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The Illusive Warranty of Workmanlike Performance: Constructing a Conceptual Framework

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The Illusive Warranty of Workmanlike Performance: Constructing a Conceptual Framework

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I. INTRODUCTION

William Prosser described warranty as “a freak hybrid born of the illicit intercourse of tort and contract.”1 If that be so, it is not hyperbole to characterize the implied warranty of workmanlike performance2 as the dysfunctional offspring of this illicit intercourse. Despite virtual universal adoption of the warranty of workmanlike performance by English and American jurisprudence, it remains an amorphous concept avoiding precise conceptualization. The absence of a precise formulation has created uncertainty as to the warranty’s doc-


trinal dimensions. This in turn has produced unpredictable and uneven judicial application of the doctrine.

Today the warranty of workmanlike performance often performs functions radically different from those contemplated by early courts which embraced it in the mid-nineteenth and early twentieth centuries. Indeed, in certain instances the warranty is perceived not as a gap filler or default rule, but as a duty which is independent of the parties' agreement and supports the imposition of tort liability. Changing formulations of the theoretical nature of the warranty have expanded its applicability beyond traditional parameters. As noted above, this transformation has manifested most prominently in the evolution of the warranty from a contractually premised doctrine to a hybrid tort. In short, these divergent formulations and the concomitant inconsistent body of law which they have produced warrant closer examination of the warranty of workmanlike performance.

A. Previous Scholarly Examinations

This article attempts to transcend previous analyses which have focused principally on the warranty's use of negligence related principles as a means of determining contractual rights and obligations. To this end, the obligation to perform in a workmanlike manner has been formulated as "an implied warranty not to be negligent." Accordingly, liability hinges on a service provider's failure to exercise the care and skill that a reasonably prudent and skilled person would have exercised under similar circumstances. Adopting this view, one commentator remarked that

[t]he proof of negligence requirement markedly distinguishes this professional

4. A number of commentators have made this observation. Comment, Guidelines for Extending Implied Warranties to Service Markets, 125 U. PA. L. REV. 365, 393 (1976)(the implied warranty of good and workmanlike performance is a rule of negligence on which the liability of the service provider is premised on proof of its negligent rendering of services); Bruce A. Singal, Extending Implied Warranties Beyond Goods: Equal Protection for Consumers of Services, 12 NEW ENG. L. REV. 859, 911 (1977)(the concept of the implied warranty of good and workmanlike performance borrows warranty language to express a standard based on negligence); John P. MacPhee, Implied Warranty of Workmanlike Performance—In Absence of Nonassignability Clause in Contract, Contractor Not Immunized from Contractual Obligation to Perform Work in Workmanlike, Non-Negligent Manner, 15 SEPTON HALL L. REV. 710, 712 (1985)(concluding negligence is necessary to establish breach of the implied warranty of good and workmanlike performance which gives rise to a contract action).
5. Greenfield, supra note 2, at 666.
6. Id. Similarly, the workmanlike performance obligation has been uniformly acknowledged as dissimilar to a "true" warranty (such as the UCC warranty of merchantability) inasmuch as liability depends on conduct. Refer to text accompanying notes 116-120, infra for further discussion of the warranty of workmanlike performance as an "in process" rather than an "end result" concept.
standard from that employed for implied warranties. Sometimes the standard borrows implied warranty language, as in implied warranties of workmanlike performance of competence and ability... and the use of ordinary or reasonable skill and care. Close analysis of these standards, however, reveals that they are actually negligence standards cloaked in misleading implied warranty terms.7

Such broad propositions effectively describe the immediately ascertainable features and consequences of the workmanlike performance warranty, particularly its distinction from traditional notions of warranty. Yet they fall short of enhancing our understanding of the concept’s fundamental substantive nature.Sparse guidance is, therefore, provided for resolving the conceptual and practical questions stemming from incorporation of the workmanlike performance obligation into agreements. Moreover, generalized conclusions tend to avoid critical discourse concerning the uncertainties which lie at the heart of a concept which is premised on contract but which relies in part on tort principles.8

The reasons underlying the dearth of critical examination of a concept deeply etched into English and American law are unclear. The concept’s historical acceptance and application may have ladened it with an aura of antiquity which has served too successfully to shield it

7. Singal, supra note 4, at 911-912. In an effort to determine the origins of the use of warranty language to describe this concept, Professor Greenfield suggests that implied warranty terminology may have been employed to express a negligence concept because the cause of action for negligent performance of services arises from a contractual undertaking. Greenfield, supra note 2, at 665.

8. The incongruence between tort and contract in the context of the workmanlike performance warranty is readily observable inasmuch as negligence concepts aid in determining breach of the obligation. Such a proposition appears inapposite to the general rule of strict liability in the performance of contractual obligations.

Generally, contractual duties are voluntarily undertaken by parties and become activated only as a result of the parties’ private agreement. E. ALLAN FARNSWORTH, CONTRACTS (2d ed. 1990); G. TREITEL, THE LAW OF CONTRACT 1 (7th ed. 1987); RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981). Therefore contract law provides the legal mechanism to protect the expectations arising from these voluntary exchanges. FARNSWORTH, supra, at 3-4. Because the nonbreaching party will be compensated for the loss of his bargain created by the exchange wholly irrespective of the breaching party’s fault or notice, contract liability can be seen as a form of strict liability. W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 92, at 664 (5th ed. 1984 & Supp. 1988) [hereinafter KEETON, ET AL.].

Tort, on the other hand, is generally defined as a legal wrong committed upon the person or the property of another; it occurs independent of any contractual undertaking between the parties. Id. § 92, 655. In contrast to contractually imposed duties, tort duties are imposed by the state as a matter of social policy. Id. § 92, 656-57. Consequently, tort liability is dependent on the failure unreasonably to conform to a socially imposed standard of care. Tort duty and liability therefore is typically imposed independent of and without regard to any exchange relationship. Richard E. Speidel, Warranty Theory, Economic Loss, and the Privity Requirement: Once More into the Void, 67 B.U. L. REV. 9, 18 (1987).
from close critical analysis.9 In this vein, perhaps the implied warranty of workmanlike performance constitutes the type of legal maxim which is first established as precedent and accepted as such by succeeding generations but escapes "rigorous scrutiny as to its raison d'etre."10

Whatever the reason, subjecting the warranty of workmanlike performance to comprehensive analysis is acutely appropriate given the persistent uncertainties which accompany it. More specifically, engaging in critical discourse regarding the concept may aid in assessing the wisdom and utility of the transformation which has occurred in certain contexts. This discourse will also test the soundness of expanding the warranty's applicability to factual situations dissimilar from those in which it historically has been applied.

The debate concerning expansion of the concept is illustrated by the development of the implied warranty of workmanlike performance in Texas. The reach of the warranty expanded significantly when the Texas Supreme Court held in Melody Homes Manufacturing Co. v. Barnes, that a service provider impliedly warrants, to consumers suing under the state's consumer protection statute, to repair or modify existing tangible goods or property in a good and workmanlike manner.11 The decision in Melody Homes brought into focus a number of unresolved issues concerning the scope and function of the warranty of workmanlike performance.

Predominant among the unresolved issues is the type of services which fall within the parameters of the workmanlike performance warranty. For instance, intermediate Texas courts have reached inconsistent conclusions on the issue of whether the warranty applies to professional service providers. Thus the warranty of workmanlike performance has been extended to apply to services rendered by architects12 and developers.13 However, expansion of the warranty has

9. See Singal, supra note 4, at 911-12.
10. Id. at 911-12 (reaching the same conclusions with respect to the well established standard of care for professional services). Indeed the warranty of workmanlike performance like the professional standard of care seems to have been applied "like rote by American courts for the better part of the nineteenth and twentieth centuries." Id.
11. 741 S.W.2d 349, 354 (Tex. 1987). The court reasoned that policy consideration warranted extension of an implied warranty concept to the above described transactions. The court emphasized the following public policy considerations: the public interest in protecting consumers from inferior services; the greater capability of a seller to prevent losses caused by the rendering of improper services; the right of consumers to rely on a service provider's expertise; and a service provider's better ability to absorb costs of inferior services. Id. at 353-54.
12. White Budd Van Ness Partnership v. Major-Gladys Drive Joint Venture, 798 S.W.2d 805 (Tex. App. 1990). In White Budd, the court invited the Texas Supreme Court to consider the question it explicitly left open in Melody Homes—whether the warranty it created applied to professional service providers. In Mel
been greeted with hostility by courts in a group of cases which have rejected application of the warranty in situations involving the provision of medical, property management, and real estate brokerage services.

The debate in Texas and other jurisdictions regarding the scope of the workmanlike performance warranty is traceable to uncertainty surrounding the substantive basis of the concept and thus its doctrinal dimensions. This lack of clarity has generated inconsistent judicial determinations regarding a number of issues, including whether the warranty of workmanlike performance is an "in process" or "end result" concept. Other issues which impact parties' substantive and procedural rights include whether the warranty's theoretical underpinnings lie in tort or contract, whether it is a concept which is independent of the implied warranty of habitability, what constitutes breach of the warranty, and whether the concept is superfluous given the availability of other tort and contract remedies.

In Melody Homes, the court had stated that "[t]he question whether an implied warranty applies to services in which the essence of the transaction is the exercise of professional judgment by the service provider is not before us." 741 S.W.2d at 354. The court held that since the essence of the transaction involved the exercise of professional judgment, the warranty did not apply. Id. at 217-18. See also Eoff v. Hal & Charlie Peterson Found., 811 S.W.2d 187, 196 (Tex. App. 1991); Wisenbarger v. Gonzalez Warm Springs Rehabilitation Hosp., Inc., 789 S.W.2d 688, 691 (Tex. App. 1990).

In Melody Homes, the court explained that the warranty it created was one concerned with performance and not the end result. It stated "[w]e do not require repairmen to guarantee the results of their work; we only require [them] . . . to perform those services in a good and workmanlike manner." Melody Homes Mfg. Co. v. Barnes, 741 S.W.2d 349, 355 (Tex. 1987). Recently, the Fifth Circuit had occasion to address this issue and held, applying Texas law, that the warranty of workmanlike performance focuses on performance and not end results. City Pub. Serv. Bd. v. General Elec. Co., 947 F.2d 747 (5th Cir. 1991).

For a more comprehensive discussion of the "in process/end result" distinction see text accompanying notes 116-120, infra.

In Melody Homes, the Texas Supreme Court indicated that the concept was grounded more in tort than in contract. The court held that "[a]n implied warranty arises by the operation of law when public policy so mandates." 741 S.W.2d 349, 355 (Tex. 1987). This position was buttressed by the court's refusal (in dictum) to permit disclaimer of the warranty. Id. at 355. Perhaps this conclusion is appropriate given that the court expanded the scope of the warranty only after careful consideration of public policy reasons for so doing. However, as discussed below, absent this type of judicial analysis, characterizing the warranty as more tort than contract may not be conceptually justifiable. See text accompanying notes 216-227, infra.

Refer to text accompanying notes 121-147, infra.

Consideration of the latter two issues are beyond the scope of the present discussion. Reserving analysis of these issues until a later day is not intended to in any
B. Constructing a Conceptual Framework

The purpose of this article is to provide a conceptual framework for addressing the varied conceptual and practical issues evoked by the warranty of workmanlike performance. In the process of articulating this framework, the article attempts to better define the theoretical and practical dimensions of the warranty. An inevitable consequence of this undertaking is the examination of the extent to which current formulations of the warranty comport with or depart from traditional contract and tort principles. Therefore, to a considerable degree, the following discussion contrasts expansive formulations of the warranty of workmanlike performance with approaches which not only adhere more closely to the original premises of the concept, but which also recognize doctrinal distinctions between tort and contract.

