service transactions.

The judicial distinction between product and service transactions originally developed around a distinction that remains today. Products often involve large volume trading at a distance between parties who have no contractual relations. Services, on the other hand, usually involve a single transaction between two parties who deal directly with each other. In the late 18th and early 19th centuries this distinction served a valid commercial purpose. It justified application of an implied warranty of quality to product transactions in order to achieve commercial stability. However, from the point of view of a modern consumer burdened by a defective product or service, this distinction is virtually meaningless.

The early implied warranty was an ancestor of the implied warranty advocated in this article. However, the original warranty was created not for consumer protection purposes, but purely to impart stability into the turbulent times of the genesis of the industrial revolution. At that time, the warranty was not necessary for service transactions because services lacked large volume trading at a distance and they were not being industrialized at a revolutionary pace. By the mid-19th century, however, implied warranty developed a noticeable consumer protection aspect. At this point, the extension of implied warranty to service transactions would have been logical. However, by parroting without analyzing, courts continued to apply warranties only to products and retained the distinction between product and service transactions.

39. Id. at 409.
40. Id. at 404-05.
41. Id.
42. Singal, supra note 8, at 878-79.
43. Thus, courts concluded that implied warranty had no application beyond the sale of
distinction was preserved upon passage of the English Sales of Goods Act in 1894. This Act excluded services from the purview of the implied warranty doctrine. The narrow promulgation of implied warranty was copied in the United States with the passage of the Uniform Sales Act and the Uniform Commercial Code.

This ossified distinction has resulted in the anomaly which forms the basis for this article. Consumer protection has spread inexorably in reforming the law of product transactions. More than a century of reforms has shifted the risks of damage caused by defective products from consumer to seller. The role of consumer protection policy in product transactions has been so forceful that distributors and retailers may be liable even for manufacturing defects in products in containers sealed by the manufacturer. Despite the fact that consumers are no better able to protect their interests when procuring services than when procuring products, consumer reforms have not spread to the service sector. As if left in a vacuum for over a century, consumers of services are still subjected to the privity defense, restrictive notions of representational and express warranty liability, unlimited disclaimers of liability, less protection from unconscionability, and, in general, remnant notions of caveat emptor. In addition, the service consumer's only cause of action for recovery, negligence, creates insurmountable obstacles to acquiring adequate relief.

THE NEGLIGENCE DOCTRINE DOES NOT PROVIDE ADEQUATE CONSUMER PROTECTION

Currently, only the doctrine of negligence is utilized by the vast majority of courts in the United States to protect consumers from goods context despite its logical application to the leasing of goods, sale and leasing of real property and rendering of services.

44. Comment, Enterprise Liability, supra note 38, at 408.
45. The English Sale of Goods Act, the Uniform Sales Act and the Uniform Commercial Code all assured the exclusion of service transactions from the implied warranty doctrine by expressly incorporating within its purview only the sale of goods. Judicial expansion by analogy, thus, was discouraged. "Deference to Legislative will caused judges to view the legislature as preempting the warranty field." Id. at 410.
46. PROSSER, supra note 17, § 100 at 664-65.
47. See text accompanying notes 71-95 infra for a discussion of the elimination of the privity defense in products cases. None of these cases or statutes have been applied to consumers not in privity with the service-provider.
48. See text accompanying notes 16-26 supra.
49. There is currently no generally accepted statutory or common law limitation on a service-provider's right to disclaim liability for defects in his service.
50. See text accompanying notes 251-259 infra.
defective services. In contrast, however, the ineffectiveness of negligence to protect consumers from defective products has been recognized by virtually every court in the United States. The inappropriateness of negligence, with its focus upon care used, to protect consumers has been articulated in the following manner:

In any case in which a seller purveys goods by creating an image of them in the buyer's mind... it is curious that relief for justifiable disappointment should depend upon the conduct of the manufacturing process... The inducement to purchase, which is crucial to distribution, lies in the management of communication rather than supervision of manufacture.

This should demonstrate to the judiciary the inappropriateness of the negligence doctrine in consumer service transactions. Most courts, however, continue to apply only negligence to consumer service transactions.

There are four main reasons why negligence is inappropriate to protect consumers from defective services: (1) negligence, in effect, applies a 19th century social philosophy to 20th century consumer service transactions; (2) it ignores the consumer's reasonable expectations for results to be achieved by rendition of a service; (3) it imposes a burden of proof which in many cases is virtually impossible to meet; and (4) through its embrace of the ordinary it eliminates the incentive to provide the best service possible. Similarly, it allows the broad shield of industry custom to be used as a defense to consumer recoveries.

**Out-Dated Social Philosophy**

In the mid-19th century, the negligence standard was a widely accepted doctrine that was applied to a wide range of human activities. By that time, it had fully replaced the previous standard of liability which imposed absolute liability on persons for all injuries to other persons or property that followed as a direct and immediate consequence from a voluntary act. In comparison to this standard of liability, the negligence doctrine was seen as progressive because it comported with 19th century laissez-faire individualism.

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51. This is the only standard imposed by law apart from the actions of the parties.
52. *See* 1 PROD. LIAB. REP. (CCH) ¶ 4050 (1977).
55. PROSSER, *supra* note 17, § 28; Comment, *Enterprise Liability, supra* note 38, at 415.
Thus, it was no surprise that the development of the negligence standard coincided with the rise of the industrial revolution.\textsuperscript{57} Use of negligence represented a "conscious choice by common law courts to immunize industry to a great degree from potential liability."\textsuperscript{58} The reversal of risks involved in the development of the negligence standard was a result of the laissez-faire emphasis on industrial expansion at the expense of the individual.\textsuperscript{59} However, the emphasis on industrial expansion no longer constitutes a social policy. In consumer transactions, protection of consumer welfare has become the ruling policy.\textsuperscript{60} Thus, the prime motivation for the utilization of negligence no longer exists in consumer transactions.

\textit{Consumer Expectations Neglected}

To prove the negligent rendition of a service, a consumer must show that the service-provider did not use reasonable care. Reasonable care usually requires a showing that the care used was less than the care that would be used under the same circumstances by a reasonable and prudent service-provider.\textsuperscript{61} Thus, the negligence doctrine focuses exclusively upon the process of rendition of the service and ignores consumer expectations for results.

For example, although the consumer expects a thorough overhaul of his car to result in a car that gets maximum mileage, shifts gears properly, brakes when necessary and does not accelerate uncontrollably, the negligence doctrine deals with consumer disappointment by asking only whether the overhaul was done in a regular manner. Despite the mechanic's representations of competence, if the consumer's car runs into a tree because a wheel bearing was not put in place accurately, no recovery is allowed unless it is proved that an ordinary mechanic would have installed the wheel bearing in a different fashion.

\textit{Difficulties of Proof}

Even if a service is provided in a negligent manner, frequently it is impossible to prove so.\textsuperscript{62} The mere fact that rendition of a service has resulted in some form of damage to the consumer is not
evidence of negligence. Rather, proof of a bad result creates no more than speculation as to the existence of negligence. Yet because of the extraordinary skill and arcane knowledge usually required to provide a service and the fact that a lack of due care is usually not witnessed by the consumer, specific proof of negligence is often not possible. Thus, if the consumer pays a contractor several hundred dollars to install a heating system in his home which fails to provide heat, mere proof of a cold house will not establish negligence.

Even if the rendition of a service leads to serious injury or death through no fault of the victim, the cloak of “ordinary prudence” will serve to guard the service-provider from the consequences of his errors. Thus, if a doctor prescribes two safe medicines which in combination cause his patient’s death, no damages will be recovered if the jury finds that most other doctors would have made a similar prescription. It is a fundamental thesis of this article that when the ordinary and prudent service-provider fails to utilize all available knowledge, a recovery of damages should not be barred. Adoption of an implied warranty of results would help accomplish this goal.

Incentive Discouraged

Other side-effects result from a standard requiring only ordinary prudence. The negligence doctrine deters any interest by the service-provider to keep abreast of the newest developments of techniques and knowledge in his industry. If the average service-provider has not incorporated a recent development into his panoply of expertise there is no incentive for others to do so. It is true that new developments must be proven effective over time before they can be widely implemented. However, only an implied warranty of results will create an incentive in service-providers to make the most expeditious analysis of new developments. In addition, the negligence doctrine, with its focus on reasonable care, creates no incentive for the service-provider to deal with the consumer in terms of the latter’s expectations of result. The service-provider imparts information from a frame of reference other than that of

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63. Id.
64. Id.
65. Industry custom and notions of the reasonable man’s performance under similar circumstances are the important considerations under the negligence doctrine. In service transactions they are controlling regardless of the availability of knowledge that would have enabled the service-provider to achieve expected results.
the consumer's. As long as the service-provider uses ordinary prudence in providing the service, he need not concern himself with expected results. Only a standard of liability that focuses on results can create an incentive in service-providers to think and communicate with consumers in terms of consumer expectations for results.

THE JUDICIAL RESPONSE TO THE INABILITY OF CONSUMERS TO PROTECT THEMSELVES—A PUBLIC POLICY DEVOTED TO THE PROTECTION OF CONSUMERS FROM DEFECTIVE PRODUCTS

Public policy for the protection of consumers has played a great role in the eclipse of negligence in product transactions. This public policy has expanded inexorably for over a century to implement more effective consumer protection. Generally untraditional, and always concerned with notions of justice, the policy has manifested itself in almost every aspect of the consumer product transaction. This policy has long called for application of an implied warranty to service transactions. A brief examination of the great changes wrought in product transactions by consumer protection policy will demonstrate its logical force for change in consumer service transactions.

The root of the modern public policy for protection of consumers began to grow in the late 18th century. The courts began to find warranties of quality implicit in the circumstances of a sale in the absence of any express undertaking by the seller. Thus, the contract of the parties was not to be the only source of remedies for the sale of defective goods. This development was received favorably in the United States by 1815, when in dicta the New York Court of Appeals suggested that an implied warranty of wholesomeness in the sale of provisions for immediate consumption

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66. For example, the purpose of strict products liability is to "insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." Greenman v. Yuba Power Prod., Inc., 59 Cal. 2d 57, 27 Cal. Rptr. 697, 707, 377 P.2d 897, 901 (1963). "[P]ublic policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products." Restatement (Second) of Torts, § 402A, comment c.
68. Id. at 652-53.
should be developed.69 This food warranty was based from the outset on the public policy of protecting consumers powerless to protect themselves.70

By the mid-19th century the force for consumer reform led the judiciary to begin dismantling the privity defense. By 1852, just ten years after the introduction of the privity rule, negligence actions were broadened to allow consumers to sue those manufacturers with whom they were not in privity for physical injuries caused by "inherently dangerous" defective products.71 "Inherently dangerous" was interpreted, at first, to include only those products that were innately dangerous such as poisons, knives, explosives and similar products.72 As circumventing the privity rule became more popular with the courts, this category grew to embrace a substantial number of products. The "inherently dangerous" category came to include many "non-inherently dangerous" products such as scaffolds,73 ladders74 and coffee urns.75 This paved the way for Justice Cardozo to abrogate the privity rule for physical injuries caused in any case in which the manufacturer could foresee that his product could cause injury if defectively made.76

By 1913, courts began to allow injured consumers without privity to recover for breach of warranty against growers and processors of unwholesome food.77 This step indicated a significant trend in product liability law because courts then could hold a handler of a defective product liable to a buyer not in privity, regardless of the fact that all reasonable precautions were taken in the handling of the product.78 The adaptation of the warranties to this extra-contractual role rapidly found favor in a majority of courts as a vehicle for circumventing the privity rule.79 The scope of the warranty was expanded beyond food in some jurisdictions to include any product

69. Van Bracklin v. Fonda, 12 Johns 467 (N.Y. 1815); Edmeades, supra note 15, at 658.
70. Edmeades, supra note 15, at 658.
71. Waters-Pierce Oil Co. v. Davis, 60 S.W. 453 (Tex. Civ. App. 1900) is an early Texas case on this point.
74. Schubert v. J.C. Clark Co., 49 Minn. 331, 51 N.W. 1103 (1892).
77. Mazetti v. Armour and Co., 75 Wash. 622, 135 P. 633 (1913) (on the theory of an implied representation that the food was safe).
78. Id. at 630, 135 P. at 636.
79. PROSSER, supra note 17, § 97 at 653.
which was expected to come into intimate contact with the body,\textsuperscript{80} including soaps,\textsuperscript{81} cosmetics\textsuperscript{82} and even animal food.\textsuperscript{83} Like the rules of tort law, liability in implied warranty was widely believed to be imposed by law for reasons of policy rather than as a result of an agreement between the parties.\textsuperscript{84}

In the early 20th century, courts developed other methods for circumventing the privity defense. Many courts began to broaden their concept of what constituted an express warranty by the manufacturer to the consumer.\textsuperscript{85} Thus, many advertisements and labels were found to contain express warranties to consumers.\textsuperscript{86} Some courts held that consumers were entitled to sue because they were third party beneficiaries of a contract between the manufacturer and dealer.\textsuperscript{87} Others found an agency relationship between either the manufacturer and dealer or dealer and consumer.\textsuperscript{88} Still others held that dealers assigned or sold their rights against the manufacturer to consumers with purchase of the product.\textsuperscript{89}

Some courts have finished the dismantling of the privity defense by completely abolishing it in product transactions.\textsuperscript{90} In the 1950’s and 1960’s the food warranty was expanded to cover a wide variety of products.\textsuperscript{91} Unlike the warranties of the Uniform Sales Act and the Uniform Commercial Code, the newly expanded food warranty was based solely on consumer protection policy. It was imposed by operation of law and could not be disclaimed by product sellers.\textsuperscript{92} A similar form of warranty was extended to include the lease and bailment of products\textsuperscript{93} and beyond products to the sale and rental of housing.\textsuperscript{94}

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\item \textsuperscript{80} Kruper v. Procter & Gamble, 160 Ohio 108, 113 N.E. 2d 605 (1953).
\item \textsuperscript{81} \textit{Id.}
\item \textsuperscript{82} Graham v. Bottenfield’s Inc., 176 Kan. 68, 269 P.2d 413 (1954).
\item \textsuperscript{83} Midwest Game Co. v. M.F.A. Milling Co., 320 S.W.2d 547 (Mo. 1959).
\item \textsuperscript{84} Edmeades, \textit{supra} note 15, at 661.
\item \textsuperscript{85} Randy Knitwear Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 181 N.E.2d 399 (1962).
\item \textsuperscript{86} \textit{Id.}
\item \textsuperscript{87} Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N.E. 557 (1928).
\item \textsuperscript{88} Wisdom v. Morris Hardware Co., 151 Wash. 86, 274 P. 1050 (1929).
\item \textsuperscript{89} Coca Cola Bottling Works v. Lyons, 145 Miss. 976, 111 So. 305 (1927).
\item \textsuperscript{90} This was recently accomplished in Texas in the case of Nobility Homes of Texas, Inc. v. Shivers, 557 S.W. 2d 77, 81 (Tex. 1977).
\item \textsuperscript{91} Prosser, \textit{The Assault Upon the Citadel}, 69 \textit{Yale L.J.} 1099, 1112 (1960). The warranty was no longer limited to food or products expected to come into intimate contact with the body but appeared to be applicable to virtually every product on the market.
\item \textsuperscript{92} Singal, \textit{supra} note 8, at 874-78.
\item \textsuperscript{93} \textit{See, e.g.,} W.E. Johnson Equip. Co. v. United Airlines, Inc., 238 So. 2d 98 (Fla. 1970).
\item \textsuperscript{94} \textit{See, e.g.,} Humber v. Morton, 426 S.W.2d 554 (Tex. 1968) and Kamarath v. Bennett,
In addition, the doctrine of strict liability in tort, expressly created to protect consumer expectations, was adopted in rapid order by virtually every court in the United States. Similar to the implied warranty in food cases, the strict liability theory imposes liability, apart from any negligence, on any party in the product's chain of distribution for physical injuries to a buyer caused by any defective product. As a matter of public policy, the strict liability rule "insure[s] that the costs of injuries resulting from defective products are borne by the manufacturer who put such products on the market rather than by the injured persons who are powerless to protect themselves."

In recognition of this development of strong consumer protection in products law and of the inadequacy of the negligence doctrine, several cases scattered among various jurisdictions have foreshadowed the coming of implied warranty to service transactions. These few courts have been willing to question the viability of the product-service distinction. Since most of the reforms brought about by consumer protection policy began with a trickle and ended with a flood, the expansion of consumer protection reforms into service transactions may be imminent. An implied warranty doctrine which is flexible enough to account for the amount of con-

568 S.W.2d 658 (Tex. 1978).

95. Prosser, supra note 17, at 657-58. However, this is questionable in light of the limitation of the doctrine to personal injury and property damage only.

96. A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. Greenman v. Yuba Power Prod., Inc., 59 Cal. 2d 57, 60, 27 Cal. Rptr. 697, 377 P.2d 897 (1963).

97. Id.

trol a service-provider has over achieving results, such as the one advocated in this article, should allow courts to extend this needed protection to consumers of services.

**EXTENDING JUDICIAL PROTECTION TO CONSUMER SERVICE TRANSACTIONS—THE POLICY JUSTIFICATIONS FOR AN IMPLIED WARRANTY OF RESULTS**

This section briefly outlines some of the consumer protection policies which specifically warrant application of the implied warranty doctrine to consumer service transactions. Some of these policies have already been mentioned: the need for judicial recognition of the existence and importance of consumer expectations; the positive effect implied warranty would have in promoting disclosures by the service-provider in terms of what results are expected from a service; the inappropriateness of applying a doctrine based on 19th century social policies to transactions with 20th century foundations; and generally, the treating of all consumer transactions equally, regardless of whether they involve a product or a service, based on the consumer's inability to protect himself.

In addition to these policies, a more fundamental consideration is important. The most basic notion of 20th century consumer protection policy requires that a business in existence to make a profit from the public pay its way and meet its social obligations. These obligations derive from the following policies.

First, the public interest in the protection of human life, health and safety which paved the way for the application of implied warranty and strict liability in tort to product transactions is no less applicable to service transactions.\(^99\) It is readily apparent that the same harmful effects are caused by an accident whether it results from the sale of a car with a defective choke or from defective installation of the choke.

A second policy recognizes the service-provider's superior ability to bear the loss caused by defects and to distribute it over the range of customers.\(^100\) Many service businesses are small independents with small profit margins. Yet recognition that many product sellers are small has not deterred the application of implied warranty and strict liability to those businesses. The general avail-

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100. This principle has been recognized in product cases. See Restatement (Second) of Torts § 402A, comment c; Greenman v. Yuba Power Prod., Inc., 59 Cal.2d 57, 29 Cal. Rptr. 697, 377 P.2d 897, 901 (1963).
ability of liability insurance makes the size of the business less important.\textsuperscript{101} Furthermore, spreading the cost of liability insurance over the range of customers is socially more efficient than leaving the costs of injury to the unfortunate victims of defective services.\textsuperscript{102} Regardless of the availability of insurance, though, public policy should recognize that businesses are better able than individuals to absorb unexpected financial shocks. The notion of eliminating fault from the service liability equation should not suffer great resistance in light of the standards currently in effect in product transactions.

If businesses are forced to bear losses, prices for services may increase. Concededly, low and middle income consumers would be least able to afford any increase in prices. These are the same consumers, however, who are least able to afford the consequences of a defective service.\textsuperscript{103} Significantly, some studies indicate that a move from negligence to implied warranty might not cause an appreciable rise in the price of services.\textsuperscript{104} To the extent that prices do rise, though, a positive side effect will occur. Although the overall cost of services to society will remain the same, higher prices will more accurately reflect the individual risk of loss from defective services.\textsuperscript{105} No longer would a few suffer to keep prices low for the masses. Purchasers of services would be able to make a more informed selection.\textsuperscript{106}

A third policy supporting an implied warranty in consumer services recognizes the service-provider's superior ability to determine whether his service is being rendered properly. The manufacturer of a product is the only person capable of instituting quality con-

\textsuperscript{101} Some of the positive effects of social insurance, whether applied to large or small businesses have been summed up as follows:

a scheme of social insurance involves (1) liability without fault (within the field of its operation), (2) an assurance that the amount of compensation theoretically due under the system will in fact be paid, and (3) a wide, regular and equitable distribution of losses under the system.

Harper and James, The Law of Torts, § 13.2 at 763-64 (1956). Furthermore, the number of injury-producing defects should increase directly in proportion to an increase in volume. Greenfield, supra note 18, at 691-92.

\textsuperscript{102} Id.

\textsuperscript{103} Id.

\textsuperscript{104} See, e.g., Comment, Enterprise Liability, supra note 38, at 440; Greenfield, supra note 19, at 694-95.

\textsuperscript{105} Comment, Enterprise Liability, supra note 55, at 433-41; Greenfield, supra note 19, at 694-95; Shapo, supra note 10, at 1371-72.

trol as the product is being made. The same is true of a service-provider as he performs the service. Deterrence of defects before they occur is the most efficient way to ensure service quality, and to the extent that imposition of a higher standard of liability on service-providers increases the incentive for quality control, resource allocation is more optimal.

Fourth, imposing an implied warranty in service transactions would achieve another positive effect that the negligence doctrine cannot. The negligence standard requires only that service-providers perform in an ordinary fashion. Thus, only when industry custom is declared as a matter of law to be patently unreasonable is the service-provider encouraged to render a better than average performance. The implied warranty advocated here would require that service-providers keep abreast of and apply the newest techniques and advances of knowledge in their industries.

Finally, in most service transactions, the service-provider is fully aware of the consumer’s expectations for results. The implied warranty advocated here can help to assure that the service-provider does the best possible job in attempting to achieve expected results.

**THE SUPERIORITY OF IMPLIED WARRANTY OVER STRICT LIABILITY AS THE VEHICLE FOR SERVICE LIABILITY REFORM**

Implied warranty is preferred over strict liability in tort as the vehicle for reform of consumer service transactions. However, the characteristics of these two doctrines vary from jurisdiction to jurisdiction to suit particular needs. These differences may result in strict liability being more appropriate in a minority of jurisdictions. In a majority of states, however, the implied warranty doc-

107. Greenfield, supra note 19, at 688.
108. Deterrence of defects before they occur is socially more efficient than reservicing or subsequent additional repairs.
109. Thus, the implied warranty of results advocated in this article allows for the complexity of each service rendered but is based in large part on a policy promoting the greatest possible utilization of available knowledge by service-providers.
110. For example, when a consumer hires an attorney to draft a will, the attorney should be fully aware of the results expected by the consumer: the orderly transfer of his property at his death to intended beneficiaries. Similarly, when a consumer hires a mechanic to overhaul the brakes on his car the mechanic should fully realize that the consumer expects his car to have properly functioning brakes.
111. Differences regarding the recovery of economic loss and the application of privity and disclaimers in particular can be seen in the various jurisdictions.
trine possesses more flexibility than strict liability in tort and should be the logical preference.

According to Dean Prosser, implied warranty is a "freak hybrid born of the illicit intercourse of tort and contract."112 This theoretical combination has confused some courts as to the purposes of implied warranty.113 In actuality, this varied background gives implied warranty the ability to reflect the contractual aspect of a consumer service transaction while it sets the public policy standards of quality. On some occasions an implied warranty might display contractual qualities, being promissory in nature and part of a bargained-for agreement.114 A person contracting to insulate a house from termites can logically be held to have impliedly warranted that after being insulated the house will be free from termites.115 At other times, an implied warranty might be interpreted as tortious in nature, exhibiting qualities of an obligation or duty imposed for public policy reasons.116 This is evident when a mechanic is held to impliedly warrant that he will not install a rebuilt carburetor in a consumer's car so as to cause an accident.117 Strict liability as applied in most jurisdictions lacks this varied nature.118

Another distinction between implied warranty and strict liability involves the recovery of economic loss. Economic loss constitutes a large portion of all losses suffered by consumers of defective services. Therefore, a doctrine that facilitates the recovery of economic loss as well as personal injury and property damage is required to fully effect consumer protection principles. In cases involving solely economic loss, strict liability is held to be inapposite in most jurisdictions.119 Most jurisdictions, however, allow the recovery of economic losses under implied warranty.120 Elimination of the privity defense in cases of economic loss brought under implied warranty121 adds to the viability of that doctrine for protecting consumers.

A third difference between the doctrines involves the ability of a

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113. Id. at 1133-34.
114. Edmeades, supra note 15 at 662.
116. Edmeades, supra note 15 at 662.
118. In most jurisdictions strict liability is based solely upon public policy and contains no notions of contract. RESTATEMENT (SECOND) OF TORTS §402A, comment m.
120. Id.
121. Id.
service-provider to shift the risk of loss, better known as the disclaimer doctrine. In most jurisdictions, a seller may not disclaim strict liability, but he is permitted to disclaim implied warranties. This article recognizes the appropriateness of a limited mechanism for the shifting of the risk of loss. Therefore, implied warranty is more appropriate.

Finally, "strict liability" or "liability without fault" would be a misnomer if applied to this analysis. The implied warranty advocated in this analysis retains an element of fault. Implied warranty would be a more precise title.

TOWARD AN IMPLIED WARRANTY OF RESULTS IN SERVICE TRANSACTIONS—THE THEORY

The following sections set out the implied warranties of results. Each element of the warranties will be analyzed and explained in these sections. There are two warranties which differ in only one respect: the measure by which the results achieved by a service are compared with the results warranted. Two warranties are necessitated because of the importance of differentiating between types of service transactions. Traditionally, most authorities have analyzed services without recognizing these major distinctions. This failure to categorize services may be one of the reasons why so few services have been held to involve implied warranties of results. Four categories of service transactions are developed later in this analysis. Recognition of the analytical distinctions between the services in each category will facilitate the application of an implied warranty of results to each service.