This article begins by tracing the warranty of workmanlike performance to its English and American origins. This historical retrospective aids in uncovering the theoretical premises on which the warranty is founded. Early cases establish fairly conclusively that the warranty was developed to accomplish a two-fold objective—to effectuate the undisclosed hypothetical intentions of the parties and to promote justice. Following a discussion of the theories of implied in fact and implied in law, the article proposes that the proper characterization of the warranty of workmanlike performance is as a gap filler or default rule. It thus constitutes a background rule which governs the manner of performance when parties to a contract for services fail to specify a standard of performance.

The discussion next illustrates the manner in which the fusion of negligence and contract has contributed to the transformation of the workmanlike performance obligation from a gap filler or default rule to a hybrid tort. The article examines decisions in which it becomes apparent that in certain instances the warranty is formulated so that it not only functions in ways other than those originally contemplated but also operates contrary to traditional contract concepts and the commercial realities of the contracting process.

The article reaches the foregoing conclusions by examining important doctrinal developments surrounding the warranty in the context of two issues. First, is the warranty of workmanlike performance independent and distinct from the warranty of habitability? Second, under what circumstances should breach of the warranty give rise to contract, tort or contract and tort remedies? After examining current

way devalue their significance. Indeed, attempting initially to define the doctrinal dimensions of the concept may facilitate the analysis of these issues.

22. See text accompanying notes 54-77, infra.
23. See text accompanying notes 78-92, infra.
24. See text accompanying notes 197-227, infra.
judicial approaches to these issues, the article evaluates them pursuant to a gap filler conceptualization. The article concludes that the proposed gap filler/default rule formulation, at a minimum, identifies policy factors worthy of consideration in resolving the myriad conceptual problems accompanying the warranty of workmanlike performance. Eventually such a formulation may reduce uncertainty concerning the concept's doctrinal content and clarify the scope of its application.

II. ORIGINS OF THE WARRANTY OF WORKMANLIKE PERFORMANCE

A. Historical Recognition

1. English Recognition

The historical roots of the implied warranty of workmanlike performance are traceable to early nineteenth century English cases which implicitly acknowledged an obligation to perform in a workmanlike manner. The first of these cases, Basten v. Butter, involved a carpenter's action in assumpsit to recover for services provided on a farm. The farmer asserted, as a defense, that the carpenter had performed in a "very improper and insufficient manner." The court held that evidence showing that the work was improperly executed could be proffered to defeat plaintiffs claim. Shortly after Basten, more explicit recognition was given to an obligation to perform services in a workmanlike manner. In Duncan v. Blundell, a plaintiff seeking payment for services rendered in erecting a stove was denied relief. In reaching this determination, the court imposed a duty on the workman to exercise good judgment in carrying out the services purchased by his employer. Central to the court's decision was the notion that the workman's improper performance resulted in his failure to deliver that for which defendant had bargained. Of particular relevance to the outcome was the court's perception that the service recipient's reliance on the service provider's expertise was integral to the exchange relationship between the parties. Duncan is cited as authority for the implication of a

25. See text accompanying notes 216-227, infra.
27. Id. at 186.
28. Id. at 188.
30. Id.
31. This perception supported the court's conclusion that a service provider who holds himself out as capable of rendering services of a specific nature implies warrants that he possesses the requisite level of skill and ability to successfully complete work. The idea that a worker implies warrants that it possesses a certain level of skill was more fully explored in Harmer v. Cornelius, 141 Eng.
term to perform service contracts in a workmanlike manner despite the court's failure to explicitly create such an obligation.\textsuperscript{32}

The concept of a warranty of workmanlike performance which impliedly arises in service contracts was more explicitly articulated in \textit{Cousins v. Paddon}.\textsuperscript{33} There the court acknowledged the propriety of implying into "every special contract for work and labor a duty that the work shall be done in a good and workmanlike manner."\textsuperscript{34} In expressly denoting this implied obligation as an implied warranty of workmanlike performance, the court noted an important consequence of a failure to comply with the warranty—it provides justification for nonpayment on the contract by the service recipient.\textsuperscript{35} Thus by the middle of the nineteenth century,\textsuperscript{36} the principle of an implied war-

\begin{itemize}
\item \textsuperscript{32} Reliance on \textit{Duncan} for this proposition seems appropriate, however, given that implicit in the decision is the notion that a service provider who fails to perform in a workmanlike manner through either negligence or the absence of the requisite skill commits a breach of contract.

\item \textsuperscript{33} \textit{Basten v. Butter} and \textit{Duncan v. Blundell} are recognized in English law as the seminal cases implying a workmanlike performance obligation into contracts for work and labor. In \textit{Young and Marten, Ltd. v. McManus Childs, Ltd.}, 2 All E.R. 1169 (1968), the court cited to \textit{Duncan v. Blundell} as providing early recognition and support for the principle of an implied term to perform services in a workmanlike manner. In \textit{Cousins v. Paddon}, 150 Eng. Rep. 234, 235 (1835) \textit{Basten} was identified as the source of this rule. \textit{See 4 HALSBURY'S LAWS OF ENGLAND} 593 (1974)(citing \textit{Duncan} as authority for the rule that implied into every service contract is a term to perform work in a good and workmanlike manner).

\item \textsuperscript{34} \textit{Id.} at 235. The court noted this principle had been established as precedence since the case of \textit{Basten v. Butter}. Express recognition of an implied term to perform in a workmanlike manner actually occurred several years prior to \textit{Cousins} in \textit{Lucas v. Godwin}, 132 Eng. Rep. 595 (1837). \textit{Lucas} is significant not only due to the court's adoption of the warranty, but because of the insight the court's comments lend to substantive theory on which the warranty of workmanlike performance is grounded. These comments are discussed in the text accompanying note 102, infra.

\item \textsuperscript{35} \textit{Cousins v. Paddon}, 150 Eng. Rep. 234 (1835). The \textit{Cousins} conceptualization of the implication of a term to perform in a workmanlike manner surfaced in \textit{Pearce v. Tucker}, 176 Eng. Rep. 61 (1862), an action where a workman agreed to erect a kitchen range which had an old boiler situated behind it. The range failed to work as constructed because hot water could not be transferred from the boiler. \textit{Id.} at 61. The court held that the plaintiff was entitled to recover for defendant's failure to fit up a range in a proper and workmanlike manner. \textit{Id.} at 62.

\item \textsuperscript{36} Apparently, recognition of the warranty of workmanlike performance proceeded at a slower pace than other warranties such as the warranty of merchantability in sales. This aspect of the history of the warranty was briefly discussed in \textit{Young and Marten, Ltd. v. McManus Childs, Ltd.}, 2 All E.R. 1169, 1175-76 (1968). In discussing the extent to which contractors warrant materials, the court noted "'[i]f a man sells an article he thereby warrants it is merchantable.' Curiously enough, however, there is no equal body of decision at common law in the nine-
\end{itemize}
ranty of workmanlike performance had gained acceptance in English law.37

2. American Recognition

The American judiciary's recognition of an implied warranty to perform services in a workmanlike manner proceeded at a brisk pace during the mid-nineteenth century. Somerby v. Tappan38 appears as the earliest reported decision to implicitly acknowledge the existence of such an obligation. In Somerby, the defendant contractor agreed to construct a house for plaintiff.39 After completion of construction, the chimney failed to carry smoke.40 Plaintiff complained the contractor breached his agreement to construct the house in a workmanlike manner notwithstanding the absence of an express stipulation in the agreement so providing.41 The Ohio Supreme Court's charge to the jury had the same operative effect as an express stipulation to perform in a workmanlike manner. The approved instruction provided if a "mechanic undertakes to bring to the performance of his work the requisite skill of his profession, and if he does not, and fails, he is liable for the consequences. In this case, the obligation was to build these chimneys skillfully, according to the approved usage of the trade."42

Any uncertainty concerning the Ohio Supreme Court's intention to imply an obligation of workmanlike performance into the contract disappeared the following year when it once again considered the matter of the defective chimney.43 The court held that when a contractor undertakes to build a house, he impliedly agrees to perform in a workmanlike manner and his failure to do so renders him liable for injuries sustained by the owner.44

The Somerby court's explicit adoption of the foregoing principle was followed by numerous other American courts in the nineteenth and early twentieth centuries.45 Among such courts was the Penn-
sylvania Supreme Court which adopted the concept in an 1855 case entitled *Wade v. Haycock.*\(^{46}\) In this matter,\(^{47}\) involving the alleged improper erection of a grist-mill, the Pennsylvania Supreme Court approved the trial court's jury charge that "[w]here one contracts to do all the millwright work necessary in the construction of a grist-mill, he is bound to do it in a workmanlike manner, so that it will answer the purpose for which it is intended."\(^{48}\)

B. Theoretical Premises of the Warranty of Workmanlike Performance

The somewhat rapid pace at which American and, to a lesser extent, English courts embraced the implied warranty of workmanlike performance was not matched by a clear articulation of the theoretical premises on which the concept was founded. Therefore, it was not uncommon to find judicial recognition of the warranty accompanied by a less than enlightening statement that the warranty is implied into agreements as a matter of law.\(^{49}\) Not surprisingly, mere enunciation of this general proposition is of negligible value in enhancing understanding of the theoretical source of the warranty, its operative effect, and any limitations imposed on its implication into agreements.

Having said this, it must in fairness be acknowledged that deter-

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46. 25 Pa. 382 (1855).
47. In *Wade*, the defendant designer of a mill procured the services of plaintiff to erect the mill. When the work was completed, defendant refused to pay the contract price based on the alleged failure of the mill to operate properly. *Id.* at 382-83. Defendant argued that plaintiff's improper performance which resulted in the failure of the promised consideration operated to bar plaintiff's requested recovery. *Id.*
48. *Id.* at 383. Elaborating on the consequences of plaintiff's alleged deficient work, the court concluded improper performance entitled the plaintiff to recover under the contract (if defects could be cured as offset by the damages resulting from the deficient workmanship). *Id.*
49. *See* text accompanying note 78, *infra.* Also, to avoid overstatement, it should be noted (as pointed out later in this discussion) that some early courts occasionally elaborated on the meaning behind the proposition that the obligation arose or was implied as a matter of law. It is the discussion by these courts which provide particularly useful information on the theoretical source of the warranty of workmanlike performance.
mining the theoretical source of a concept is not necessarily an easy task. Professor Prosser recognized the complexities inherent in efforts aimed at uncovering a concept's theoretical source in his exploration of the substantive underpinnings of the implied warranty of merchantable quality in the sale of goods context. His analysis revealed the emergence of three distinct theories as potential sources of the warranty of quality: (a) misrepresentation of fact; (b) the warranty as representing an unexpressed term assented to by the parties; and (c) the warranty as implied into the agreement as a matter of law regardless of the intentions of the parties. Professor Prosser reached the conclusion that the warranty of merchantable quality rests, to some extent, on all three of the above referenced theories.

In contrast, early American courts most often based implication of the workmanship warranty into service agreements on principles operating under an implied in law theory. As the following discussion reveals, regardless of the stated premise of the warranty, decisions recognizing and applying it seldom seemed far removed from broader policy considerations. Ascertaining the true meaning of statements that the warranty of workmanlike performance arose as a matter of law unlocks the door to its conceptualization. However, in order to understand what courts meant in stating that the warranty arose as a matter of law, it is necessary briefly to review the concepts embodied in the terms “implied in law” and “implied in fact.” As the following discussion unfolds, it becomes apparent that the obligation to perform in a workmanlike manner was originally conceived to operate as a gap filler or default rule which was incorporated into service agreements to define the performance obligations of the service provider.

1. Implied in Fact Terms

It is well established that courts will imply into agreements terms which are necessary for the resolution of contractual rights and obligations. These implied terms are sometimes characterized as terms

51. Id. at 124-25. Professor Prosser also noted, however, that courts most often seemed to rely on implied in fact as providing the basis for decision. Professor Prosser also emphasized the difficulties encountered in attempts to differentiate between implied in fact and implied in law as providing the theory on which a court had relied. Id. at 124. He further remarked that regardless of the theory employed, policy considerations were seldom absent from warranty cases and often controlled the decision. Id. As will be seen below, similar observations attach to the implied warranty of workmanlike performance. See text accompanying notes 108-109, infra.
52. See discussion accompanying notes 78-92, infra.
53. See discussion accompanying notes 107-110, infra.
"implied in fact." Implied in fact terms are said to differ from express contractual provisions in that the former are provided circumstantially while the latter are expressly stated. Thus an implied in fact term can be fairly described as a contractual obligation inferred from the intentions of the parties as manifested in the express terms of the agreement, the parties' conduct, and other circumstances present in a particular case.

This process of implication or inference has been primarily related to two premises. First, courts will imply terms in an attempt to realize the actual expectations of the parties. In the event actual expectation cannot be derived based upon circumstances surrounding the transaction such as the language of the contract, negotiations, course of dealings or usage of trade, resort must be made to the second premise. E. Allan Farnsworth, Disputes Over Omission in Contracts, 68 COLUM. L. REV. 860, 876 (1968). This latter premise "consists of basic principles of fairness or justice which a court uses to extrapolate from the situations for which the parties have provided to the casus omissus for which they have not." Id. at 877. A third possible premise for the process of inference is the hypotheti-
cal reactions of the parties. In other words, a term is implied which the parties would have incorporated into their agreement if they had anticipated the need for such a term. Id. at 873. This premise has been criticized as contrived due to the difficulty courts have in surmising what either or both parties would have done if the situation would have been foreseen. Id.

Some scholars have argued that the process courts engage in when supplying a term is better described as a process of inference rather than implication. "The method by which a court resolves a casus omissus, once it has determined that there is one, can best be described as inference, a word that accurately refers to a process by which the court derives its conclusions, as opposed to implication, a word that unhappily attributes the result to the parties." E. Allan Farnsworth, Disputes Over Omission in Contracts, 68 COLUM. L. REV. 860, 876 (1968); Glanville L. Williams, Language and the Law—IV., 61 LAW Q. REV. 384, 403 (1945)(arguing against designating the process as one of implication since it bears less of a relationship to interpreting a pre-existing and expressed intent than it does to amending or supplementing that intent which is expressly set forth).

Implied in fact terms—that which the parties categorize to be a part of their agreement constitute the first of the three types of terms which may be implied
2. **Implied in Law**

In contrast to the implied in fact concept, terms may be implied in law notwithstanding uncertainty as to whether the parties would have agreed to incorporate such terms into their agreement. These terms which consequently operate independently of contractual consent have traditionally been viewed as serving a gap filling function.

Thus the implied in law or gap filler term is considered necessary for into agreements. The second and third categories of implied terms are: terms which the parties no doubt would have included if they had considered them; and terms which are implied for reasons of fairness and justice. Hadjiyannakis, *supra* note 54, at 38, n.22. Terms falling into the second and third categories have been described as terms "implied in law" or alternatively as "constructive conditions." *Id.; see* 3A Arthur Corbin, *Corbin on Contracts*, §§ 632, 653 (1950).

Note, however, that determining whether an implied term rests on the first or second and third premise is fraught with uncertainty. It has been said that expectation shades into fairness or justice so that it is often hard to distinguish between the two. Since it may be difficult or impossible to tell whether or not the parties were aware of a usage, by recourse to it whether they were or not the court avoids the necessity of an inquiry into the parties' actual expectations. More generalized standards of reasonableness also help to form a bridge between actual expectation on the one hand and fairness or justice on the other so that it is rarely necessary to decide which of the two is being relied upon.

Farnsworth, *supra* note 54, at 877-78. *See also* Corbin, *supra* note 54, at 280 (in order to make a just decision, courts rarely need to distinguish between terms implied in fact and implied in law).

58. Corbin, *supra* note 56, at 286 (terms implied in law create duties irrespective of the obligor's intentions or expressions); see Williams, *supra* note 54, at 401 (noting that implied terms included terms courts imply based upon considerations of fairness or policy irrespective of the intentions of parties to an agreement); Hadjiyannakis, *supra* note 54, at 41 n.34 (implied in law obligations constitute contractual obligations even though they are not strictly premised on intention; references to intent are reduced to meaning the absence of a manifestation of intent to the contrary).

*See also* Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 Va. L. Rev. 821, 822 (1992). Professor Barnett argues that implied in law terms (which he characterizes as default rules) tend to undermine support for a consensual basis of contract. *Id.* at 822. He also notes, however, that while such rules are not the product of expressed or implied-in-fact consent, parties often indirectly consent to them by not contracting around them. *Id.* at 826, 861.

59. Barnett, *supra* note 58, at 822 (stating "[m]uch of what is taught as the law of contract can be conceived as publicly provided 'background' rules or principles that fill the inevitable gaps in the private law made by contracting parties"); Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 Yale L.J. 87 (1989)(noting that default rules fill the gaps which exist within incomplete contracts).

60. Hadjiyannakis, *supra* note 54, at 39 n.25 (noting that terms imposed by law can be alternatively characterized as "constructive" terms, "gap fillers" or "rules" of law). *See* discussion in note 69, *infra* identifying other terminology used to convey the concept of non-assent premised terms.
resolving contractual rights and obligations. As alluded to above, it has been long recognized that these gap filler or implied in law terms are imposed for reasons of principle or policy and any notion that they are based on assent is fictitious.

Different terminology is often employed to define the process by which courts imply terms into an agreement irrespective of intent. In-

61. Focusing on the import of implied terms to determine rights in duties, Section 204 of the Restatement (Second) of Contract provides: "[w]hen the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court." RESTATEMENT (SECOND) OF CONTRACTS § 204 (1979)(emphasis added).

As noted previously, whether a term is implied in law or fact is difficult to ascertain. See Hadjiyannakis, supra note 54, at 38-39; see also 3 CORBIN, supra note 54, § 561, at 280 (commenting that distinguishing between the categories of implied terms is often not required in order for a court to resolve a particular dispute and reach a just decision). Refer to note 57, supra for further discussion of the difficulties involved in distinguishing between implied in fact and implied in law terms.

62. Barnett, supra note 58, at 826. ("Terms supplied by default rules are not a product of the express or implied-in-fact consent of the parties as these two notions have traditionally been understood, and may therefore be considered genuinely implied-in-law"); Slawson, supra note 55, at 54 (conditions implied in law are supplied by courts in the interest of justice notwithstanding an absence of consent); Hadjiyannakis, supra note 54, at 41 n.34.

In commenting on the importance of default rules or gap fillers, Professors Goetz and Scott comment that "a key purpose of state-supplied terms is to save parties from the necessity of formulating a complete set of express conditions for contingencies that may be difficult to anticipate, or are at least easily overlooked. Thus, many of the general rules of contract, such as those of impossibility and excuse, impose constructive conditions that reduce incompleteness risks." Charles J. Goetz & Robert E. Scott, The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms, 73 CAL. L. REV. 261, 270 (1985).

Professor Barnett criticizes the use of default or gap-filler terms to the extent they are imposed and thereby disregard the consent of the contracting parties. He proposes replacing the traditional dichotomy of expressed or implied in fact contract terms and implied in law terms with what he believes is a more realistic trichotomy. The first category of the proposed trichotomy would include terms which are the product of direct consent (expressed or implied in fact terms); the second category would include terms produced by indirect consent (implied in law default rules); and the third prong of the trichotomy would include terms imposed totally irrespective of consent (implied in law immutable terms). Barnett, supra note 58, at 827-28. Professor Barnett postulates that his proposed reconfiguration, would reduce the instances in which terms are genuinely imposed on the parties. Id.

The foregoing formula is consistent with Professor Barnett's consent theory of contract—enforceable and unenforceable contracts can be distinguished by determining if the parties to a particular agreement manifested an intention to create or alter their legal relations—which he argues was the predominant theory of contract in the nineteenth century. Randy E. Barnett, Some Problems with Contract as Promise, 77 CORNELL L. REV. 1022, 1027-28 (1992).
creasingly this process is referred to as the concept of default rules which also embodies the idea that contract terms will be supplied in instances where parties fail otherwise to agree. The default rule approach analogizes the way that contract law fills gaps in the expressed consent of contracting parties to the way that word-processing programs set our margins for us in the absence of our expressly setting them for ourselves. A word-processing program that required us to set every variable needed to write a page of text would be more trouble than it was worth. Instead, all word-processing programs provide default settings for such variables as margins, type fonts, and line spacing and leave it to the user to change any of these default settings to better suit his or her purposes.

Accordingly, a default rule will govern contractual relations unless the parties elect to contract around them. The concept of default rules or, under the more traditional parlance, of gap fillers, is generally recognized to be efficient "if it imposes a term that the parties to a contract would have agreed to had they dealt with the matter in their negotiations. This is so because, with such a default rule to rely upon, the parties can be spared the transaction costs of reaching an agreement on that term." In sum, despite different terminology a default

63. The default rule terminology is believed to have been transplanted from corporate legal theory to contract law. Barnett, supra note 58, at 824 n.13.

64. Ian Ayres and Robert Gertner, Filling Gaps in Incomplete Contract: An Economic Theory of Default Rules, 99 YALE L.J. 87 (1989). Default rules are necessary to fill gaps in incomplete contracts, the incompleteness occurring either because (1) the contract failed to specify duties for particular future contingencies; or (2) a contract is insensitive to a relevant future contingency. Id. at 92 n.29.

65. Barnett, supra note 58, at 824.

66. Ayres & Gertner, supra note 64, at 87. Professors Ayres and Gertner divide default rules into two distinct classes. The larger class is comprised of default rules around which parties can contract such as the implied warranty of merchantability. Id. at 87. The smaller class consists of "immutable" rules which the parties cannot contract around such as the duty of good faith. Id. at 87.

Professor Barnett notes that the default rule approach to gap filling finds distinction in contract law in that default rules are binding in the absence of a contrary manifested assent. He agrees with the Ayres and Gertner categorization of default rules and concludes that a gap-filling principle which parties cannot contract around is not a default rule but an immutable rule—"that is, some other kind of contract law background norm that may fill a gap in assent or may even displace the manifested assent of the parties." Barnett, supra note 58, at 825.


As stated by Judge Posner:

In speaking of an implied contractual term we identify another important function of contract law. . . . The longer the performance will take . . . the harder it will be for the parties to foresee the various contingencies that might affect performance. Moreover, come contingencies, although foreseeable in the sense that both parties well know that they could occur, are so unlikely to occur that the costs of careful drafting to deal with them might exceed the benefits, when those benefits are discounted by the (low) probability that the contingency will actually occur.
rule essentially fills gaps in incomplete contracts and thus constitutes an alternative means of stating the implied in law or gap filler process.

Despite the alternative ways in which the concept can be expressed, the primary significance is that a gap-filling term or default contract rule amounts to "an implicit term of a contract unless the

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It may be cheaper for the court to 'draft' the contractual term necessary to deal with the contingency if and when it occurs.

RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 82 (3rd ed. 1986); see Charles J. Goetz & Robert E. Scott, The Mitigation Principle: Toward a General Theory of Contractual Obligation, 69 VA. L. REV. 967, 971 (1983)(default rules should comport with the terms parties would have reached were they to bargain over each detail of a transaction).