The implied warranties reject customary or industry standards in determining liability. Instead, the standard of liability allows a focus on consumer expectations of results from services procured and, at the same time, distinguishes between those results that can be accomplished and those that cannot. The outcome in terms of

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122. The authors of the doctrine specifically eliminated the application of disclaimers to strict liability. Restatement (Second) of Torts § 402A, comment m.
123. See text accompanying notes 222-31 infra.
124. To allow for the complexity factor in providing a service, some notion of fault must be retained. Thus, a service-provider will not be liable for the failure to achieve a result if there was no knowledge or technique available to enable him to achieve the result.
125. As will be demonstrated, one warranty measures the quality of a service by examining the performance of a product before and after servicing. The other warranty measures the quality of a service by looking to other expected results. The warranties are mutually exclusive in application. Only one will apply to a given service transaction.
warranted results should directly reflect the extent of control a service-provider has over achievement of expected results. In the analysis that follows, this complexity factor plays a central role in determining the existence and scope of the implied warranty in each individual service transaction.

A CONSUMER WHO HAS BEEN ADVERSELY AFFECTED BY THE PROCUREMENT OF A SERVICE WHICH IS THE PRODUCING CAUSE OF A PRODUCT PERFORMANCE IN VIOLATION OF HIS REASONABLE EXPECTATIONS MAY RECOVER FOR BREACH OF IMPLIED WARRANTY IF THERE WAS AVAILABLE TO THE SERVICE-PROVIDER A TECHNIQUE OR KNOWLEDGE SUFFICIENT TO ACCOMPLISH THE EXPECTED PRODUCT PERFORMANCE.

A CONSUMER WHO HAS BEEN ADVERSELY AFFECTED BY THE PROCUREMENT OF A SERVICE WHICH IS THE PRODUCING CAUSE OF A FAILURE TO ACHIEVE A RESULT REASONABLY EXPECTED BY THE CONSUMER MAY RECOVER FOR BREACH OF IMPLIED WARRANTY IF THERE WAS AVAILABLE TO THE SERVICE-PROVIDER A TECHNIQUE OR KNOWLEDGE SUFFICIENT TO ACCOMPLISH THE RESULT.

These paragraphs embody the service transaction equivalent to the Uniform Commercial Code's implied warranty of the merchantability of goods. The first warranty is created to apply to service transactions in category one, due to their special nature which allows them to be analyzed for quality in terms of product performance. The second warranty is created to apply to service transactions falling into categories two, three and four.

The warranties, as set out above, are not worded affirmatively. They do not say what the service-provider is warranting. Instead they talk in terms of when the implied warranty is breached. They are worded in this fashion to incorporate into one phrase all the elements deemed necessary by this article to secure effective consumer protection.

What is actually being warranted can be expressed as follows:

UPON THE PROCUREMENT OF A SERVICE BY A CONSUMER THE SERVICE-PROVIDER IMPLIEDLY WAR-
RANTS THAT HE WILL UTILIZE ALL THE TECHNIQUES AND KNOWLEDGE AVAILABLE TO HIM IN ORDER TO ACHIEVE THE [PRODUCT PERFORMANCE] REASONABLY EXPECTED BY THE CONSUMER.

These warranties impose a standard of quality consonant with consumer-tort principles. The scope of their application is derived from these principles. Thus, they should always be subject to a liberal interpretation in effecting consumer protection policy and, except to the extent indicated in a later section, they should not be waivable by contract. The following sections analyze the warranties element by element. After the elements of the warranties are analyzed, the four categories of services will be developed and various applications of an implied warranty of results will be demonstrated.

A Consumer . . .

The warranties are intended to be implied only in transactions involving the procurement of services by a consumer. However, a broadening of the traditional notion of a "consumer" is necessary to achieve maximum justice. Application of the implied warranty should be flexible enough to extend to all purchasers of services to whom consumer protection principles logically apply. The scope of this logical application would extend beyond the standard notion of a consumer as one who purchases "for personal, family or household purposes."

Application of the implied warranties should be a question of law determined on a case-by-case basis. In determining which service transactions are to be subject to an implied warranty of results, factors such as the relative amount of bargaining power, the amount of information possessed by the purchaser about the service and its attendant risks and messages of competence imparted by the service-provider should be considered. In no case should a purchaser of services who fits within the standard definition be denied implied warranty protection. In many cases, however, pur-

129. These principles are dealt with individually in most of the remaining sections of this article.
130. See text accompanying notes 220-27 infra.
131. This narrow definition of the term consumer recurs in many statutes, such as the UCC § 9-109(1) and the Magnuson-Moss Warranty Act, 15 U.S.C.A. § 2301(3) (1975). However, a much broader definition of the term consumer has been promulgated by the Texas Deceptive Trade Practices-Consumer Protection Act, TEX. BUS. & COMM. CODE ANN. § 17.45(4) (1977).
chasers of services falling outside this definition, such as business purchasers, also should be accorded such protection.\textsuperscript{132}

In transactions that are adjudged not to be consumer transactions, the implied warranties can still be utilized by the courts to promote commercial stability.\textsuperscript{133} On a basis similar to that of the Uniform Commercial Code, it is suggested that in these situations the warranties be subject to full disclaimers.

\textbf{Who Has Been Adversely Affected...}

The term "adversely affected" is derived from statutes.\textsuperscript{134} Its basic function is to resolve questions of standing to sue on a policy basis. Both Congress and state legislatures have utilized the test of adverse effect, and it provides a sound basis upon which to resolve questions of standing in consumer service transactions. Courts should follow this legislative lead and extend application of the test to implied warranty cases.

A consumer is adversely affected by a breach of implied warranty when he: (1) suffers an injury in fact which (2) is within the zone of interests to be protected by the implied warranty doctrine.\textsuperscript{135} The Supreme Court of the United States in another context indicated that the adverse effect test is to be construed in a liberal fashion to promote the policies underlying the statute in which it is included.\textsuperscript{136} Therefore, it should not be unreasonable to give a liberal construction to the test for adverse effect in promoting consumer protection policies under the implied warranty doctrine.

Liberal use of the adverse effect test would aid courts in eliminating unrealistic and artificial barriers to consumer compensation. Possibly the most important effect would be elimination of the privity defense. This defense denies to consumers any recovery against persons with whom they have not dealt directly.\textsuperscript{137} The privity defense has been characterized by some as a barrier to justice.\textsuperscript{138} The privity defense has been completely eliminated, or nar-
rowly circumscribed, in consumer product transactions. A liberal use of the adverse effect test should accomplish the same result in service transactions. This would recognize the consumer-tort principle that harm resulting from breach of an implied warranty should be recoverable without regard to privity or the lack of privity. The focus should be, as the Supreme Court has held, on the “interests infringed.” Thus, when a consumer is damaged after purchasing a defective product in reliance on the assurances of a product testing service published in a magazine, the consumer should be allowed to prove a cause of action against both the product tester and the magazine. The fact that no fee was paid by the consumer to the testing service or that someone else purchased the magazine should not as a matter of law bar a recovery by the consumer.

Using the test for adverse effect could also eliminate unrealistic distinctions that have been drawn by courts between various services. For example, by looking to the zone of interests protected by the implied warranty doctrine, it should become irrelevant whether a service is denominated “professional” or “non-professional.” The adverse affect test would allow judicial analysis of the true issue in a consumer service transaction: whether or not a warranty of results is justified in a particular service transaction. The focus would be on controlling issues, free from the distraction of meaningless distinctions.

Finally, the test for adverse effect would allow, when justified, a broadening of the range of damages for which a consumer is allowed to sue. In determining the extent of adverse effect from damage to the environment, the United States Supreme Court held that the interests protected “at times may reflect ‘aesthetic, conservational and recreational’ as well as economic values.” A similar broad zone of protection should be available to consumers. This interpretation of adverse effect has already been sanctioned by the Texas Supreme Court to the extent of allowing recoveries for mental anguish apart from personal, property or economic damages.

. . . By the Procurement of a Service . . .

The implied warranty should arise upon the procurement of a

139. See text accompanying notes 71-90 supra.
141. Id. at 734.
service by a consumer. To apply this element, it is necessary to
determine what commercial circumstances are required in order
for a service to be procured. This has particular relevance in regard
to two applications of the implied warranty doctrine: to services
rendered without a fee and to services rendered by persons not in
the business of rendering the service.

In the vast majority of cases, the service will be provided at a
cost to the consumer. This should not, however, preclude applica-
tion of implied warranty to some services rendered without a fee,
when a court determines the warranty should apply as a matter of
policy. Some services are rendered gratuitously as a preliminary to
services with a cost. The factor of consumer reliance and the effect
of representations of service-provider competence may be as great
in the preliminary services as in others. Thus, damages resulting
from the "free towing service" offered by an automobile repair ga-
rage should be recoverable under the implied warranty doctrine.
Similarly, errors in the diagnosis called a "free estimate" by prod-
uct repair businesses should be subject to implied warranty if the
circumstances so warrant. Furthermore, the fact that a consumer
did not procure any services that follow from the preliminary ser-
vice should not, as a rule, bar recovery. As with the determination
of who is to be deemed a consumer, the application of implied war-
 ranty to services rendered without charge should be made when a
court determines consumer protection policy logically applies to
the facts of the case. The flexibility of a case-by-case approach will
allow the most just application of the implied warranty doctrine.

The case-by-case approach should also be used when persons
render services for a fee in isolated transactions. In most cases,
persons not in the business of supplying the services should not be
held to impliedly warrant results, because the redistributive poli-
cies underlying the implied warranty doctrine usually will not ap-
ply to persons who are not in the business of rendering such ser-
 vices. Prior to determining, however, that an isolated service was
rendered without an implied warranty, a court should weigh other
consumer protection factors. The policy of protecting human life,
health and safety may outweigh the lack of a redistributive basis
for implying warranties. Relevant facts might include the extent of
consumer reliance involved in the transaction, relative bargaining
positions and the general representational context surrounding the
transaction, including the messages of competence communicated
by the service-provider to the consumer. This flexible approach
would recognize that consumer expectations for results will not al-
ways differentiate between a service-provider regularly in the business and one involved in an isolated transaction. For example, an implied warranty may be appropriate in a case when the service is provided by a person in a business involving other products or services. Application of implied warranty to isolated service transactions should proceed on a case-by-case basis.

. . . Which Is a Producing Cause . . .

"Producing cause" has become the prevailing standard of legal causation in Texas consumer transactions and it is appropriate for the implied warranty in service transactions. Producing cause is defined as "an efficient, exciting, or contributing cause, which in a natural sequence, produced injuries or damages complained of, if any." The substitution of producing cause for proximate cause reflects the move away from negligence to liability without fault in consumer transactions. When liability without fault is imposed, traditional tort notions of causation become improper. Thus, intent, knowledge and foreseeability should not play a part in determining legal causation in an implied warranty case.

. . . Of a Product Performance In Violation of His Reasonable Expectations . . .

There are two logical limitations on the range of consumer expectations for results that are to be granted legal protection. One limitation requires that protection be extended only to those results that can be achieved by the service-provider. That limitation

143. This flexible approach is preferred to the traditional categorical approach taken by the UCC and strict products liability. The UCC warranty of merchantability in § 2-314 applies only to a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed. Similarly, comment f to § 402A limits strict liability to "any person engaged in the business of selling products for use or consumption."
144. Rourke v. Garza, 530 S.W.2d 794, 801 (Tex. 1976).
145. Id. The court also stated that there can be more than one producing cause.
146. The implied warranty of results advocated in this article retains a notion of fault, unlike strict products liability. However, this is done only to allow a practical application of implied warranty to service transactions. The focus of this warranty standard is on results and not the standard of care. The negligence-foreseeability limitations on liability are rejected for a higher standard of liability. Thus, producing cause and not proximate cause should be the legal test for causation in service transactions involving the implied warranty of results.
will be taken up in the next section. The second limitation requires that of all consumer expectations for results, only those that are reasonable should be accorded protection. This section analyzes the latter limitation on expectations for results, that of reasonableness.

The test for reasonable expectations should take into account the entire representational context surrounding the service transaction. This includes, to the extent possible, determining what promises, assurances, messages and images were present during the transactional period that were likely to have caused the development of expectations in the consumer. The court should view the transaction from the point of view of the consumer, thereby reflecting the one-way flow of information from service-provider to consumer. Those expectations of result that would objectively be expected by a consumer in light of the representational context should be deemed reasonable.

Application of the test for the reasonableness of consumer expectations will necessarily require the development of an objective standard against which the expectations of individual consumers will be compared. It is important that this standard not set a level of intelligence or care so high that it would deny protection to the uneducated or gullible. Unless the circumstances clearly warrant a different conclusion, the test for the reasonableness of expectations should protect those expectations for results that would be held by "the ignorant, the unthinking, and the credulous." Thus, a jury should be warranted in finding that a consumer reasonably expected that his mechanic would install a rebuilt carburetor in his car in a manner that would not cause an accident (keeping in mind that the limitation dealt with here is one of reasonably expected results, not achievable results). It would probably not be reasonable for the consumer to expect his four cylinder engine to suddenly perform like an eight cylinder. Similarly, a consumer would be reasonable in expecting the installation of a solar heating system in his home to result in an adequate supply of heat, but he would not necessarily be reasonable in expecting his heating bill to be cut in half.