68. Ayres & Gertner, supra note 64, at 91-93. An incomplete contract has been described in economics terminology as "any contract short of the ideal of a complete contingent contract, which has been drafted with all contingencies in mind and provides for optimal performance on every contingency." Mark P. Gergen, The Use of Open Terms in Contract, 92 COLUM. L. REV. 997, 999 (1992).

Professor Farnsworth explained that disputes concerning omissions in contracts arise when there is an absence or understatement of expectation. Farnsworth, supra note 54, at 871. The former occurs when the parties fail to consider the particular situation and, therefore, develop no expectation with respect to it. Thus, they fail to foresee it. Id. The latter arises when the parties develop expectations with respect to a particular situation but fail to reduce those expectations to writing. Id. at 872. The reasons for understatement range from the assumption that a certain expectation accompanies what has been expressed, to fear that attempts to reduce the expectation to writing will result in delay or hinder completion of the deal. Id.

The parties may fail to include a term because they did not foresee a particular situation which later causes a dispute between them, or they may have failed to manifest their intention with respect to a foreseeable situation, or, they may have deliberately avoided manifesting any intention with respect to a foreseeable situation because it could have hampered negotiations or simply because they considered the matter not worth mentioning.


Other scholars attribute contractual incompleteness primarily to the costs of contracting. "Contracts may be incomplete because the transaction costs of explicitly contracting for a given contingency are greater than the benefits. These transaction costs may include legal fees, negotiation costs, drafting and printing costs, the costs of researching the effects and probability of a contingency, and the costs to the parties and the courts of verifying whether a contingency occurred." Ayres & Gertner, supra note 64, at 92-93; see Barnett, supra note 58, at 822 (noting the costs of attempting to anticipate even those contingencies which are foreseeable influence parties not to negotiate such terms).

69. Alternative terminology has been used to convey the concept encompassed by gap filler and default rule terminology. Examples of such terminology include "background, backstop, enabling, fallback, gap-filling, off-the-rack, opt-in, opt-out, preformulated, preset, presumptive, standby, standard-form and suppletory rules." Ayres & Gertner, supra note 64, at 91.
contracting parties explicitly agree to vary it." Moreover these terms embody the idea that implying a term aids in defining the exact scope of parties' contractual obligations. Thus gap fillers or default rules define "the exact substance of a party's obligation, by specifying (among other things) the condition under which her nonperformance will be excused, and the sanction which will be applied to any unexcused nonperformance." As will be seen below, the implied warranty of workmanlike performance is an implied term which operates as a gap filler. It thus joins an impressive list of other gap filling terms which operate to imply conditions into agreements such as: (1) the implied warranty of merchantability in the sale of goods; (2) the rule that payments and delivery of goods constitute concurrent conditions; (3) the implied warranty that vessels are seaworthy; (4) the implied warranty of habitability; and (5) obligation to complete performance within a reasonable time.

Early decisions in which courts implied a warranty of workmanlike performance into agreements reveal the courts' perception of it as an implied term which operated as a constructive condition amending or supplementing the parties' expressed intent. Specifically, it determined the standard or manner of performance when the parties to service contracts failed to specify otherwise. These cases also support the proposition that implication of a warranty of workmanlike performance into these agreements is not dependent on the intentions of the parties. Rather it functions as a suppletive rule of law based on a "common factual situation or set of conditions," which are applicable unless otherwise stated.

70. Jason Scott Johnson, Strategic Bargaining and the Economic Theory of Contract Default Rules, 100 YALE L.J. 615, 615-16 (1990); Ayres & Gertner, supra note 64, at 87.
71. Richard Craswell, Contract Law, Default Rules, and the Philosophy of Promising, 88 MICH. L. REV. 489, 503 (1989). Professor Craswell has elected to refer to such rules as "background rules" rather than default rules which he views as a more limited concept since they apply only to those rules which the parties can agree to vary by inserting appropriate language into their contract. He defines background rules to encompass contract rules which are both waivable and nonwaivable. Id. at 489-90.
72. For a discussion of constructive conditions see note 87, infra.
73. Williams, supra note 54, at 403.
74. See Hadjiyannakis, supra note 54, at 40; see also, JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE (3d ed. 1988) § 3-4 through 3-11 for discussion of gap filler terms adopted in Article 2 of the Uniform Commercial Code. Article 2 includes gap fillers relating to price, delivery, quantity, and payment terms.
75. The use of default rules to dictate the details and standard of performance has been acknowledged. Goetz & Scott, supra note 62, at 270, 276.
76. See Farnsworth, supra note 55, at 864-66.
77. Id. at 866.
III. CONCEPTUALIZING THE WARRANTY OF WORKMANLIKE PERFORMANCE

A. Early Decisions

1. Gap Filler/Default Rule Formulation

Early decisions in which courts stated that the workmanlike performance warranty arose as a matter of law support the characterization of the warranty as a gap filler. Certain of these cases emphasized that implication of the warranty was proper under circumstances where the contract failed to specify the level of performance required. This idea was expressed in *Hattin v. Chase* as

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78. Early American cases virtually uniformly held that the obligation to perform in a workmanlike manner was implied by law. One illustrative case is *Hartford Mill Co. v. Hartford Tobacco Warehouse Co.*, 121 S.W. 477 (Ky. 1909), which involved a contract to build an addition to a warehouse. *Id.* at 478. The court held that the law implied the obligation that a contractor undertaking services perform in a workmanlike manner. *Id.* at 479. *Accord* *Manuel v. Campbell*, 3 Ark. 324, 335, 337 (1851); *Byerly v. Kepley*, 46 N.C. (1 Jones) 35 (N.C. 1853)(instruction that work was to be performed in workmanlike manner was correct); *Somerby v. Tappan*, Wright 570, 572 (Ohio 1834)(law implies obligation on part of workman to perform in workmanlike manner); *Waul v. Hardie*, 17 Tex. 553, 559 (1856)(trial court erred in not instructing jury that work must be performed in a workmanlike manner); *Davis v. Baxter*, 2 Patt. & H. 133, 698 (Va. 1856)(unfaithful service is defense to action for services rendered). See note 79, infra for citations to additional decisions adopting this principle.

In addition to the reasons previously given for why courts resort to implied in law terminology, early courts may have used the implied in law language as a means of connecting the implication of the workmanlike performance obligation to parties' intent. This additional explanation is consistent with the approach initially taken by courts which began in the early 19th century to look beyond the terms of the agreement to sources beyond the terms of the agreement to determine rights and obligations. See *Farnsworth*, supra note 54, at 863-64. The use of implied in law language was a part of an effort by courts to preserve the illusion that implied terms were premised on the intent of parties. *Id.* at 863-864. As courts gradually became more comfortable in looking beyond parties' expressed expectations, they more readily incorporated into agreements terms premised on notions of fairness and justice and not on the pretext of the parties' intention. *Id.* at 864-65. "Thus by 1893, when Parliament enacted the Sale of Goods Act, the warranties of fitness and merchantability were no longer stated as terms based on the ‘intention’ of the parties, but as suppletive rules of law. The same formula was followed in the Uniform Sales Act and in the Uniform Commercial Code. . ." *Id.* at 865.

79. *Schindler v. Green*, 82 P. 631, 632 (Cal. App. 1905)(where contract fails to provide, law imposes obligation to perform in workmanlike manner); *Bye v. George W. McCauley & Son Co.*, 76 A. 621, 622 (Del. 1908)(law presumes workman will perform services in a skillful and workmanlike manner); *Hall v. Cannon*, 4 Del. (4 Harr.) 360, 362 (Del. 1846)(one who undertakes to perform work requiring skill also undertakes to perform in a workmanlike manner); *Cannon v. Hunt*, 42 S.E. 734, 734-36 (Ga. 1902)(where plans and specifications do not prescribe a particular kind of material to be used for a given purpose and in a specified way, but in
The law, interpreting the contract, adds to its general words, in the absence of special ones, or of special facts controlling the particular case, his promise to bring to the work ordinary skill and capacity, together with integrity therein and faithfulness to the interests of his employer.  

Similarly, in *Lane v. Pacific & I. N. Ry.* the idea of the warranty of workmanlike performance operating as a gap filler necessary to define performance standards where the agreements fails to specify the manner of performance was presented as follows: "It is a well-established rule that where a party agrees to do a certain thing, and does not specify how it shall be done, the law implied a promise on his part to do it in the usual manner. . . ."  

In another group of cases the notion of the warranty of workmanlike performance operating as gap filler which defined performance obligations was stated in terms of the impact the failure to comply with the obligation would have on the parties' respective contractual duties. Thus in one case, the court held that when the failure to perform in a workmanlike manner renders the work of no value to the service recipient, the latter's obligation to pay for services is discharged. The court also concluded that improper performance enti-

80. Id. at 899-990 (emphasis added).
81. Id. at 658. As noted above, the language in *Lane* referencing the expectations of the parties may reflect the predilection of courts to try to connect the implication of terms to the parties' intentions. See Farnsworth, supra note 54, at 863-64 (emphasis added).
83. In *Waul v. Hardie*, 17 Tex. 553, 557-58 (1856). In *Waul*, plaintiff sought to recover for damages for work performed in the erection of a mill. *Id.* at 554. Defendant responded by asserting plaintiff's unworkmanlike performance as a defense. In reversing the lower court's refusal to instruct the jury that the law implies a duty to perform in a workmanlike manner, the appellate court noted the trial court's error in failing to instruct the jury on the uncontrollable law concerning the effects of the failure to perform in a workmanlike manner. *Id.* at 558-59. The
tled the service recipient to recover for damage resulting therefrom. Under such a scenario, the failure to fulfill the condition of proper workmanship could not only discharge the service recipient's performance obligation, but could also give rise to a cause of action for damages. This treatment of the warranty of workmanlike performance as a constructive condition demonstrates the perception of it as a gap uncontrovertible law to which the court referred was the rule that the law implies an obligation to perform work in workmanlike manner. 

86. Id; accord, Manuel v. Campbell, 3 Ark. 324, 337 (1841) (workmanlike performance is condition precedent to obligation to compensate contractor for services rendered); Bye v. George W. McCaulley & Son Co., 76 A. 621, 623 (Del. 1908) (service recipient may be entitled to set-off or total release from payment obligation for contractor's defective work); Hall v. Cannon, 4 Del. (4 Han.) 360, 363 (1846) (workman's failure to perform in workmanlike manner may preclude his recovery on contract); Manville v. McCoy, 3 Ind. 148, 150 (1851) (service recipient may deduct from amount due to service provider for damages resulting from latter's failure to perform in a workmanlike manner); Smith v. Bristol, 33 Iowa 24, 25 (1871) (carpenters cannot recover contract price for services performed in unworkmanlike manner); Taft v. Inhabitants of Montague, 14 Mass. 282 (1817) (breach of express promise to perform in workmanlike manner entitles service recipient to claim for damages); Schuler v. Eckert, 51 N.W. 198, 199-200 (Mich. 1892) (contractor's recovery under contract can be reduced by amount reflecting damages resulting from improper performance); Sherman v. Bates, 16 N.W. 831 (Neb. 1883) (improper performance supports claim for damages); Dyer v. Lintz, 68 A. 908 (N.J. 1908) (unworkmanlike performance by contractor allows owner an allowance against amounts due contractor); Davis v. Baxter, 2 Pat. & H. 133, 138-39 (Va. 1856) (failure to perform in workmanlike manner may entitle service recipient to offset against amounts claimed by contractor for services rendered); Muth v. Frost, 32 N.W. 231, 232 (Wis. 1887) (extent to which work is performed in workmanlike manner determines the extent to which a service provider can recover the contract price and its liability for damages resulting from improper performance).