148. See text accompanying notes 147-49 infra.
149. See text accompanying notes 9-26 supra.
150. See text accompanying notes 27-29 supra.
If There Was Available To the Service-Provider a Technique Or Knowledge Sufficient To Accomplish the Expected Product Performance

This section illustrates the last element necessary for recovery. It provides a second limitation of consumer expectations: the consumer must prove the expected result was achievable. This element represents the heart and substance of the service-provider's warranty. He impliedly warrants that in providing the service he will utilize all the knowledge and techniques available to him to achieve reasonably expected results. If the consumer can prove that the failure to achieve a reasonably expected result was accompanied by the service-provider's failure to utilize all knowledge or techniques that might have accomplished the result, this element will be satisfied.

By incorporating this element, the implied warranty advocated by this article does not represent "liability without fault". Rather, it tempers a result-oriented focus with a type of fault analysis. It is impossible to allow for the complexity factor involved in providing a service and still retain a fully result-oriented focus. The negligence standard, however, should no longer provide the measure of fault. It should not matter whether the technique or knowledge not utilized was reasonably overlooked. The test for fault should focus only upon whether it was available to the service-provider. As a corollary, it should not matter whether the technique or knowledge was utilized by 95% or just 5% of all service-providers in the industry. What should matter is availability. The existence of a technique or knowledge which may accomplish a reasonably expected result allows the law, as a matter of consumer protection policy, to presume that it will be utilized. In virtually all cases, existence of the available technique or knowledge should be a jury question.

This shifting of the standard of liability is justified as a judicial response to the inability of consumers to protect their interests in service transactions. No longer would a service-provider be required only to use reasonable care. He would now be required to be as accurate in providing a service as contemporary knowledge in

151. This element sets a standard which requires the service-provider to provide the best service that he can, in the light of available techniques and knowledge. Thus, the test for implied warranty replaces industry custom with this higher standard. The importance of consumer protection policy lays the foundation for this alteration in the standard of liability. See text accompanying notes 97-109 supra.
the industry allowed. This element would encourage service-providers to focus their attention on expected results instead of on reasonable care, thus promoting disclosures to the consumer in the result-oriented terms which lead consumers to procure services. This element also would encourage service-providers to keep abreast of the latest discoveries and advances in knowledge within their industry.

The most significant feature of this element is that it allows the range of results impliedly warranted by a service-provider to narrow as the number of variables outside his control increases. This accounting for complexity can be illustrated by application of the implied warranty to three services commonly provided by attorneys. Ranging in descending order of complexity, they are: litigating a case; drafting a will; and rendering an abstract of title. A consumer's reasonable expectations for results from the services would include, respectively: a victorious outcome to the litigation; an orderly transfer of property to intended beneficiaries; and an accurate appraisal of the extent to which title is clouded.

The practice of litigation involves many variables beyond the control of an attorney. The most obvious involve unpredictable jury findings and court rulings. Although the attorney has a direct influence on how these result, it can hardly be said that there is a technique or knowledge available in the legal industry that might assure beforehand that litigation will be victorious. Although it would be a question for the jury, it is hard to imagine an attorney being held to impliedly warrant a positive outcome to litigation. The flexibility of this element, however, would allow a jury to find, for example, that a more specific implied warranty was made by the attorney that he would utilize all available theories of recovery in attempting to be victorious in litigation.

The drafting of a will involves less variables beyond the control of an attorney. Some of the variables involve complying with the rules against perpetuities and restraints on alienation, fulfilling the elements of testamentary capacity and intent, procuring a sufficient number of qualified witnesses and meeting all the procedural requirements of the probate court. Although many wills fail to

152. One commentary suggests that the complexity in litigation and other services such as medical treatment may be overstated. Comment, Extending Implied Warranties, supra note 28, at 405.

153. For example, a jury might find that an attorney impliedly warranted he would utilize all available theories of recovery in an attempt to prevail in court.
achieve the intended result of passing property to the specified beneficiaries, it is not difficult to imagine a jury finding an implied warranty that this result will be accomplished. An attorney is usually not pressed for time in drawing a will. He has all the comforts of his office including form books. He has time to confer with a local expert if he runs into a problem not covered by the form book. Furthermore, as complex as the rule against perpetuities is, it can hardly be said that there is not sufficient knowledge in the legal industry to assure compliance with the rule. Such a warranty would not be unjust in light of the specificity of results intended by the parties and the message of competence imparted to a consumer by a person calling himself an “attorney.” Of course, a jury finding of implied warranty is not automatic. If the result could not be achieved, no warranty would be implied.

In regard to abstracting of titles, to the extent that this involves merely checking the record files, there is virtually no variable affecting results beyond the control of the attorney. Thus, it would be rare that an attorney did not impliedly warrant the accuracy of an abstract of title.

Other examples of service transactions further illustrate the operation of the complexity factor. Since knowledge exists to accurately perform most automobile repair services, implied warranties in such transactions will be found frequently by juries. In comparison, it will likely be rare that a doctor impliedly warrants a cure from medical treatment, because the variable of individual patient reaction to medical treatment is likely to be beyond the comprehension of the medical industry. It cannot be said, however, that knowledge of the range of available forms of treatment is nonexistent. Thus, in most cases, a doctor should be held to impliedly warrant his utilization of all available treatments to accomplish a cure.

To prove this element, the consumer would introduce evidence showing that at the time the service was provided it was possible to achieve the result reasonably expected. This evidence could be a specific available technique which was not utilized or a more general failure to use available knowledge. For example, the failure of a doctor to accurately diagnose a disease in his patient could be linked to either the doctor's failure to use a particular available test or to his general failure to recognize the condition from test data. Similarly, the failure of a mechanic to accurately install a carburetor could be linked to his failure to use an available technique for testing its installation or to a failure to attach a neces-
Toward an Implied Warranty of Results in Service Transactions—Application

To facilitate application of implied warranties, the following sections present a categorization of service transactions on the basis of their controlling characteristics. The implied warranty of "product performance" is created especially to apply to category one service transactions. The other categories do not focus on product performance, but rather on a result or results reasonably expected from the service. It should be noted, however, that the four categories do not represent hard and fast analytical differences.

Category One Services

Category one services can be measured for quality in terms of the performance of the product into which they are incorporated. The service, in effect, becomes the product. Category one services include automobile and other product repair services, product modification services such as waterproofing and chroming, and other services which derive a function in relation to some previously existing product, such as product-testing services.\(^1\)

The services in this category, unlike those in the remaining three categories, carry a difficult burden of proving causation of injury or loss. This difficult burden results because category one services are integrated into and actually become part of an already existing product. Thus, it is not sufficient merely to prove that product performance in violation of reasonable consumer expectations resulted after the product was serviced. The violation of expectations caused by poor product performance must be linked causally to the failure of the service-provider to utilize knowledge or a technique sufficient to result in adequate product performance.

Measuring consumer expectations by the performance of a product is not new. The Uniform Commercial Code and Restatement (Second) of Torts § 402A measure quality in consumer product transactions in terms of product performance. The UCC requires

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1. This article takes an expanded and untraditional view of what a "product" is. See text accompanying notes 172-92 infra. As will be seen, not all products can be brought to the service-provider.
that a product be at least “fit for the ordinary purposes.” Section 402A requires that a product not perform so as to violate the expectations of the ordinary consumer. Both reject the negligence standard with its focus on the customs and ordinary care within an industry.

By utilizing product performance tests, both the UCC and Section 402A have laid the groundwork for measuring the quality of all product-related services by the resulting product performance. These two promulgations have already substituted a product performance test in place of negligence for many services. Because of the interwoven relationship of services and products, it was impossible for the UCC and Section 402A to eliminate negligence from the product standard of liability without affecting the standard applied to services. All the services that go into a product prior to its sale, designing, manufacturing, transporting, preparation for sale, etc., are currently measured for quality in terms of product performance. Similarly, any post-sale services provided by the product seller in order to keep the product merchantable are currently measured for quality by the product’s performance. Thus, the test for service quality proposed in category one is not new. It merely represents an extension of a standard already applied by the UCC and Section 402A to many product-related services.

Several cases indicate that a product performance test for services has already been accepted by some courts. In Realmutto v. Straub Motors, Inc., the defendant, a used car dealer, improperly installed a rebuilt carburetor in the plaintiff’s car. The carburetor, as installed, caused uncontrollable acceleration resulting in an accident. Citing the policy basis for strict liability the court held:

[W]e are of the view that a used car dealer ought to be subject to strict liability in tort with respect to a mishap resulting from any defective work, repairs or replacement he has done or made on the vehicle before the sale. . . .

Another case involving similar facts reached a similar result by the

156. Strict products liability applies when a product is sold “in a condition not contempl- plated by the ultimate consumer, which will be unreasonably dangerous to him.” Section 402A, comment g.
158. Id. at 344-45, 322 A.2d 440.
use of implied warranty.\textsuperscript{159} In a case involving the defective repair of a grinding wheel, the court cited policy factors as the basis for allowing a strict liability instruction.\textsuperscript{160} The court eventually applied strict liability on traditional product liability grounds. It recognized, however, the broader issue regarding application of strict liability to repairs and suggested its viability on policy grounds.\textsuperscript{161}

The heavy reliance placed on policy by these courts is justifiable in view of the consumer’s inability to protect his interests in service transactions. Application of the implied warranty test suggested in this article, however, need not be based wholly on policy because fault is not completely eliminated from the test.

The implied warranty test can be illustrated by its application to the facts in the \textit{Realmutto} case cited above.\textsuperscript{162} There should be no issue over the violation of reasonable consumer expectations in \textit{Realmutto}. It is normal for a consumer to expect services to be performed on his car so as not to render it unsafe to drive. Furthermore, this violation of reasonable expectations led to an adverse effect on the consumer and damage to himself and his automobile. The most difficult element for the consumer to establish would most likely be producing cause. The consumer would have to secure a finding that the installation of the carburetor was “an efficient, exciting, or contributing cause, which in a natural sequence produced” the violation of his reasonable expectations.\textsuperscript{163} Then, he would recover his damages if he could establish that there was available to the mechanic a technique or knowledge sufficient to allow accurate installation of the carburetor.

A fact situation involving only economic loss arose in the case of \textit{Aegis Productions Inc. v. Arriflex Corp. of America}.\textsuperscript{164} In that case, the plaintiff alleged breach of implied warranty for the failure to properly repair a camera. The defendant diagnosed the cause of the camera’s poor performance to be a defective timing device. After several attempts at repairing the camera, the defendant assured the consumer that his camera was repaired. It was unfortunate for the consumer that the timing device only appeared to be synchro-

\textsuperscript{161} \textit{Id.} at 246-47, 111 Cal. Rptr. at 538-39.\textsuperscript{1}
\textsuperscript{162} See notes 155-56 supra.
\textsuperscript{163} Since the focus of the implied warranty of results is on reasonable consumer expectations, the test for producing cause inquires whether rendition of the service caused a violation of reasonable expectations, not whether it caused the injuries.
nized. His pictures continued to be spoiled by the camera after being repaired. In court, the consumer was unable to prove negligence by the defendant in providing the repair service. Citing the traditional rule that implied warranties do not apply to services the court denied recovery of the service fees.

Under the analysis proposed here, the result might have been a recovery for the consumer. Of the range of consumer expectations connected with the operation of a camera, one of the most basic is that it will take acceptable quality photographs. Therefore, such an expectation should be found reasonable. If the plaintiff could prove that the defective timing device was the cause of poor camera performance, the failure to repair this device adequately would be the producing cause of the violation of the consumer's reasonable expectations. Finally, if the consumer could prove that sufficient knowledge was available to the service-provider to enable him both to determine that the timing device was the cause of poor pictures and to repair the device, a prima facie case for breach of warranty would have been established.

A service component analysis can facilitate application of implied warranty to product performance situations such as that in Aegis. A defect can exist in one or more of the components. The first component involves analysis of the problem to ascertain its cause. Thus, if a consumer's car pulls to the left when the brakes are applied, a mechanic hired to correct the problem will first be required to determine what causes the car to pull to the left. If the mechanic determines that the cause is a worn brake lining he must then select or fabricate a solution to the problem. This constitutes the second component of the service. The most logical solution would be to replace the brake lining, but if it is possible to cure the problem with some minor adjustment this would represent an alternative solution. The third component involves application of the solution, i.e., replacing the brake lining or making the adjustment. If the car continued to pull to the left after servicing and this caused an accident, the consumer would have to causally link one or more of these service components to the accident to satisfy the producing cause element. The consumer could causally link the accident to a defect in the first component

165. The component analysis was developed in Greenfield, supra note 19, at 697.
166. This component analysis can also extend outside of category one to include, for example, medical services. See text accompanying note 216 infra.
of the service by proving that the real source of the pulling to the left was a bent frame. Causation to service component two would be established if, instead of replacing the defective brake lining, the mechanic mistakenly assumed a minor adjustment would suffice. Causation to service component three would be established if it were proved that the wrong-sized brake lining was installed.

Once the consumer causally linked a defective service component to the violation of his reasonable expectations for product performance, a prima facie case could be established upon proof that a technique or knowledge was available that would have enabled that component of the service to be rendered accurately. The technique or knowledge element would be satisfied with regard to component one if it were possible to determine that the cause of the problem was a bent frame even though 95% of the time the cause is a worn brake lining. The element would be satisfied regarding component two if it were possible to determine that a minor adjustment would be inadequate even though virtually all mechanics would make the minor adjustment. The element would be satisfied regarding component three if it were possible to select the correct-sized lining, regardless of ordinary care.

The case of McCool v. Hoover Equip. Co.,167 represents a variation in the type of service that can be measured by a product performance warranty. The plaintiff in that case was in the business of selling second-hand crankshafts. The defendant was in the business of chroming used crankshafts and was hired by the plaintiff to apply chrome to several of the plaintiff’s crankshafts. After the chroming service was completed all of the crankshafts failed in short order. In his complaint the plaintiff did not allege negligence. The court found for the plaintiff nonetheless, holding that there was no reason for implied warranties to be limited to the sale of goods.168 The court emphasized the plaintiff’s necessary reliance on the defendant and the defendant’s representations of competence, factors which suggest the appropriateness of a product performance warranty.169 It appears from the facts that an improper application of chrome was the producing cause of the failure of the crankshafts to perform as reasonably expected by the consumer. If the consumer was able to prove that there was available to the defendant some technique for applying chrome to this type of crankshafts, a prima facie case could be established.

168. Id. at 958.
169. Id. at 958-9.
shaft without causing it to malfunction, there would be no reason to deny a recovery of damages to the consumer. In light of the lack of complexity involved in many service transactions, such as in the McCool case, consumer recoveries should not be difficult in such cases absent unusual circumstances.

Finally, the case of Hanberry v. Hearst Corp., serves to demonstrate another possible application of the product performance warranty. In that case, the defendant supplied the services of testing products for quality and certifying those of high quality. As publisher of Good Housekeeping magazine, the defendant had a good reputation for competence in evaluating the quality of products. If the facts of that case had been that the defendant's product certification was the inducement for a consumer purchasing a defective product, the implied warranty doctrine might provide a remedy to the consumer. The element for adverse effect would entail examination of the interests protected and ignore any lack of privity between the consumer and the product certifier. Similarly, recovery would not be barred due to the lack of a fee paid by the consumer to the product certifier. It would be irrelevant who bought the magazine containing the product description as long as the plaintiff was able to establish that the defendant's certifying service was the producing cause of the purchase. If the consumer could prove that there was a method of testing available that would have exposed the defect, recovery would be allowed.

Because of the product-related nature of the services in category one, the measure of product performance provides a logical basis for the application to these services of implied warranty. The test already applied by the UCC and Section 402A of the Restatement can be expanded in logical fashion to cover all the services in category one. The warranty, as set out in this section, comports with consumer protection policy and provides better protection for consumer expectations than the negligence doctrine.

Category Two Services

The services in category two are those which result in the functional equivalent of a "product." As contemplated by this analysis, the term "product" denotes a creation with specific functions which can be measured in terms of consumer expectations. The

170. Of course, if there was no such technique available, the failure to make this disclosure would constitute a deceptive trade practice. See text accompanying notes 267-68 infra.
controlling question in evaluating category two services is: How well does the product perform its intended functions? It is also central to this category of services that the term "product" be expanded, beyond traditional notions of what a product is, to include all creations with specific intended functions.

Included in this category are services resulting in "products" such as homes, heating systems, photographs, rain gutters, septic tanks, paint jobs, wills, architectural plans and specifications, IRS tax returns (prepared for a fee), contracts and title abstracts. These products are created by the service-provider to perform functions which "are mutually known and intended" by the parties to the transaction. Thus, a heating system is created to provide adequate heat; a photograph is produced to adequately recreate a visual scene on paper; a will is created to effect the orderly transfer of a person's property at his death; and a title abstract is created to exhibit the extent of encumbrances upon a piece of property. These services are unlike category one services in that the latter are incorporated into a larger product and manifest their functional value only in terms of the performance of that product. While category one service-providers have only partial input into an already existing and functioning product, category two service-providers create a new product.

As was the case with category one service transactions, the logical basis for implied warranty in category two is established by the UCC warranty provisions and Restatement Section 402A. These two promulgations recognize the existence of products with intended functions and measure the quality of such products by asking how well the products perform their functions. Although the term "product," as contemplated in category two is much broader than that contemplated by the UCC warranty provisions and Section 402A, the justifications for those laws apply with the same force to the category two analysis. It is fundamental to this category of services that by altering its focus, a court can change almost any service transaction into a product transaction. For example, the building of a home was once considered to be a service and subject only to the negligence doctrine. Now the building of a

172. Thus, in order to comport with UCC warranty standards, cars, dishwashers, shoes and other products must function so as to be "fit for their ordinary purposes." UCC § 2-314. Similarly, these products must function in a manner that does not cause physical damage to any person or property. Section 402A. It is the thesis of category two that this functional analysis can be extended to any "product" created to perform a function.
home is considered to yield a product which is measured for quality by the implied warranty doctrine.\textsuperscript{173} A similar shift has occurred with regard to the maintenance of rented dwellings at a level of habitability.\textsuperscript{174}

The application of the implied warranty to a category two service can be illustrated by various transactions resulting in the installation of wiring into a dwelling. When wiring is installed in a new home prior to sale, the wiring itself is considered to be a product.\textsuperscript{175} It has various functions which include providing electricity to the various parts of the home in an efficient and safe manner. If the wiring system fails to supply electricity or does so in a dangerous manner, it is defective and will cause a breach of the implied warranty of habitability of the house. The quality of the wiring system is evaluated as a product in terms of its compliance with the inhabitants' reasonable expectations for habitability. A similar view is taken of the wiring in a dwelling leased for occupancy.\textsuperscript{176} Reasonable care on the part of the contractor in designing and installing the system plays no part in determining the quality of the product. If the wiring does not perform in a manner reasonably expected by the tenant, the tenant can recover damages for breach of implied warranty.

On the other hand, if a contractor installs a wiring system in a home already in existence, the system is not treated as a product, but merely as the result of a service.\textsuperscript{177} The illogical result is that the standard of care used in installing the system is the measure of quality for the wiring. The system as a product, that is, in terms of its expected functions, is ignored. Thus, when a consumer's home burns down because of a faulty wiring system, implied warranty is available in some cases but not in others. The analysis of this article extends implied warranty to include all products.

In \textit{Aced v. Hobbs-Sesack Plumbing Co.},\textsuperscript{178} the court demonstrated the efficacy of an expanded product analysis. In that case, the plaintiff-consumer contracted with the defendant to install a

\textsuperscript{173} Humber v. Morton, 426 S.W.2d 554 (Tex. 1968); Greenfield, \textit{supra} note 19, at 676.

\textsuperscript{174} \textit{E.g.}, Kamarath v. Bennett, 568 S.W.2d 658 (Tex. 1978).

\textsuperscript{175} This is because the sale of a new home is held by most courts to entail an implied warranty of habitability of the home and all its parts. \textit{See} note 173 \textit{supra}.

\textsuperscript{176} This is true in jurisdictions that recognize an implied warranty of habitability in the rental of a dwelling. \textit{See} note 174 \textit{supra}.

\textsuperscript{177} Thus, implied warranty is usually not extended beyond the sale and leasing of dwellings.

\textsuperscript{178} 55 Cal.2d 573, 12 Cal. Rptr. 257, 360 P.2d 897 (1961).
radiant heating system in a concrete slab floor. Within several years of installation the system became so defective that it had to be replaced. The consumer was not able to prove that the system was negligently installed. The only evidence introduced was that the system did not provide the expected heat and that it was necessary to have a new system installed in its place to accomplish that result. As a preliminary matter, the court found that the implied warranty of merchantability of the Uniform Sales Act\(^\text{179}\) did not apply because the contract contemplated a service for labor and materials.\(^\text{180}\) The court then held, however, that, "similar warranties may be implied in other contracts not governed by such statutory provisions when the contracts are of such a nature that the implication is justified."\(^\text{181}\)

The *Aced* court concluded that there was an implied warranty as to both the workmanship and the materials aspects of the transaction and that the warranty required that the system "be fit for its intended uses."\(^\text{182}\) Thus, by focusing on the results to be achieved by the heating system and implying a warranty covering all aspects of the transaction, the court treated the system as a product in and of itself. The care used by the service-provider in creating the product was of no moment as the court concentrated on the consumer's expectations of results to be obtained from the heating system. By extending the doctrine of implied warranty to guarantee the intended result that the heating system would heat adequately, the court in *Aced* was implicitly recognizing the functional nature of that product. It recognized that the resultant heating system could be judged by how well it performed its intended functions, just as could a car, a bowl of soup, a permanent wave solution or a bottle of medicine.

The warranty advocated in this article would first have asked if the heating system performed in a manner that violated the consumer's expectations for results to be achieved by its installation. Since the expectations in *Aced* were in terms of an adequate supply of heat, it would seem obvious that the expectations were violated. The reasonableness of this expectation also seems easily established, since that was the primary function for which the system was created. No facts are apparent which would break the

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179. This Act was the precursor of the UCC.
180. 55 Cal.2d at 580-82, 12 Cal. Rptr. at 262, 360 P.2d at 902.
181. *Id.* at 582, 12 Cal. Rptr. at 262, 360 P.2d at 902.
182. *Id.*
chain of causation between rendition of the service and the violation of reasonable consumer expectations. The producing cause, thus, appears to be the installation of an inadequate system.

The final issue would be whether knowledge was available to the service-provider that would have enabled him to design and install a heating system that heated adequately. Since installation of properly functioning heating systems constitutes the main purpose of the industry, it would require the existence of an unusual set of facts for the jury to find that achievement of the contemplated result was not within the control of the service-provider.

The term product has been expanded in Illinois to include an automobile paint job. In Jeffreys v. Hickman,\(^{183}\) the plaintiff brought his car to the defendant to have it painted. Within a few months after completion, the paint began to crack and peel. The plaintiff was not able to prove the exact cause of failure of the paint job. Thus, he apparently was unable to prove negligence. The court did not, however, concern itself with the care exercised in rendering the service. Instead it took a functional approach to the product, the resulting paint job, and held that the evidence was sufficient to warrant the conclusion that there was an implied warranty for the accomplishment of a known purpose: a paint coat which would be serviceable for a reasonable period of time.\(^{184}\) Because the service-provider failed to provide services which accomplished the mutually known intended purpose, the consumer was able to recover damages for breach of implied warranty. Once again, this article provides a useful framework for conceptualizing the implied warranty. The frustration of reasonable consumer expectations for a serviceable paint job seems clear. Similarly, the producing cause of the frustration of expectations appears to be the procurement of the painting services. Additionally, the expectation that the paint job would retain its integrity beyond several months seems to be reasonable. The closest question of fact concerns whether or not there was available to the painter a technique or knowledge that would enable him to perform a paint job that lasted beyond several months. The variables would include the climatic conditions in which the car is driven or type of paint job purchased. The ever present salt on Chicago streets during the winter or the hot and dry Phoenix summers would cause cracking and peeling in a shorter time than would conditions in other parts

\(^{183}\) 132 Ill. App. 2d 272, 269 N.E.2d 110 (1971).

\(^{184}\) Id. at 272, 269 N.E.2d at 111.
of the country. Similarly, it is possible that the automobile industry is not capable of creating a metallic paint job that lasts as long as a standard paint job. These limitations on the painter's capabilities would be the ultimate jury consideration in determining whether or not there existed an implied warranty that the paint job would last beyond several months. Expansion of the term product to include other products with tangible or sensible functions such as photographs, raingutters, septic tanks, etc., should follow logically from the analysis presented in the foregoing paragraphs.

There are, however, other "products" to which these principles apply which are not tangible and do not perform sensible functions. These include, for example, wills, contracts, abstracts of title and engineering plans and specifications. These products cannot be measured for quality by the senses as can heating systems and paint jobs. In a manner similar to tangible products, however, they can be analyzed for quality in terms of how well they perform their intended functions. When there is an intangible but "mutually known intended purpose" for a product resulting from services, with a concommitant lack of consumer bargaining power and necessary consumer reliance on the service-provider, an implied warranty framework based on public policy is appropriate. Significantly, the consumer reliance factor may be even greater in services resulting in non-tangible products because of the specialized training these services frequently require. Since the implied warranty doctrine advocated here is flexible enough to allow for any increased complexity in achieving intended results, implied warranty should set the standard of quality for products with intangible functions.