87. A constructive condition also falls under the rubric of gap filler or implied in law terms as pointed out by Professor Corbin.

Arthur L. Corbin, Conditions in the Law of Contract, 28 YALE L.J. 739, 744 (1919) (footnote omitted); Hadjiyannakis, supra note 54, at 39, n.25; Farnsworth, supra note 54, at 866 ("The term read into the contract was labelled a 'constructive' rather than an 'implied' condition to indicate that it was rooted in 'a rule of law, and is not based on interpretation'.")

Commenting on the consequences of a condition, Professor Patterson remarked

[Since a contract may be conditioned in a way which does not depend upon its containing conditional language, the word "condition," in this broader sense, is not synonymous with a term in a contract; a condition is
filler provision defining the parties' performance obligations.

2. *Failure of Consideration*

Other cases spoke of implying a duty of workmanlike performance as necessary to avoid a “failure of consideration.” Failure of consideration is confusing terminology which has largely fallen out of usage. Notwithstanding what the concept suggests, it relates to

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*a fact* which bears a certain relation to the obligation of a contract (footnote omitted). Condition, then, denotes facts (events or occurrences) and connotes legal consequences. The primary legal consequence of a condition in a contract is that it gives the promisor a defense (negative or affirmative) to an action for the breach of his promise. His duty to perform his promise is dependent upon the condition, which may be, of course, the occurrence of a specified event or type of event, or its non-occurrence.

Edwin W. Patterson, *Constructive Conditions in Contracts*, 42 COLUM. L. REV. 903-904 (1942). Professor Williams viewed implied terms which he preferred to designate as constructive conditions as legislation which amends or supplements expressed intent. Such terms are incorporated in the absence of an express or contrary intention. Williams, *supra* note 54, at 404.

Professors Goetz and Scott also recognize that many gap-filler terms or default rules operate to create constructive conditions. Goetz & Scott, *supra* note 62, at 270-71.

Indeed, a key purpose of state-supplied terms is to save the parties from the necessity of formulating a complete set of express conditions for contingencies that may be difficult to anticipate, or are at least easily overlooked. Thus, many of the general rules of contract, such as those of impossibility and excuse, impose constructive conditions that reduce incompleteness risks. These supplementary rules of contract do not remove all incompleteness, however; they are necessarily generalized formulations that do not purport to address every set of circumstances.

*Id.*

Under a constructive condition analysis, the implied warranty of workmanlike performance would perform a dual function. On the one hand, it operates to prevent an immediate duty (typically the obligation of a service-recipient to pay) from becoming due. It thus can operate to discharge the service recipient's performance obligation. In addition, it creates a secondary duty in a service provider to compensate the service recipient for the former's failure to perform in a workmanlike manner. *See* Corbin, *supra*, at 742, 745. Thus, it would create a new right, that being the right of the service recipient to seek damages for breach of the promise to perform properly.


89. MURRAY, *supra* note 68, at 602 (use of the anomalous phrase “failure of consideration” as grounds for discharging another party's performance obligations resulted in some confusion since the term consideration is normally used in the context of contract formation); 3A ARTHUR CORBIN, CORBIN ON CONTRACTS, § 658, pp. 155-577 (1960) (also noting that when courts speak confusingly of “failure of consideration” what they mean is failure of performance).

To avoid the confusion generated by this terminology, the Restatement (Second) of Contracts rejects the phrase, “failure of consideration” and replaces it
performance obligations and not to contract formation. The phrase merely provides an alternative means of expressing the principle that one party's failure to deliver the performance promised may potentially result in discharge of the other party's performance obligation. Thus failure of consideration is "another way of stating that the promisor's performance is dependent and conditional on the delivery or tender of what the promisee has promised."

Consequently, when courts spoke (or in instances when they continue to speak) of failure of consideration in the context of a breach of the implied warranty of workmanlike performance, satisfactory performance—rendering services in a workmanlike manner—became a condition precedent to the service recipient's obligation to pay for the services rendered. When failure of consideration is replaced with modern parlance, improper performance provides the basis for finding nonperformance which may, in a proper case, not only discharge the services recipient of its payment obligation, but also subject the service provider to a claim for breach of contract. In short, this form of analysis further suggests that the warranty of workmanlike performance was regarded as a gap filler which operated to define performance obligations.

90. Coin, supra note 89, at § 658 p. 155 (noting the term failure of consideration is not synonymous with an absence of consideration which relates to the contract formation process); Lake LBJ Mun. Util. Dist. v. Coulson, 692 S.W.2d 897, 903, n.2 (Tex. Ct. App. 1985) (" 'failure of consideration' has nothing to do with an absence of consideration; the less confusing term used in the Restatement is 'failure of performance'"); Kent Feeds, Inc. v. Stahl, 238 N.W.2d 483, 487 (S.D. 1976) (Lack and failure of consideration are distinct concepts. One goes to the reason for the alleged contract while the other focuses on events occurring after contract formation).

91. Coin, supra note 89, at 156. Professor Patterson concluded that the substantive effect of constructive conditions and the "failure of consideration" concept is the same. Patterson, supra note 87, at 922. The only difference between the concepts were procedural and pleading formalities. Id.

92. For illustrative modern cases employing failure of consideration terminology see Worcester Heritage Soc'y, Inc. v. Trussell, 577 N.E.2d 1009, 1010 (Mass. App. Ct. 1991) ("The right to rescind a contract on the ground of failure of consideration exists only where the failure of consideration amounts to an abrogation of the contract, or goes to the essence of it, or takes away its foundation") (quoting DeAngelis v. Palladino, 61 N.E.2d 117 (Mass. 1945)); Colonial Ins. Co. v. Graw, 129 N.E.2d 491, 495-96 (Ohio Ct. App. 1955) (failure of consideration occurs when one of the parties to the contract refuses or neglects to perform the consideration agreed upon); Burt, Vetterlein & Bushnell, P.C. v. Stein, 844 P.2d 239, 244 (Or. Ct. App. 1992) (failure of consideration excuses a party's nonperformance where evidence demonstrates that the other party materially failed to do what the contract required); Kent Feeds, Inc. v. Stahl, 238 N.W.2d 483, 487 (S.D. 1976) (a partial failure of considerations creates a basis for abatement of damages).
3. Hypothetical Intention or Justice?

Thus we see that the implied warranty of workmanlike performance, as originally conceived by American courts, served as a gap filler or default rule which applied unless the parties expressed a contrary intention. Although the warranty's conceptualization as a gap filler can be readily established, uncertainty appears in advancing to the next level of analysis; is the concept's status as an implied in law term (gap filler/default rule) premised on the hypothetical intention of the parties or on principles of fairness and justice? As previously discussed, implied in law terms were traditionally viewed as consisting both of terms based on contracting parties' hypothetical intentions and terms which courts implied based on principles of fairness and justice.\(^9\)

To the extent that the warranty of workmanlike performance is a gap filler\(^9\) which furthers the common sense,\(^9\) yet unexpressed, expectations of the parties, perhaps it is premised on what the parties

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93. Refer to discussion accompanying notes 58-62, \textit{supra}.

\textit{But see} Farnsworth \textit{supra} note 54, at 879-80, attacking the soundness of the first of these premises. He argued that inference premised on the hypothetical intentions of the parties is contrived due to the speculation in which courts must engage in attempting whether the parties would have sought to include a term even if they had foreseen a situation and if so, what term they would have supplied if they had expressed their expectation in writing.

Professors Ayres and Gertner have relied on economic analysis to attack the premise of implication that courts should fill in the gap with the terms the parties "would have wanted." They recognize that most theorists conclude that courts should fill gaps with terms which the parties could have wanted. This is a consequence of the theory that parties have gaps in agreements because of transaction costs. Ayres \& Gertner, \textit{supra} note 64, at 93. They argue, however, that the transaction costs theory overlooks the possibility that parties allow gaps to exist (that is withhold information) for strategic reasons. Therefore, lawmakers should establish default rules that "encourage the better informed parties to reveal their information by contracting around the default." \textit{Id.} at 127.

94. Assuming as this discussion does that the warranty of workmanlike performance is a gap filler or default rule which has the operative effect of a constructive condition, the question arises whether it should be immutable. Incorporating into service agreements the duty to perform in a workmanlike manner may reflect a normal expectation that those who enter into service contracts expect, at a minimum, proper performance. \textit{See} Barnett, \textit{supra} note 58, at 884. The implied warranty of workmanlike performance in functioning as a background rule establishes just such a presumption. If it reflects an expectation which goes to the very essence of particular transactions, arguably it takes on the character of implied terms such as the duty of good faith. Indeed, a case can be made that it is untenable to believe that a service recipient would enter into an agreement where it would condone improper services. \textit{See} Barnett, \textit{supra} note 58.

Although beyond the scope of this article, this inquiry leads to a question of whether the implied warranty of workmanlike performance is a term that can be displaced only with a more stringent and specific standard of care than that which it imposes. Under such a formulation, the warranty sets a minimum standard of performance which cannot be derogated and can only be enhanced. The
would have agreed to if they had given the matter thought. On the other hand, to the extent that the warranty is the result of some opinion as to policy, or some attitude not capable of exact qualitative measurement and a resulting allocation of risk, it may be viewed as premised on principles of fairness and justice.

In general, just as the dividing line between implied in fact and implied in law is unclear, the line between the premises for court

over-arching question becomes to what extent service providers should be permitted to allocate risk of improper performance to the service recipients.

95. Professor Barnett has constructed the following definition: "[C]ommon sense," as used here, simply means the sense of things that most people share in common." Barnett, supra note 58, at 880.

96. Farnsworth, supra note 54, at 879. The sources of these principles of fairness and justice have been described as follows:

Where do courts find these basic principles of justice? Often they look to the idea of fairness in the exchange. In searching for what Lord Mansfield called "the essence of the agreement," a court seeks a fair bargain. It may, for example, justify the term it supplies on the ground that the term prevents one party from being in a position of "economic servility" and "completely at the mercy" of the other. It is likely to supply a term that is suitable for a particular market or other segment of society or even for society in general. Furthermore, if the situation is a recurring one, a court will try to resolve the omitted case in a way that yields a convenient rule or that promotes certainty.

Farnsworth, supra note 8, at § 7.16, at 548 (footnotes omitted).

97. In discussing the manner in which a principle based upon justice or fairness may be chosen, it has been stated:

A result may be chosen on the basis of a convenient rule of thumb or because it will discourage litigation by promoting certainty... Or a result may be chosen because it places the risk in a way that is thought desirable from the point of view of a particular market or of society in general. (citations omitted).

Farnsworth, supra note 54, at 878-79.

98. See discussion accompanying note 57, supra.

Professor Treitel in discussing The Moorcock, which is routinely cited as the leading authority on the concept of implied in fact terms, TREITEL, supra note 8, at 164, illustrates that English courts and scholars also struggle with distinguishing between implied in fact and implied in law terms. In The Moorcock, plaintiffs contracted to unload their ship at a wharf owned by defendants. Id. The ship incurred damage when it settled at low tide on a ridge of hard ground. Id. The court found defendants liable for the resulting damages based on breach of an implied term to exercise reasonable care to see that the ship's berth was safe. Id. The court’s implication of the term was premised both on implied in fact and implied in law principles.