The case of Broyles v. Brown Eng'r Co., 185 illustrates a functional approach to an intangible product. The plaintiffs in Broyles had hired the defendant, an incorporated group of civil engineers, to design plans and specifications for drainage of a proposed subdivision. The complaint alleged "that the defendant, being informed of the nature of the project and the need of civil engineering services to draw plans and specifications for adequate drainage of a tract of land to be developed, accepted employment for the rendition of such engineering services." 186 The complaint further alleged that "the drainage areas depicted on the plans submitted by the defendant were incorrect and did not show adequate storm drain-
age easements where necessary" and that the plans were inadequate for their intended purpose, thus, leading to a system that caused periodic flooding. 187

Recognizing the result-oriented focus of the complaint, the court summed up the effect of its allegations:

Neither negligence nor the want of reasonable skill and diligence in the preparation of the plans was charged in the complaint. A breach of implied warranty of adequate results is the gravamen of each count. Plaintiffs take the position that an implied warranty exists and it casts upon the defendant the obligation of a guarantor or insurer of the plans for the purpose in view and of which defendant had knowledge when it accepted employment. 188

The court found the warranty to be extant and held that a right to recovery had been alleged. 189 This is significant not only as a statement of judicial recognition of an implied warranty of results in service transactions, but also because the warranty was extended to protect buyers who were not purchasing for "personal, family, or household" use. 190 Furthermore, the language used left no doubt that the court was adopting a functional product approach to the creation of the drainage plans:

We are of the opinion that . . . the defendant impliedly warranted the sufficiency and adequacy of the plans and specifications to reasonably accomplish the purpose for which they were intended. . . . We are further of the opinion that an express warranty was not necessary to charge the defendant with becoming an insurer or guarantor that such plans and specifications would reasonably accomplish the purposes in view. 191

Stressing, in effect, both the reasonable expectations of the consumers and the understanding of the service-provider, the court continued:

The defendant professed to be expert or held itself out to be, and certainly was charged with notice that correct and adequate plans and specifications were essential for adequate drainage of rain water from the area of land to be converted. Common under-

187. Id.
188. Id. at 37, 151 So.2d at 769-70.
189. Id. at 38, 151 So.2d at 770.
190. Thus, this court holds that implied warranty is appropriate to business buyers of services. See text accompanying notes 131-33 supra.
standing and the ordinary course of dealing would speak up and
justify a reasonable conclusion, as we view all the circumstances
and the nature of the contract, that the parties mutually intended
an agreement of guaranty as to the sufficiency and adequacy of
the plans and specifications to accomplish proper and adequate
drainage.192

The court's heavy emphasis on the specific purposes of the
plans, which were contemplated by both sides of the transaction,
parallels the approach advocated for this category of services. The
plans designed by the defendant constituted a product created
specifically to serve as blueprints for a drainage system. As the
court recognized in overruling the defendant's demurrers, leaving
the negligence doctrine as a sole remedy for recovery would frus-
trate the plaintiff's reasonable expectations of result. Application
of an implied warranty of results could provide protection for the
plaintiff's reasonable expectations while accounting for the com-
plexity involved in the creation of the drainage plans. Thus, the
jury could have been able to find that the procurement of the engi-
neering services was the producing cause of the violation of the
plaintiff's reasonable expectations for blueprints of an adequate
drainage system. If that finding had occurred, the jury would have
had to inquire whether the engineers used all available techniques
and knowledge to accomplish the reasonably expected result. Upon
a "yes" finding the plaintiff would have been able to recover his
damages.

A will that failed to operate as intended would give rise to an
analysis similar to that of Broyles. The message of competence
sent by the attorney to the consumer, the specificity of the mutu-
ally intended result, the consumer's lack of bargaining power and
necessary reliance all justify an implied warranty that the attorney
will utilize all available knowledge to assure that all property
passes as intended. When such a result is not accomplished, the
jury should be allowed to weigh the factors that might cause the
unintended result and allocate liability on that basis. It would be
important, for example, to weigh the risks of an unfriendly probate
judge against the wealth of knowledge and experience available to
an attorney drafting a will.

Extending this analysis of warranty applications, a jury might be
justified in finding that an accountant impliedly warranted that he

192. Id. at 38, 151 So.2d at 771.
would use all available knowledge in preparing a tax return that utilized all available tax breaks and complied with the law; that an attorney would create a contract sufficient to assure the proper flow of consideration; that a title company would prepare an abstract that would indicate all clouds on title; and that a termite inspector would issue a document accurately reflecting the extent of termite infestation in a home. Expansion of the term "product" to include all services resulting in a creation with a mutually intended function is logical and just. It is the functional aspect of each product in this category which facilitates an implied warranty analysis. Unless the jury were to find that the failure of a product to achieve its mutually intended purposes was caused by factors beyond the control of the service-provider, the damaged consumer should be allowed to recover his damages.

Category Three Services

The services in this category and the next do not become incorporated into a product, nor do they result in a functionally independent product. Categories three and four thus include all the services that are not grouped in categories one and two. Categories three and four could be combined into one category. They are, however, kept separate in this analysis for two reasons. First, courts have developed a distinction between services deemed "mechanical" or "administrative" and those deemed "judgmental."193 In this analysis, most of the former are in category three, most of the latter in category four. Second, the move from category three through category four illustrates a spectrum upon which the complexity factor increases. One of the main purposes of this article is to develop a test for implied warranty that allows for the complexity factor; separating the categories allows this flexibility to be emphasized.

Category three includes services that tend to be mechanical and administrative.194 As a result, courts may be more willing to use

193. Id. at 38-39, 151 So.2d at 771-72. Services such as those performed by lawyers and doctors tend to be viewed as complex, whereas some related services, such as the transfusion of blood, are considered to be mechanical and not complex. Cunningham v. MacNeal Mem. Hosp., 47 Ill. 2d 443, 266 N.E.2d 897 (1970).

194. In this category, a mechanical or administrative service may include some services performed by doctors and lawyers. A service is mechanical or uncomplex when the range of results expected from the service is within the range of results achievable by the service-provider. This would include, for example, the administering of an injection by a doctor or the filling of most cavities by a dentist.
implied warranty in category three services than in category four. In terms of this analysis, category three includes those services in which the range of achievable results should be broad enough to include most all reasonably expected results. Separation of these services into a category of their own, however, is not an indication that they should be resolved as a matter of law. Except for the occasional summary judgment, the existence and scope of implied warranty should be questions of fact just as in the other categories.

Recognition of the mechanical nature of a service is probably most well known in the blood transfusion cases. Those cases usually involve the transfusion of impure blood or blood of the wrong type into the consumer-plaintiff. One court articulated three reasons for applying strict liability to “mechanical and administrative” hospital services: (1) the serious potential consequences of defective hospital services; (2) the inability of the layperson to control or recognize the defective service; and (3) the necessity of providing doctors with accurate and complete information. Similar reasoning was utilized in Mauran v. Mary Fletcher Hosp., in which it was suggested that the implied warranty doctrine might be applicable to a fact situation in which a hospital employee mistakenly injected insulin instead of anesthesia into a patient.

A trend was noticed by the court in Mauran, indicating a judicial recognition of the lack of complexity involved in these services. This lack of complexity is a characteristic common to all category three services. It is unfortunate that courts have been too willing to exclude all “professional” services from the “mechanical and administrative” grouping they have developed. In fact, a large number of legal, medical, architectural and other services are truly uncomplex and should not be exempted categorically from the implied warranty test advocated by this article. Some of the services that fall into category three, that is, where achievable results almost always include those reasonably expected, are as follows: those rendered by an employment agency that merely matches opportunities with available talent; a dentist filling cavities; a doc-

198. Id. at 301.
199. A jury might find, for example, that a reasonable expectation in such a case was that if employment opportunities for a person with the consumer’s talents are available, the
The attorney drafting articles of incorporation or the termite inspector issuing a report on the extent of termite infestation in a structure might be put into category two. However, the category is not important in such borderline cases because the implied warranty test applied will be the same.
the redistributive policies behind implied warranty and strict liability, allowing recoveries in certain circumstances may be justified even when no implied warranty has been breached.\textsuperscript{201} Courts unwilling to completely eliminate the concept of "defect" need look no further than the implied warranty test advocated here in allocating liability. The test's focus on whether information was available assumes that defendants will pay for bad results only when good results were attainable.

A number of authorities have encouraged courts to venture beyond traditional negligence liability in cases involving category four services.\textsuperscript{202} A small minority of courts have taken that step and others have indicated a willingness to do so at some time in the future.\textsuperscript{203}

In \textit{Buckeye Union Fire Insurance Co. v. Detroit Edison Co.},\textsuperscript{204} the defendant was sued for the defective supplying of electricity which caused a fire destroying the plaintiff's building. The defendant argued that electricity is not a good and therefore should not be subject to implied warranties. The Michigan Court of Appeals rejected that distinction and held:

\begin{quote}
[T]he implied warranties, . . . should apply to the sale of services as well as to the sale of goods. We see no reason upon which a logical distinction can be based, especially when, as here, we are dealing with the production and sale of a form of energy which under certain circumstances, can be inherently dangerous.\textsuperscript{205}
\end{quote}

The court limited the scope of its decision to the sale of electricity,
prefering to extend implied warranties to service transactions on a case-by-case basis.206 A broad foundation, however, has been established in Michigan for extension of judicial solicitude to protect consumer expectations in service transactions.207

The plaintiff lost in the Buckeye case because he was unable to prove causation. If the plaintiff, however, had been able to secure a finding that procurement of the service of providing electricity was “an efficient, exciting, or contributing cause, which is a natural sequence produced” the fire destroying his building, under this implied warranty analysis he would have then been entitled to a finding from the jury on the availability of a technique or knowledge sufficient to safely supply electricity to his building. If the jury found that adequate means were available to safely supply electricity to the consumer’s building, then a recovery would have been appropriate.

Even in the more difficult and complex area of the rendition of medical services, some justices have indicated a willingness to apply strict liability. In Magrine v. Spector,208 a lengthy dissent criti
cized the majority’s refusal to apply strict liability to a dentist. In that case, the plaintiff was injured when a needle used by the dentist broke off in her mouth. The needle broke due to a latent defect unknown to the dentist. The dissenting justice would have held for the plaintiff regardless of a lack of negligence:

The law of torts should seek to compensate the injured, to encourage safety practices and to distribute losses justly. ... These objectives may be taken to express the needs of justice. In my view these objectives are advanced by granting plaintiff an award in this case. Dentistry as an enterprise should pay its own way. Denying compensation is to require an injured person who bears the loss alone to subsidize the risk-creating activities by which others profit.209

The dissent also noted that the availability of insurance could cushion the blow of a judgment against the dentist.

In the case of Helling v. Carey,210 the plaintiff sued ophthalmologists for the failure to diagnose and treat a glaucoma condition
which eventually resulted in her blindness. The plaintiff contended that, despite her young age, the defendants were negligent in failing to give her a pressure test by which the condition could have been discovered. The defendants argued that the standard of the profession, which does not require the giving of a routine pressure test to persons under the age of forty, was adequate to insulate them from liability for negligence. The court held that “there are precautions so imperative that even their universal disregard will not excuse their omission.”

The court found as a matter of law that the defendants were negligent despite the uncontradicted evidence of the industry standard regarding pressure tests. Thus, although a negligence standard was applied it was not the traditional negligence standard. It fell somewhere between negligence and implied warranty. A concurring judge recognized this and declared that the facts of the case justified a finding of liability without fault, or strict liability.

Although the court’s opinion used negligence terms, the reasoning of the Washington Supreme Court in *Helling* parallels that of the implied warranty test of this article. The plaintiff’s expectation engendered by the defendants’ representations of competence, was that any serious eye diseases she had would be diagnosed by the defendants. Accurate diagnosis of serious eye disease is a logical purpose for which the services of an opthamologist are procured and would therefore constitute a reasonable expectation on the part of the consumer. The failure of the defendants to diagnose the condition was a violation of the consumer’s reasonable expectations. Furthermore, the consumer offered uncontradicted proof that there was available to the defendants a test which would have enabled them to diagnose the condition. Their failure to use the pressure test was the producing cause of the violation of her reasonable expectations. Under the implied warranty analysis, the consumer would likely have been entitled to a summary judgment for the opthamologists’ breach of an implied warranty.

The outcome would be no different if the pressure test had been utilized by or known to only five percent of all opthamologists, so long as the technique was available to the defendants. It is important to keep notions of foreseeability out of the test for availability. The test should not be what a service-provider should have

211. *Id.* at 519, 519 P.2d at 983.
212. *Id.* at 521, 519 P.2d at 984-85.
known was available to him but what in fact was available to him. Similarly, the outcome should be no different even if the pressure test was able to diagnose glaucoma only in five percent of all cases. The focus of implied warranty should not be in terms of general acceptance of a technique in the industry, for that approximates a negligence standard. If it is possible that the pressure test would disclose the existence of glaucoma in any case, the ophthalmologist should impliedly warrant that he will try it. Such application of implied warranty would force doctors to fully evaluate all available techniques and come to an individual decision as to the value of each. The doctor’s decision not to use a technique on a patient would only be justified if there was no possibility that it could aid in diagnosis.