Lord Esher M.R. said that it must be implied that the defendants had 'undertaken to see that the bottom of the river is reasonably fit, or at all events that they have taken reasonable care to find out that the bottom of the river is reasonably fit for the purpose. . . Had these alternatives been put to the parties they might well have disagreed. (emphasis added). This suggests that the term was not implied in fact but in law. Again in a famous passage, Bowen L.J. said: 'An implied warranty, or, as it is called, a covenant in law . . . is in all cases founded on the presumed
supplied terms is also unclear. "In practice, expectation shades into fairness or justice so that it is often hard to distinguish between the two."99 No doubt, principles of fairness reflect the expectations which arise from particular relationships. At the same time, common sense expectations justify imposing obligations which reflect the expectations of the business community or context within which parties operate.

Regardless of the precise theoretical basis, the warranty of workmanlike performance is a court supplied gap filler which governs unless the parties express a contrary intention.100 In summary, the warranty of workmanlike performance has been selected as a gap filler because it comports with the way in which service providers and recipients transact business and with the expectations reasonably flowing from this relationship. Consequently, the implication of this term makes common sense in the context of these transactions and presumably promotes fairness and justice. Therefore, the implied warranty of workmanlike performance can be viewed as a generalized standard which helps to create a bridge which links expectation (actual or hypothetical) with notions of justice and fairness.101

This relationship between expectation and justice appears in English cases which, like their American counterparts, recognize that the obligation to perform in a workmanlike manner is based on premises which operate independently of the actual intentions of parties.102

intention of the parties and upon reason. . . . In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are businessmen. The italicized phrases show that Bowen L.J. was not exclusively concerned with the intention of the parties.

Id. From the foregoing, Professor Treitel extrapolates that in many instances a court's implication of terms is premised neither upon implied in law nor implied in fact but on both.

99. Farnsworth, supra note 54, at 877.
100. See Corbin, supra note 56, at 278-79 (suggesting that the precise bases on which a term is implied are often irrelevant).
101. See Farnsworth, supra note 54, at 878.
102. See TREITEL, supra note 8, at 162 (implied in law terms differ from implied in fact terms in that the former do not depend on any inference as to parties' actual intentions).

In Miller v. Cannon Hill Estates Ltd., 2 K.B. 113 (1931), the court noted that where a builder has an obligation to erect a house, the law will further imply a promise that the house is to be constructed in an efficient and workmanlike manner. "[Q]uite apart from the express agreement . . . [was] an implied agreement that this house should be completed in an efficient and workmanlike manner. . . . Id. at 122.

In the seminal case of Duncan v. Blundell, 171 Eng. Rep. 749 (1820) the court suggests the source of the warranty of workmanlike performance exists independent of the actual intentions of the parties. The Duncan court spoke of the duty created in broad terms, suggesting the implied obligation to perform in a
Thus in England it has been said that the law implies terms not to make a contract more reasonable in its consequences but only in order to give the contract "business efficacy." In addition, the workmanlike performance obligation has been imputed into contracts because in the context of service contracts, justice and fairness required its implication. In short, like American courts, English courts viewed the workmanlike performance obligation as serving a gap filling function arised as a matter of justice and fairness based upon the nature of the relationship and tacit assumptions arising therefrom as providing predicates for the obligation.

See 3 BLACKSTONE, COMMENTARIES 165, where it is said that the implied warranty of workmanlike performance was such a term that "reason and justice dictate, and which therefore the law presumes that every man has contracted to perform [a service], and upon this presumption makes him answerable to such persons as suffer by his non-performance."

That the duty to perform in a workmanlike manner is premised on notions of fairness and justice was articulated in dictum in Lucas v. Godwin, 132 Eng. Rep. 595 (1837) where plaintiff contractor agreed to build six cottages. The contract provided, in part, that plaintiff would construct the cottage by a certain date and would execute the work in a workmanlike manner. Plaintiff failed to complete construction of the house before the date stipulated in the contract. In ruling on behalf of the plaintiff's right to recover, the court noted that notwithstanding express contractual language that the work be performed in a proper and workmanlike manner, such a condition was implied into every contract of the type before it—the provision of building services. This focus on the nature of the relationship as justifying the imposition of the obligation connotes principles of justice and fairness.

Another interesting aspect of Lucas is the effect of the contractor's improper performance. The court afforded failure to comply with the warranty the same operative effect an American court would have given applying a constructive condition analysis. It concluded that when an implied in the workmanlike performance obligation is not satisfied, breach may have occurred. Id. at 743-44. In addition, the court held compliance with the condition was a condition precedent to recovery. Id.

Similar expressions can be found in Basten v. Butter, 103 Eng. Rep. 185 (1806). There Le Blanc J., stated "the plaintiff must be prepared to shew [sic] that his work was properly done, . . . otherwise he has not performed that which he has undertook to do, and the consideration fails." Id. at 188. It was further stated by Lawrence J. that "if the work stipulated for at a certain price was not properly executed, the plaintiff would not have done that which he engaged to do; the doing which would be the consideration of the defendant's promise to pay. . . ." Id. at 187.

103. ALFRED ARTHUR HUDSON, BUILDING AND ENGINEERING CONTRACTS, 50, (10th ed. 1970). The author states that one of the more important of the terms implied, when the agreement fails otherwise to specify, is that workmanship shall be of a proper standard. Id. at 50-51. In the context of construction contracts, other terms which the law will apply in the absence of express provision include an implied obligation to complete performance within a reasonable time, and an implied obligation to perform work with reasonable diligence and due expedition. Id. at 51-52.

104. In England, the concept of implied in law terms has been described as duties arising prima facie out of certain contractual relationships or as legal incidents to such relationships. TREITEL, supra note 8, at 182.
which operated to more sharply define contractual performance obli-
gations. And as with American courts, the hypothetical inten-
tions of the parties and principles of fairness and justice coalesce to
provide the theoretical source for the obligation.

B. Summary

Early cases demonstrate that the concept of an implied in law term
provided the predominant theoretical premise for the implied war-
ranty of workmanlike performance. Courts implied the obligation
beyond what they believed the parties would have contracted for and
upon a desire to achieve fairness—that is, what is necessary to further
common sense expectations which arise in service contracts. The
omitted case involving the implied warranty of workmanlike perfor-
ance is analogous to the type of omitted case identified by one com-
mentator who stated that “[a]t one end are those instances where a
party is so confident that his expectation follows from what has been
said that it does not seem worthwhile to reduce it to contract lan-
guage.”

Thus warranty of “workmanlike performance emanates from the
very fact that a builder or other service provider agreed to provide
services in exchange for consideration normally payment for such
services.” Therefore incorporating the warranty of workmanlike
performance is necessary to lend meaning and content to the parties’
respective contractual undertakings where they have failed to do so.
It defines the performance obligations of service providers. In addi-
tion, the respective rights and duties of service providers and service
recipients depend on the fulfillment of a condition to perform in a
workmanlike manner. Consequently, improper performance might
operate to discharge the service recipient’s obligation to pay and con-
versely defeat the contractor’s right to payment for services ren-
dered. In appropriate cases, the workmanlike performance

105. The gap filling function of the implied duty to perform in a workmanlike manner
is acknowledged by the author of a leading English treatise on building contracts.
He concludes that “[i]n the absence of any special term or direction in the con-
tract specifying the manner in which the work is to be done, there is an implied
condition in all contracts for work and labour that the work will be carried out
with care and skill, or as it is sometimes expressed, in a good and workmanlike
manner.” HUDSON, supra no 103, at 305. The author concludes that the obliga-
tion amounts to nothing more than a warranty that the work described in the
contract will be carried out with reasonable skill and care. Id.

106. In Pearce v. Tucker, the court’s statement that “it is doubtful that the parties
would have contracted if they had known the work would not have been per-
formed properly,” suggests that the implied obligation arises from the hypotheti-
cal intentions of the parties.

107. Farnsworth, supra note 54, at 872.

108. See Goetz & Scott, supra note 62, at 270.

109. The effect of this implication, as is the case for constructive conditions generally,
obligation operates to create the right in service recipient to seek breach of contract damages from the service provider. Therefore, the implied warranty of workmanlike performance was perceived as operating such that it could, on the one hand, prevent an immediate duty (typically the obligation to pay for services rendered) from being imposed on the service recipient, and, on the other hand, subject the service provider to damages for the failure to comply with the performance standard.\textsuperscript{110}

The forgoing discussion underscores the contractual nature of the obligation to perform in a workmanlike manner, at least, as it was traditionally perceived. Yet as the following discussion reveals, modern courts are not uniform in recognizing a contractual conceptualization of the warranty of workmanlike performance.

IV. MODERN RECOGNITION AND DIVERGENT FORMULATIONS

A. Transformation and Expansion

Like their predecessors in the late nineteenth and early twentieth centuries, modern American courts have uniformly embraced the concept that contractors and other service providers impliedly warrant to perform in a workmanlike manner.\textsuperscript{111} One consequence of the wide-

\textsuperscript{110}Corbin, \textit{supra} note 87, at 742, 745.

spread acceptance of the doctrine is judicial divisiveness over its pre-

Premco Drilling, Inc. v. Maillet Bros. Builders, Inc., 218 A.2d 542, 544 (Conn. Ct. 1965)(contractor has duty to perform in a workmanlike manner); Smith v. Berwin Builders, Inc., 287 A.2d 683, 695 (Del. Super. Ct. 1972)(implied warranty of good quality and workmanship is imposed on builders); Ehrenhaft v. Malcolm Price, Inc., 483 A.2d 1192, 1200 (D.C. 1984); Schmeck v. Sea Oats Condominium Ass'n., Inc., 441 So.2d 1092, 1097 (Fla. Dist. Ct. App. 1983)(developer can be held liable for failure to construct in workmanlike manner); Blue v. R.L. Glosson Contracting, Inc., 327 S.E.2d 582, 583 (Ga. Ct. App. 1985)(every construction contract implies a duty to perform services in skilful, diligent and workmanlike manner); (Sam Finley, Inc. v. Barnes, 275 S.E.2d 380, 382 (Ga. Ct. App. 1980)(a duty is implied into every construction contract that contractor perform in skilful, careful and workmanlike manner); Altevogt v. Brinkoetter, 421 N.E.2d 182, 186 (Ill. 1981)(since contract to construct a building involves the rendering of services, there is an implied undertaking to perform services in a workmanlike manner); Midwest Dredging Co. v. McAninch Corp., 424 N.W.2d 216, 220 (Iowa 1988)(warranty to perform in a workmanlike manner is implied into construction contracts); Markman v. Hoefer, 106 N.W.2d 59, 62 (Iowa 1960)(in the absence of express term, obligation to perform in a workmanlike manner is implied into construction contracts); Corral v. Rollins Protective Servs. Co., 732 P.2d 1260, 1268 (Kan. 1987)(one who agrees to perform work or render a service impliedly warrants to perform in a workmanlike manner); Gilley v. Farmer, 485 P.2d 1284, 1289 (Kan. 1971)(law implies into contracts for rendering of services, duty that undertaking be performed in workmanlike manner); Salard v. Jim Walter Homes, Inc., 563 So. 2d 1327, 1330 (La. Ct. App. 1990)(it is implied into every building contract, that builder is to perform in workmanlike manner); Trahan v. Broussard, 399 So. 2d 782, 784 (La. Ct. App. 1981)(implicit in every contract is duty of builder to perform in a workmanlike manner); Previews v. Everets, 94 N.E.2d 267, 268 (Mass. 1950)(plaintiff who agreed to provide promotional services impliedly promised to perform them in workmanlike and adequate manner); Friese v. Boston Consol. Gas Co., 88 N.E.2d 1, 4 (Mass. 1949)(gas company owed duty to install gas water heater in workmanlike manner); Abrams v. Factory Mut. Liab. Ins. Co., 10 N.E.2d 82, 83 (Mass. 1918)(like other service providers, an insurer impliedly agrees to perform a workmanlike job and to use reasonable care); Worthington Constr. Corp. v. Moore, 231 A.2d 466, 467 (Md. 1967)(one who constructs a house is obligated to use ordinary skill and care); Gaybis v. Palm, 93 A.2d 269, 272 (Md. 1952)(law imposes obligation on part of contractor to perform work with skill and care); Paine v. Spottiswoode, 612 A.2d 235, 238-39 (Me. 1992)(acknowledging contractor's duty to build in workmanlike manner); Wimmer v. Down E. Properties, Inc., 406 A.2d 88, 92 (Me. 1979)(law implies into construction contracts warranty that work will be performed in a skillful and workmanlike manner); Gosselin v. Better Homes, Inc., 256 A.2d 629, 639-40 (Me. 1969)(notwithstanding absence of express term, an obligation to perform in a workmanlike manner is implied into construction contracts); Dierickx v. Vulcan Industries, 158 N.W.2d 778, 783 (Mich. Ct. App. 1968)(law imposes duty to perform services in workmanlike manner); George B. Gilmore Co. v. Garrett, 582 So. 2d 387, 391 (Miss. 1991)(builder has a duty to construct house in workmanlike manner); Ferguson v. Town Pump., Inc., 580 P.2d 915, 920 (Mont. 1978)(a construction contract implies that a contractor will perform work in a reasonably skillful and workmanlike manner); Garden City Floral Co. v. Hunt, 255 P.2d 352, 355 (Mont. 1953)(accompanying every contract is a common law duty to perform with care, skill, reasonable expediency and faithfulness)(overruled in part on other grounds Bohrer v. Clark, 590 P.2d 117 (Mont. 1978)); Pioneer Enters., Inc. v. Edens, 216 Neb. 672, 675, 345 N.W.2d 16, 18 (1984)(every contract for services includes implied duty to perform skillfully and
cise doctrinal meaning. This divergence of views is reflected in varying perceptions of the dimensions of the warranty. Thus, in certain instances the obligation to perform in a workmanlike manner has been construed to mean something more or different than a gap filler or default rule which merely defines the standard by which a service provider's performance is measured absent express agreement.