An analytical distinction should be made between cases in which a doctor fails to diagnose and those in which he fails to cure. The shortcoming in the Helling case was a failure to diagnose accurately a condition. It is possible, however, for a doctor to diagnose a condition adequately but fail to treat it properly. Consumers of medical services have reasonable expectations that their conditions will be accurately diagnosed and that once a condition is diagnosed, a cure will be effected. Unlike diagnosis of some diseases, the treatment of virtually all diseases is fraught with great uncertainty and medical science is frequently unable to comprehend the varied reactions of different patients to particular courses of treatment. Thus, a finding of an implied warranty of cure should be a good deal more rare than a finding of an implied warranty of accurate diagnosis. Although the extent of medical knowledge may not justify a warranty of cure in many cases, there is, in effect, a “sub”-implied warranty available to offer some protection for the consumer’s expectation of cure. Thus, a jury could find that a doctor impliedly warranted to utilize all available drugs, medicines, devices and other forms of treatment in an attempt to cure his patient. For example, if a disease has three available forms of treatment that have resulted in cures in the past, a doctor will impliedly warrant to utilize all three treatments in an attempt to cure a patient with that disease. The efficacy of the order of use of the treatments should be determined from the point of view of the consumer’s reasonable expectations. The question would be which treatment could effect the cure with the least amount of unreason-

213. See the component analysis set forth in the text accompanying notes 165-66 supra.
able side-effects or other drawbacks, such as expense. Furthermore, any attempt to place a foreseeability limit on the doctor’s liability for the occurrence of unexpected side-effects is discouraged because that incorporates a negligence standard. As in other cases, the question should be whether or not there was a method of effecting a cure without causing any side-effects. In the rare case that a treatment cures one problem but creates another more severe problem, it is clear that the consumer’s reasonable expectations for result will have been violated.

The winning of litigation by an attorney will probably never by reduced to a technique or knowledge. However, just as the consumer expectation of a cure of disease can include a doctor’s implied warranty that he will utilize all methods of treatment, the concept of “sub”-warranties may be helpful in the case of litigation. Thus, although an attorney cannot warrant the successful outcome of a trial, he can be held to impliedly warrant that he will utilize all available theories of recovery.

Although an extremely broad range of services fall into category four, the flexible test for implied warranty can provide the standard of liability for defects in virtually all of them. Stable-keepers would be required to utilize all available techniques and knowledge to determine whether the horses they rented to the public were safe to ride. The standard of liability would not be whether the stable-keeper used reasonable care in selecting and maintaining a safe horse but whether it was possible to determine that a particular horse was not a safe one. If the consumer can prove his reasonable expectations for a safe horse were violated by a failure of the stable-keeper to determine that the horse was not safe, the consumer should be able to recover his damages if an accurate determination was possible. If a firm specializing in marketing new products and services was hired by an inventor, the firm might impliedly warrant that it would secure needed patents and take advantage of all available markets for the invention. If impure water is furnished to a consumer when it was possible to furnish pure water there would be a breach of implied warranty.

The test for implied warranty illustrated in the previous sections provides a result oriented standard of liability which can be tempered by practicality. Breach of warranty may occur upon the vio-

214. However, an implied warranty of a positive outcome at court might be made, for example, in the case of an uncontested divorce or in an attempt to secure a default judgment.
lation of the consumer’s reasonable expectations for result regardless of reasonable care. However, the range of impliedly warranted results directly decreases as the number of variables outside the control of the service-provider increases. In order to recover for a breach of an implied warranty of results the consumer must prove the following elements:

1. That the rendition of a service resulted in a violation of consumer expectations for results;\(^{215}\)
2. the expectations for results were reasonable;
3. rendition of the service was a producing cause of the violation of reasonable expectations for results;
4. the consumer was adversely affected;
5. there was available to the service-provider a technique or knowledge sufficient to accomplish the reasonably expected results.

The four categorical distinctions between services do not represent hard and fast analytical differences. For example, a termite inspection resulting in a certificate or statement of termite presence to be relied upon could be put into category two or into category three. Similarly, the line separating categories three and four is merely one of degree. Categories three and four could be grouped into one larger category. The categorization of services is indulged in only to demonstrate the differing characteristics of many services which, for equally different reasons, facilitate and justify application of an implied warranty of results.

**THE IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE IS NOT NECESSARY IN CONSUMER SERVICE TRANSACTIONS**

The test for reasonable expectations as advocated in this article eliminates the need for utilization of an implied warranty of fitness for a particular purpose in service transactions.\(^{216}\) In the sale of goods context, the warranty declares that:

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is . . . an implied warranty that the goods shall be fit for such purpose.\(^{217}\)

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215. In the case of category one services the first element would be a breach of the consumer’s expectations for product performance.
216. That warranty is found in § 2-315 of the UCC.
This warranty is unnecessary in service transactions because the test for the reasonableness of expectations would incorporate the entire representational context of the service transaction. In situations when the service-provider has reason to know that the service is procured for a particular result and that the consumer is relying on the service-provider's skill or judgment to achieve that result, a jury should find that an expectation of that result was reasonable. The implied warranty of results would then supply the needed protection. Thus, when a contractor installs a solar heating system in a consumer's home, the representational context might justify a reasonable expectation that the consumer's electricity bill would be reduced by fifty percent. Similarly, given the proper representational context, a consumer may reasonably expect a moving company to complete a cross country move in a day and a half.

APPLICATION OF IMPLIED WARRANTY TO ECONOMIC LOSS—SHIFTING THE RISK OF LOSS TO THE SERVICE CONSUMER

Breach of implied warranty traditionally has been an appropriate vehicle for the recovery of economic losses. A large amount of consumer losses resulting from defective services are solely economic. Because economic losses involve the same violations of consumer expectations as personal injuries and property damage it would contravene consumer protection policy to exclude economic loss from the purview of the implied warranty doctrine. Therefore, the implied warranty of results should extend to economic loss as well as to personal injury and property damage.

Analytically, however, economic loss is distinguishable in at least one respect from personal injury and property damage. That difference concerns the right of the parties to a consumer transaction to shift from service-provider to consumer the risk of a violation of expectations, better known as the risk of loss. The implied warranty of results in service transactions should allow this shifting only in circumstances involving economic loss.

This limited range of shifting to the consumer the risk of a violation of reasonable expectations can be explained as follows. The shifting of the risk of loss in the form of personal injury or property damage should not be allowed. This principle has been recog-

218. See text accompanying notes 148-50 supra.
219. See text accompanying notes 119-21 supra.
220. As applied to the sale of goods, this risk-shifting mechanism is embodied in UCC § 2-316.
nized by the UCC and Restatement 402A.221 Similarly, because freedom of contract does not exist for consumers in consumer service transactions, service-providers should not be allowed to impose upon consumers blanket disclaimers of liability for economic loss. If this were allowed, it would lead to the automatic inclusion of disclaimers in the contract for services and frustrate the standards for service quality set by public policy.

The shifting of risk to consumers should be allowed only when the shifting actually reflects freedom of choice by consumers. This would occur only in situations where there exist several truly alternative service approaches to achieving results. True alternatives would exist only when each alternative reflected meaningful differences in both relative value to the consumer and in the risks of violation of reasonable expectations.

If two approaches to the rendition of a service existed that did not reflect different relative values to the consumer, the consumer would choose the alternative involving the least risk of a violation of his expectations. In that situation, no freedom of choice would exist for the consumer and the two approaches would not constitute true alternatives. Similarly, if the two approaches did not reflect a difference in the risk of a violation of expectations, the consumer would automatically choose the approach which had more relative value to him. The two approaches in this situation also do not present real freedom of choice and would not constitute true alternatives.

Application of the risk shifting mechanism to a situation in which true alternatives do not exist would result in a general waiver of liability and should not be allowed. Furthermore, the shifting of risks to the consumer should be allowed only upon a full and understandable disclosure by the service-provider of the values and the risks involved with each alternative. Once a full disclosure is made, the consumer's reasonable expectations for each alternative would reflect the values and risks involved with each and the consumer would be able to make a meaningful and informed choice.222 The risk of a violation of expectations could then be shifted without violating consumer protection policy.

These principles can be illustrated by the following hypotheticals. A part goes out on the consumer's car causing it to malfunc-

221. Uniform Commercial Code § 2-719(3); Section 402A, comment m.
222. If such a disclosure was not made, the consumer's reasonable expectations would not encompass the risks entailed in choosing the alternative with greater relative value.
tion. He brings the car to a mechanic for repairs in order to enable the car to function properly. The mechanic determines that the defective part is one that serves two functions: it keeps the cooling system functioning and it facilitates starting in cold weather.\textsuperscript{223} The part is located at the bottom of the engine and its replacement would require several hours of labor to remove and reinstall the engine. However, it is possible to bypass the part by connecting portions of the cooling system, which would take only fifteen minutes of labor. Thus, there are two alternative approaches to achieving adequate product performance involving a difference in labor cost of several hundred dollars.

Each alternative also involves different risks in terms of a violation of consumer expectations. Although the bypass alternative would result in a properly functioning cooling system, the car might be difficult to start in cold weather. The other alternative, replacing the part, would assure that the cooling system worked and that the car was not difficult to start in the winter. If the service-provider gave the consumer a full disclosure of the costs and risks of poor car performance involved with each alternative, the shifting of the risk could be accomplished if the consumer chose the less expensive alternative.\textsuperscript{224}

The relative appeal to the consumer of each alternative will not necessarily turn upon their respective costs. The difference may be one of aesthetics. For example, the purchaser of a new car may have a choice between a standard paint job or one with a metallic finish. The latter may be more desirable to the consumer. However, it may also involve a greater risk of cracking and peeling than the standard paint job. If the service-provider gives a full and understandable disclosure to the consumer of the risks involved, the provider should be allowed to shift the risk of cracking and peeling to the consumer when the consumer chooses the metallic paint job.\textsuperscript{225}

This example is also useful to illustrate the result of a failure of

\textsuperscript{223} Such is the role of a “freeze plug” on a 1974 Renault 12 as it was explained to me.

\textsuperscript{224} These were the alternatives I faced when a freeze plug went out on my Renault. I chose the less expensive alternative. However, no explanation of the risks involved with each alternative was made to me. Only after making my own inquiries did I learn that my car would have trouble starting six months later when cold weather set in (Fortunately, four months later my car blew a head gasket and I was able to have a new freeze plug installed at no extra cost).

\textsuperscript{225} However, of course, the service-provider would be required to utilize all available techniques and knowledge in providing the metallic paint job.
the service-provider to make a full and understandable disclosure of risks. Regardless of which alternative he selected, if the consumer was not aware of the relative risks of cracking and peeling, the risk of such a violation of reasonable expectations could not be passed to him by the service-provider, even if the consumer selected the metallic paint job.

APPLICATION OF STATUTE OF LIMITATION AND NOTICE REQUIREMENTS TO IMPLIED WARRANTY ACTIONS

Statutes of limitations and notice requirements will play a part in determining the outcome of a number of warranty cases. Therefore, it is necessary to apply them so as not to frustrate consumer protection policy.

Statutes of limitations are creations of policy, designed to assure fairness to defendants. They promote justice by preventing surprises from the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. However, the policies behind statutes of limitations are deemed not to be inflexible. In Burnett v. New York Cent. R.R., the United States Supreme Court held that the policy frequently may be outweighed when the interests of justice require a vindication of the plaintiff's rights. Thus, to the extent allowed by statute in a given jurisdiction, limitations should be tailored to fit consumer protection policy. Regarding the running of limitations in implied warranty cases, there are two basic concepts which can be affected by the public policy of protecting consumers: 1) the point in time that the statute of limitations begins to run, and 2) the applicable period of limitations.

Under tort law, limitations begin to run when a defect in goods is or reasonably should be discovered. The date of the transaction between the parties is not the controlling consideration. A two-year limitation period traditionally has been applied to tort actions. Traditional contract law, on the other hand, holds that

227. Id. at 428.
limitations begin to run at the time of delivery of the goods\textsuperscript{230} or at the time of rendition of the service.\textsuperscript{231} These dates are focused upon by courts regardless of when a defect in the product or service becomes apparent. When a written contract is involved, a limitations period longer than the two-year tort period is applied.\textsuperscript{232}

Until recently, implied warranty actions for personal injury were uniformly treated as tort actions with the cause of action accruing when the defect was or should have been discovered and lasting for two years.\textsuperscript{233} Implied warranty actions for economic loss were treated as contract actions, with the cause of action accruing when the contract was made and lasting for more than two years.\textsuperscript{234} Several recent cases have been willing, to the extent allowed by statute, to use policy justifications to alter these rules in consumer transactions. In \textit{Morton v. Texas Welding and Mfg. Co.},\textsuperscript{235} the court, after citing the UCC's policy of uniformity in commercial transactions and its mandate to liberally construe UCC provisions, concluded that a cause of action for a breach of implied warranty causing personal injury accrues on the date of injury\textsuperscript{236} and lasts for four years.\textsuperscript{237} In \textit{Aced v. Hobbs-Sesack Plumbing Co.},\textsuperscript{238} the court broadly construed the principle of a warranty relating to a future event\textsuperscript{239} to find a four-year cause of action for breach of an implied warranty of a heating system which did not accrue until leaks were discovered.\textsuperscript{240} Additionally, in \textit{Richman v. Watel},\textsuperscript{241} a four-year cause of action accruing on the date that the damage occurred was held to arise from the breach of an implied warranty of habitability in the sale of a new home.

\textsuperscript{231} Hamilton v. General Motors Corp., 490 F. 2d 223 (1973); Harry Goldstein Realty Co. v. City of Chicago, 306 Ill. App. 556, 29 N.E.2d 283 (1940).
\textsuperscript{235} 408 F. Supp. 7 (S.D. Tex. 1976).
\textsuperscript{236} Id. at 11.
\textsuperscript{237} Id. at 10-11.
\textsuperscript{238} 55 Cal.2d 573, 360 P.2d 897 (1961).
\textsuperscript{239} This is now embodied in UCC § 2-725 (2).
\textsuperscript{240} 55 Cal.2d 583-84, 360 P.2d 903 (1961).
These cases and consumer protection policy support the application in service warranty cases of a contractual period of limitation which accrues only at the time the defectiveness of the service became or should have become apparent to the consumer. To charge a consumer with knowledge of a cause of action before he can be expected to realize he has one is unfair. Moreover, unlike most businesses, the average consumer does not have counsel available to indicate when the consumer's rights have been infringed, nor are consumers often anxious to invest uncertain amounts of time and money to hire a lawyer. In consumer service transactions, limitations should not begin to run until it is or should be apparent to the consumer that a reasonably expected result will not accrue. Public policy should also reflect the fact that consumers frequently tend to procrastinate and "sit on their rights" more than other classifications of persons. Thus, a contractual limitation period is more appropriate in consumer service transactions.

As a corollary, public policy should encourage the most efficient utilization of informal dispute resolving mechanisms. This could lead both to a reduction of court docket backlogs and a quick and inexpensive resolution of consumer problems. Thus, the principle of tolling the running of limitations should be utilized to encourage consumers to file complaints with government and private consumer protection agencies before resorting to a lawyer and the legal system. A consumer actively pursuing a claim or negotiations through the local attorney general's consumer protection office or through a bona fide private consumer protection organization cannot be said to be "sleeping on his rights." Therefore, the running of limitations should be tolled during such periods.

Notice requirements are also creations of policy. They are designed to promote informed resolution of commercial disputes. In product transactions under the UCC, for example, consumers are required to give notice of a defect in the product to their sellers as a prerequisite to the right to recover damages for the defect. The imposition of a notice requirement serves the purpose of letting the seller know a problem exists and gives him an opportunity to cure the defect. It can also serve to promote out of court set-

243. See, e.g., Guerra v. Manchester Terminal Corp., 498 F. 2d 641 (5th Cir. 1974).
244. UCC § 2-607(3)(a).
245. Id., comment 4.
Therefore, in cases involving the rendition of defective services causing solely economic loss a reasonable notice requirement should be applied.\textsuperscript{247}

In certain circumstances, however, notice requirements can be unrealistic and may lead to injustice. In cases when the consumer has suffered personal injury or property damage there is little logic in the imposition of a notice requirement since it is too late to cure the defect. Similarly, any notice requirement imposed upon a consumer who has not dealt directly with the service-provider should be applied with caution. It is possible that the identity of the service-provider will not become apparent to the consumer in time for him to give timely notice. Furthermore, since the giving of notice of a defect is usually effected by the individual consumer prior to hiring a lawyer, the law should not punish a consumer for failing to go immediately to a service-provider with whom he never dealt. It has been recognized that application of notice requirements outside of privity as a prerequisite to recovery of damages can constitute a "booby-trap for the unwary."\textsuperscript{248}

The law of consumer-service transactions should reflect an awareness of the policy basis underlying statutes of limitations and notice requirements. To the extent allowed by statute, these concepts should be tailored to comport with consumer protection policy.

\textbf{Completing the Task of Marketplace Regulation—Effective Utilization of the Unconscionability Doctrine and Deceptive Trade Practices Acts}

The implied warranty doctrine advocated in this article implements the most basic and necessary form of judicial regulation for

\textsuperscript{246} This is the apparent justification for the notice requirement contained in the progressive Texas Deceptive Trade Practices Act, Tex. Bus. \& Comm. Code Ann. § 17.50A (1977).

\textsuperscript{247} In no case should the violation of a notice requirement cause a consumer to give up as a matter of law his entire right to recovery. It should be left to the jury to determine what reasonably would have been accomplished by the giving of notice by the aggrieved consumer. The most efficacious notice requirement would be one that both reasonably penalizes the consumer for failing to comply with the requirement, and also gives the service-provider an opportunity to avoid greater damages. Thus, an incentive to settle can be engendered in both of the prospective parties to a lawsuit. The drafting of a progressive notice requirement is, of course, a legislative and not a judicial function. See, e.g., Tex. Bus. \& Comm. Code Ann. § 17.50A (1977) for a notice requirement which may apply by judicial analogy to Texas consumer service transactions for breach of an implied warranty of results.

\textsuperscript{248} Prosser, supra note 17, at 655.
consumers of services, that governing service quality. True consumer-tort regulation of the service marketplace cannot evolve, however, upon regulation of service quality alone. The judiciary must concern itself additionally with deterring abuses of bargaining power and with policing the flow of information from service-providers. Legal tools to accomplish these ends have been provided by legislatures in most jurisdictions via enactment of unconscionability statutes and deceptive trade practices acts. Thus, while implied warranty regulates the quality of services provided, the unconscionability doctrine can regulate abuses of bargaining power by service-providers and the deceptive trade practices acts can regulate the advertising, representations and other disclosures made by service-providers. The remainder of this article briefly outlines a path for interpretation of these statutes.

"For at least two hundred years equity courts have refused to grant specific enforcement of contracts so unconscionable 'as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.' "249 In most jurisdictions, this doctrine has received statutory sanction via the UCC.250 UCC section 2-302 reads:

If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

The prevalence of adhesion contracts in all consumer transactions suggests the necessity for application of this doctrine to consumer service transactions.

From the time of its development, the unconscionability doctrine has been underutilized and narrowly construed. Various factors have prevented this doctrine from becoming the tool for consumer protection that it should be. The term "unconscionability" is not defined by the UCC except in vague and "value"-laden terms.251 Thus, as a new and largely untried doctrine, its lack of specific and certain application has retarded its development and has likely dampened judicial enthusiasm for its efficacy. Further,

unconscionability is intended by the UCC as a question for the court.252 By keeping questions of unconscionability from the jury, the UCC has further limited practical application of the doctrine. In addition, it has been interpreted, unjustifiably, to be no more than a shield for consumers from the effects of oppressive contract terms. By failing to allow the recovery of damages by consumers victimized by unconscionability, courts have done little to deter such contracting practices.253 Finally, the unconscionability doctrine has been construed by many courts to apply only to contracts and terms unconscionable at the time they are made, and not to those which subsequently result in an unconscionable effect.254

A proper consumer-tort focus on the unconscionability doctrine should center around a policy devoted to deterrence of unconscionable acts and practices. Deterrence would be most effectively achieved by implementation of the following reforms: (1) the application of the unconscionability doctrine to consumer-service transactions as well as product transactions should be expressly sanctioned by the courts; (2) since the doctrine can logically apply to all acts or practices involving parties in unequal bargaining positions, unconscionability should be applied beyond unfair contracts and contract terms. Unconscionability is currently utilized to regulate only those acts or practices which arise from rights granted by contract. In the consumer context, the doctrine should prescribe any unconscionable act or practice that occurs during the course of a transaction. For example, it should be recognized that the failure of a service-provider to reasonably negotiate or compromise a problem when the consumer is in a desperate situation can be unconscionable; (3) damage recoveries should be allowed along with the striking of unconscionable contracts and contract clauses;255 (4) any act or practice which results in a subsequent unconscionable effect on a consumer should be found to fall within the purview of the unconscionability doctrine. Thus, a consumer should not be penalized when a transaction resulting in a gross disparity in value received and consideration paid by the consumer appeared fair and conscionable at the time of contracting. This is particularly appro-

252. Id. at 114.
253. Thus, businesses have nothing to lose by committing unconscionable acts in contracting. The only risk involved in taking such actions is that occasionally a court will purge the unconscionable effects of a contract.
255. Such recoveries are allowed in Texas, although it was the Legislature and not the Judiciary that instituted this reform. Tex. BUS. & COMM. CODE ANN. § 17.50(a)(3) (1977).
priate when applied to service transactions because it focuses upon the results achieved by rendition of the service; (5) unconscionability should be utilized to reduce the occurrence of the most widespread consumer rip-off: excessive price. Similarly, the imposition of charges upon a consumer which have no logical connection to services rendered should be deterred by the unconscionability doctrine.

Deceptive trade practices acts (DTPA's) provide a final cornerstone in the comprehensive formulation of consumer remedies. Such acts exist in one form or another in most states. They reflect a philosophy of consumer transactions that is in line with the analysis of this article. Consumer service and product transactions are treated equally. Both are fully subject to the provisions of DTPA's. Privity requirements apparently are eliminated from the DTPA in most jurisdictions. Many of the DTPA's provide for the recovery of attorney's fees and court costs for consumers successful in court. Some even provide for the trebling of damages recovered by successful consumers. Finally, the decline of fault liability in setting a standard of liability for the quality of product and service transactions is paralleled in the DTPA's. Most of the specific violations of these acts do not require proof of intent or knowledge.

257. This reform would be most important in jurisdictions which do not proscribe "unfair" trade practice. A representative fact situation was presented in Commonwealth v. Decotis, 366 Mass. 234, 316 N.E.2d 748 (1974). In Decotis, a lessor of mobile home lots routinely imposed a fee on each lessee that resold his mobile home. No services were rendered by the lessor in return for the fee. Each collection of the resale fee would be unconscionable by virtue of this reform.
260. For example, the Illinois DTPA provides that "Any person who suffers damage as a result of a violation of . . . this Act committed by any other person may bring an action against such person" (emphasis added). Ill. Rev. Stat. ch. 121 1/4, § 270 a(a); Similarly, the Texas DTPA provides that a consumer may maintain an action for "the use or employment by any person of an act or practice declared to be unlawful" by the DTPA (emphasis added). Tex. Bus. & Comm. Code Ann. § 17.50 (a) (1).
261. See, e.g., Ill. Rev. Stat. ch. 121 1/4, § 270a (c).
262. See, e.g., Tex. Bus. & Comm. Code section 17.50(b)(1). In Woods v. Littleton, 554 S.W.2d 662 (Tex. 1977), the Texas Supreme Court held that the awarding of treble damages, attorney's fees and court costs to a victorious consumer was mandatory and not to be left to the discretion of the court.
263. Of the twelve enumerated deceptive trade practices in Illinois, only two require proof of intent. Ill. Rev. Stat. ch. 121 1/4, § 312 (1)-(12).
There are several methods by which a dtpa may be violated in a consumer service transaction. The Illinois DTPA provides that:

§ 2. A person engages in a deceptive trade practice when, in the course of his business, vocation or occupation, he:

. . . . .
(5) represents that . . . services have . . . characteristics, ingredients, uses, benefits or quantities that they do not have. . . .
. . . . .
(7) represents that . . . services are a particular standard, quality or grade . . . if they are of another;
. . . . .
(12) engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding.264

These provisions reflect a direct concern for the protection of consumer expectations. These sections can help to assure that the full representational context in which the service transaction takes place is accounted for in determining reasonable consumer expectations for results from services. For example, any message of competence sent by a service-provider to a consumer should be considered a representation.265 Thus, when a service-provider holds himself out as an "attorney" or a "mechanic", the service-provider sends a message to the consumer that he possesses a certain minimum of skills. Merely undertaking, for a fee, to perform a service sends a similar representation of competence. These representations create in the consumer expectations for results that can be achieved by the service-provider. If these results are not achieved, then the above sections should be held to have been breached.

CONCLUSION

The law should be based on current concepts of what is right and just and the judiciary should be alert to the neverending need for keeping its common law principles abreast of the times. Ancient distinctions which make no sense in today's society and tend to discredit the law should be readily rejected. . . .266

The mandate for reform of consumer service transactions is clear. Everyday each one of us plays the role of consumer many times. We all have an interest in developing a system of laws which helps put consumers on equal footing with businesses. The current

264. Id.
law of negligence is inadequate to protect consumers who are powerless to protect themselves from the consequences of defective services. The great reforms achieved in product liability law provide an impetus for judicial reform of the law governing service transactions. At the center of the reforms should be an implied warranty of results based upon reasonable consumer expectations. By providing a mechanism for shaping the implied warranty of results to reflect the complexity of each service, it is hoped that this article has demonstrated the practicality of an implied warranty of results. Full reform of service liability necessarily entails application of other consumer-tort concepts. The most important of these include a liberal application of the doctrine of unconscionability and deceptive trade practice theories. This article is concerned with justice and fairness in the law. From that perspective, it is clear that the reform of service liability is long overdue.