The following discussion will focus on the manner in which the judiciary has approached two issues, as a vehicle for illustrating the uncertainty surrounding application of the workmanlike performance concept and the disparate views concerning its dimensions. Attention is directed first to how misinterpretation of the theoretical premises of the workmanlike performance warranty has sometimes led to its improper absorption into the warranty of habitability. Once again this article posits that it is a misunderstanding of the fundamental bases of the warranty which can account for such results. The discussion next turns to an exploration of cases examining the substantive causes of action which are invoked for failure to perform in a workmanlike manner.

A review of these cases reveals inconsistent results conspicuous for reasoning which ignores pertinent policy consider-

in workmanlike manner); Henggeler v. Jindra, 191 Neb. 317, 319, 214 N.W.2d 925, 926 (1974)(a contractor impliedly agrees to construct a building in a workmanlike manner); Daniel v. Hilton Hotels Corp., 642 P.2d 1086, 1087 (Nev. 1982)(surveyor possessed an implied duty to perform survey work in workmanlike manner); Aronsohn v. Mandara, 484 A.2d 675, 678 (N.J. 1984)(in absence of express provi-
sion, law incorporates into contract an obligation to perform construction in a reasonably good and workmanlike manner); Mascarenas v. Jaramillo, 806 P.2d 59, 61 (N.M. 1991)(tradesmen impliedly warrants to perform in a workmanlike manner); Hartley v. Ballou, 209 S.E.2d 776, 782 (N.C. 1974)(builder is obligated to per-
pliedly warrants to perform in workmanlike manner); Lucas v. Canadian Valley Area Vocational Technical Sch. 824 P.2d 1140, 1141 (Okla. Ct. App. 1992)(builder-
vendor of new home, impliedly warrants that home is constructed in workman-
like manner and is fit for intended use). Davis v. New England Pest Control Co., 576 A.2d 1240, 1242 (R.I. 1990)(service contracts carry implied duty to perform work in skillful, careful, diligent and workmanlike manner); Hill v. Polar Pan-
tries, 64 S.E.2d 885, 888 (S.C. 1951); Kennedy v. Columbia Lumber and Mfg. Co., Inc., 384 S.E.2d 730, 736 (S.C. 1989)(builder impliedly warrants to erect building in good careful, diligent and workmanlike manner); See Kirby Farms Homeowners Ass'n v. Citicorp Citibank, N.A., 773 S.W.2d 249 (Tenn. Ct. App. 1989)(impliedly recognizing warranty of good and workmanlike performance attaches to the a dwelling); (Cline v. Sawyer, 600 P.2d 725, 731 (Wyom. 1979)(contractor is under an implied obligation to perform his contractual obligations in a workmanlike manner).

112. See text accompanying notes 121-147, infra.

113. See text accompanying notes 153-215, infra.
Moreover, it is in these cases where the transformation and expansion of the warranty of workmanlike performance from a contractually based gap filler into a hybrid tort is most pronounced.

The following discussion attempts to demonstrate that these inconsistent judicial determinations stem, at least in part, from a misunderstanding of the theoretical underpinnings of the warranty of workmanlike performance. It proposes that conceptualizing the warranty as a gap filler or default rule provision will, at a minimum, enhance our understanding of the underlying nature of the obligation. Further, a gap filler conceptualization will provide, at a minimum, a framework of analysis which examines policy considerations typically overlooked in resolving the myriad of issues implicated when the warranty of workmanlike performance is at issue. Finally, the proposed conceptualization may lessen reliance for resolving disputed issues on concepts which possess their own conceptual and practical uncertainties such as the economic loss rule.115

Before discussing these issues in detail, however, it is appropriate to briefly reconsider a fundamental question often posed regarding the warranty of workmanlike performance—does it constitute an “in process” or “end result” concept?

B. In Process or End Result?

Commentators and scholars agree that the warranty of workmanlike performance is not an end result warranty such as the warranty of merchantability under Article Two of the Uniform Commercial Code.116 Indeed, unlike the warranty of merchantability and the warranty of habitability,117 the implied warranty of workmanlike per-

114. See text accompanying notes 216-227, infra.
115. See text accompanying notes 228-243, infra, for discussion of the economic loss rule.
116. See William K. Jones, Economic Losses Caused by Construction Deficiencies: The Competing Regimes of Contract and Tort, 59 U. CIN. L. REV. 1051, 1059-60 (1991)(proper efforts contracts imposes liability only for breaches of the applicable standard of care while result-oriented contracts impose absolute liability); Murray H. Wright & Edward E. Nicholas, III, The Collision of Tort and Contract in the Construction Industry, 21 U. RICH L. REV. 457, 463-64 (1987)(design professionals do not warrant an accurate result, but that they will exercise due care in the provision of services); Hal G. Block, As the Walls Came Tumbling Down: Architect’s Expanded Liability Under Design-Build/Construction Contracting, 17 J. MARSHALL L. REV. 1, 18 n.86 (1984)(the warranty of workmanlike performance is a warranty not to act negligently); Greenfield, supra note 22, at 666 (the implied warranty of workmanlike performance requires non-negligent performance and not a guarantee of results); Note, Extension of Warranty Concept to Service-Sales Contracts, 31 IND. L.J. 367, 374 (1956)(service provider under obligation to perform in workmanlike manner possesses duty to perform and workmanlike manner which is not a guarantee of results).
117. However, as discussed in the text accompanying notes 126-130, infra, the warranty of habitability is not always characterized as an “end result” warranty.
formance is an "in process" concept. "In process" refers to those situations in which the liability of the service provider hinges on the nature of the conduct he or she provides when rendering services. Therefore "in process" is to be contrasted with a "true warranty" in that the former focuses on conduct, while the latter focuses on the end result. Accordingly, conformance by the service provider with the governing standard of care will more than likely relieve it of liability for defects resulting from its performance. As one commentator stated:

The "proper efforts" standard is common in service contracts, .... In general, courts construe these contracts as imposing no more than an obligation to employ proper efforts, in conformity with standards of the profession, and there is no breach even if the objective of the contract is not achieved—the patient dies, the lawsuit is lost, the building collapses—as long as the contracting party has made the proper effort.

Thus, consistent with a notion of a gap filler, the principal function of the warranty of workmanlike performance is to expose the implicit understanding that the service provider engage in a minimal level of care.

C. Independent of Warranty of Habitability?

Does the warranty of workmanlike performance have an identity separate and distinct from the warranty of habitability? Moreover,
how does a gap filler conceptualization of the warranty of workman-
like performance assist in responding to this question? As an initial
matter, examination of these issues requires a comparative analysis of
the concepts embodied in both the warranty of habitability and the
warranty of workmanlike performance. It also warrants examination
of the interests sought to be protected within the rubric of the two
theories. Accordingly, consideration of these questions begins with a
brief review of the warranty of habitability.

In Vanderschrier v. Aaron, the Ohio Supreme Court initiated
the American demise of caveat emptor in holding that an implied
warranty of good and workmanlike construction and habitability was

121. 103 Ohio App. 340, 140 N.E.2d 819, 821 (1957). The following year, the Wash-
ington Supreme Court recognized a home purchaser's claim premised on the war-
ranty of habitability against a builder-vendor. Hoye v. Century Builders, Inc., 329
P.2d 474 (Wash. 1958). Shortly thereafter other states followed suit. See gener-
ally Peter J. Shedd, The Implied Warranty of Habitability New Implications,
New Applications, 8 REAL EST. L.J. 291 (1980)(identifying and discussing the pace
at which courts adopted the warranty of habitability).

122. See generally Walter H. Hamilton, The Ancient Maxim Caveat Emptor, 40 YALE
L.J. 1133 (1931)(discussing the history and meaning of caveat emptor). See also,
Roy Ryden Anderson, Disclaiming the Implied Warranties of Habitability and
Good Workmanship in the Sale of New Houses: The Supreme Court of Texas and
The Duty to Read the Contracts You Sign, 15 TEX. TECH L. REV. 517, 524-27
(1984)(outlining the origins and premises of caveat emptor); Hal G. Block, supra
note 116, at 21 (noting caveat emptor was premised on equal bargaining positions
and arms length bargaining).

In England, the abandonment of the caveat emptor doctrine began in Miller v.
Cannon Hill Estates Ltd., [1931] 2 K.B. 113 where the court in dictum announced
that an implied warranty of habitability should attach to the sale of a house to be
erected. In announcing this dictum, the Miller court reasoned that implication of
the warranty was justified given that

the whole object, as both parties know, is that there shall be erected a
house in which the intended purchaser shall come to live. It is the very
nature and essence of the transaction between the parties that he will
have a house put up there which is fit for him to come into as a dwelling-
house. It is plain that in those circumstances there is an implication of
law that the house shall be reasonably fit for the purpose for which it is
required, that is for human dwelling.

Id. at 121. William D. Grand, Implied and Statutory Warranties in the Sale of
Real Estate: The Demise of Caveat Emptor, 15 REAL EST. L.J. 44, 45 (1986)(recog-
izing the demise of caveat emptor as beginning with the Miller dictum); Block,
supra note 116, at 22 (Miller represents the first breach in the citadel of caveat
emptor).

Perry v. Sharon Development Co., [1937] 4 All. E.R. 390, expressly adopted the
Miller dictum and implied a warranty of good and workmanlike performance and
habitability into every contract for the erection of a house. Id. at 395. It should be
noted that the court in Perry encountered difficulty adopting the dictum stated in
Miller to the situation before it. In Miller the court limited the proposed war-
 ranty to houses being constructed. In Perry, the house was substantially com-
 pleted. The court avoided the limitation imposed on application of the warranty
in Miller by concluding that the house was unfinished for purposes of applying
the Miller dictum. Id.
implied into every contract for the sale of an unfinished house. Eventually, the warranty of habitability was extended to the sale of a completed house. Today, the applicability of the implied warranty of habitability to homes is recognized in virtually all states.

The implied warranty of habitability has been defined "as a guarantee by the builder-vendor that the structure will have no defects of a nature that substantially impairs the enjoyment of the residence." Most courts construe the foregoing to mean that the warranty of habitability is breached only in those instances when defects are of such a nature that a home is rendered uninhabitable. Thus a fundamental difference between the implied warranty of habitability and the warranty of workmanlike performance emerges. The former is an "end result" concept where conduct or the manner in which performance is conducted is irrelevant. As such, the warranty of habitability represents a form of strict liability since the adequacy of the completed structure and not the manner of performance by the builder governs liability.

See Anderson, supra note 122, at 530 (identifying Vanderschier as the first American case implying a warranty of habitability).

Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1964) is acknowledged as the first case to extend the warranty of habitability to transactions involving completed homes. Anderson, supra note 122, at 530. See Grand, supra note 122, at 45 (noting Ohio was the first state to recognize this implied warranty in the sale of uncompleted homes and Colorado was the first state to extend such warranties to the sale of completed homes).


Notwithstanding its significance, the warranty of habitability is of limited scope. The protections it affords purchasers of residential property typically have not been extended to protect purchasers of commercial or investment properties. See Lieder, supra, at 959 (most courts refuse to give commercial and investment purchasers the protection of the implied warranty); Powell & Mallor, supra, at 331-34 (while acknowledging the general rule, arguing for extension of the warranty of habitability to commercial purchasers for the same policy reasons supporting application of warranty to residential purchasers).

Edie Lindsay, Comment, Strict Liability and the Building Industry, 33 EMORY L.J. 175, 204 (1984).

"[T]he implied warranty of habitability protects only against relatively substantial defects. As a general rule, the complaint must relate to design or workmanship defects that render the property unsuitable for its intended use." Powell & Mallor, supra note 125, at 314.

Powell & Mallor, supra note 125 at 312-13.

Jeff Clarkson, Note, Implied Warranties of Quality in Texas Home Sales: How Many Promises to Keep?, 24 HOU. L. REV. 605, 615 (1987) (the adequacy of the completed structure is the focus of the warranty of habitability); Bruce R. Toole & Peter F. Habein, The Warranty of Habitability: A Bill of Rights For
Despite this critical distinction, confusion surrounds the relationship between the warranties of habitability and workmanlike performance in the construction context. This confusion results, to some extent, from language often employed to describe the concept of the implied warranty of habitability. For instance, "implied warranty of workmanship" or "workmanlike quality" are terms often used to describe the concept embodied in the implied warranty of habitability.130

1. Unitary Concepts

However, linguistic casualness fails completely to account for the confusion surrounding the relationship between the two concepts. Different conceptualizations of the notion of an implied warranty of habitability contribute to the failure to clearly distinguish the concepts. Therefore, the scope and breadth of the warranty of habitability will often dictate its relationship with the workmanlike performance concept.

Some courts define the implied warranty of habitability so as to encompass the warranty of workmanlike performance. In these cases, the warranties of habitability and workmanlike performance are discussed together with little or no attempt to differentiate them.131 In

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130. See e.g., Crawley v. Terhune, 437 S.W.2d 743, 745 (Ky. 1969)(phrase implied warranty that major structural features are constructed in workmanlike manner used to express court's adoption of warranty of habitability); Lempke v. Dagenais, 547 A.2d 290, 291 (N.H. 1988)(implied warranty of workmanlike quality); Dixon v. Mountain City Constr. Co., 632 S.W.2d 538, 541 (Tenn. 1982)(implied warranty of good workmanship and materials).

131. See e.g., Richards v. Powercraft Homes, Inc., 678 P.2d 427, 430 (Ariz. 1984)(using language suggesting warranty of habitability encompasses warranty to perform in workmanlike manner). But see Columbia W. Corp. v. Vela, 592 P.2d 1294, 1299 (Ariz. App. 1979)(indicating warranties are separate); Lucas v. Canadian Valley Area Vocational Technical Sch., 824 P.2d 1140, 1141 (Okla. Ct. App. 1992)("When a builder-vendor sells a new home, there is an implied warranty, as a matter of law, that the home is or will be completed in a workmanlike manner and will be reasonably fit for occupancy as a place of abode"). But see, Elden v. Simmons, 631 P.2d 739, 740 (Okla. 1981)(using language which perhaps suggests obligations of workmanship and habitability create distinct warranties).

In Klos v. Gockel, 554 P.2d 1349 (Wash. 1976), plaintiff alleged defects including the separation of a door frame from the wall of house and buckling and sinking of front yard patio slabs. The court concluded that these defects did not give rise to breach of the implied warranty of habitability which it stated provides that the dwelling “is sufficiently free from major structural defects, and is constructed in a workmanlike manner, so as to meet the standard of workmanlike quality then prevailing at the time and place of construction.” Id. at 1352 (quoting Hartley v. Ballou, 209 S.E.2d 776 (N.C. 1974)). As discussed below, a different result could have occurred if the court had viewed the warranty of workmanlike performance as an independent concept. The alleged defects could have given rise to
this group of cases, the obligation to perform in a workmanlike manner becomes a component or prong of the warranty of habitability. An important consequence of defining the warranty of habitability as incorporating the warranty of workmanlike performance is to limit the function of the latter and deprive it of vitality as an independent basis for recovery for defective performance.

2. Distinct and Independent Concepts

Notwithstanding the above, there exist sound bases for conceptualizing the warranty of workmanlike performance as a concept distinct and independent of the warranty of habitability. As such, a failure of a builder to perform in a workmanlike manner should be actionable even in instances where habitability is not impaired. This was the outcome in Evans v. Stiles. In reaching a decision in favor of the homeowner, the Texas Supreme Court first noted that in earlier decisions it had indicated that builder/vendors warrant workmanship and habitability.

132. In Kirk v. Ridgeway, 373 N.W.2d 491, 496 (Iowa 1985), the court identified the following elements of the implied warranty of workmanship in the sale of real estate, including: (1) house is fit for its intended purpose; or (2) is constructed in a good and workmanlike manner.

Similarly, in Gaito v. Auman, 327 S.E.2d 870 (N.C. 1985), the North Carolina Supreme Court defined the warranty of habitability as follows: "In every contract for the sale of a recently completed dwelling, and in every contract for the sale of a dwelling, then under construction, the vendor, ... shall be held to impliedly warrant ... the dwelling, ... is sufficiently free from major structural defects, and is constructed in a workmanlike manner, so as to meet the standard of workmanlike quality then prevailing at the time and place of construction. ..." Id. at 874.

See Roper v. Springlake Dev. Co., 789 P.2d 483, 485 (Colo. Ct. App. 1990) ("The contractual responsibilities of the builder of a new house which are implicit in the concept 'implied warranty of habitability' include the buyer's right to both a home that is built in workmanlike manner and one that is suitable for habitation").

On occasion, the workmanlike performance prong of the warranty of habitability permits recovery for minor defects under a habitability theory. See Deisch v. Jay, 790 P.2d 1273, 1276 (Wyo. 1990). Query whether the operative effect of permitting recovery for minor defects based on violation of the workmanlike performance prong of the habitability warranty is in essence the same as in those instances when the recovery for such defects would be permitted for breach of a warranty of workmanlike performance which is deemed distinct and independent of habitability.

133. In England, the warranties expressly adopted in Perry v. Sharon have been construed as distinct. This was made clear in Hancock v. B.W. Brazier Ltd. [1966] 2 All E.R. 901, 904 [1966] and Billyjack v. Leyland Construction Co., [1968] 1 All E.R. 783, 789. In Billyjack, the obligations of builders who enter into building contracts were defined as threefold: (a) to perform the work in a workmanlike manner; (b) to supply proper materials; and (c) to build a house that is habitable.

134. 689 S.W.2d 399 (Tex. 1985).
bility. In recognizing the distinct identity of the two warranties, it
held that "[t]he implied warranty of construction in a good work-
manlike manner is independent of the implied warranty of
habitability . . . ."135

Similarly in Aronson v. Mandara,136 the warranty of habitability
was found not to apply to claims involving an improperly constructed
patio.137 However, the peripheral nature of the defects did not elimi-
nate a possible claim for breach of the warranty of workmanlike per-
formance. In reaching this conclusion, the New Jersey Supreme
Court discussed the relationship between the warranties of workman-
ship and habitability.

The doctrine of implied warranty of habitability is therefore inapplicable
under the circumstances here. That does not mean, of course, that in other
situations a breach of an implied warranty of reasonable workmanship could
not also constitute a breach of an implied warranty of habitability, if the con-
dition were sufficiently serious to affect the home's habitability.138

After properly noting that the warranty of workmanlike performance
rests on an implied contractual provision,139 the court remanded the
matter for determination of whether the warranty of workmanlike

135. Id. at 400. Other courts emphatically conclude that the workmanship obligation
is conceptually distinct from the warranty of habitability. Schmeck v. Sea Oats
Condominium Ass'n Inc., 441 So. 2d 1092, 1097 (Fla. Dist. Ct. App. 1983)(devel-
oper may be liable for breach of warranty to construct in workmanlike manner or
for failure to provide a habitable dwelling); Chandler v. Madsen, 642 P.2d 1028,
1031 (Mont. 1982)(builder vendor of residence impliedly warrants both its habitabil-
ity and its workmanlike manner of construction); Kennedy v. Columbia Lumber
workmanlike service is distinct from the warranty of habitability); Meadowbrook
1989)(claim alleging breach of warranty of workmanship may exist notwithstanding
fact defects fail to render dwelling uninhabitable); Toole & Habein, supra
note 129, at 162 (proposing that the court in Chandler v. Madsen recognized two
independent warranties, the warranty of workmanlike performance and the warranty of
habitability).


137. Id. at 682.

138. Id. at 682.

139. Id. at 683.
performance had been breached even though defects were not of such a nature to invoke the warranty of habitability.

In addition to noting that the warranties rest on different premises which justify treating them as separable, some courts focus on the different requirements for determining breach. Wimmer v. Down East Properties, Inc.\textsuperscript{140} falls within this category. There the court stated that

\begin{quote}
[defendants'] argument confuses the implied warranty of habitability, breach of which requires that the defect be of sufficient magnitude to render the dwelling unsuitable for habitation, and the implied warranty of workmanlike performance, which requires only that a house be constructed in a reasonably skillful and workmanlike manner. The test is one of reasonableness, not perfection, the standard being, ordinarily, the quality of work that would be done by a worker of average skill and intelligence.\textsuperscript{141}
\end{quote}

In rejecting defendants' argument that defects in a chimney were insufficient to constitute breach of the implied warranty of habitability and, therefore, any warranty, the court concluded such leaks could constitute breach of the warranty of workmanlike performance.\textsuperscript{142}

Recognizing habitability and workmanlike performance as distinct concepts is consistent with the underlying nature of the two concepts and the different rationales which underlie them. As noted above, the implied warranty of habitability is a result oriented concept\textsuperscript{143} based upon specific public policy considerations. These include the propriety of shifting the costs of defective construction from consumers to builders who are presumed better able to absorb such costs; the nature of the transaction which involves the purchase of a manufactured product, a house; the buyer's inferior bargaining position; the foreseeable risk of harm resulting from defects to consumers; consumer difficulty in ascertaining defective conditions; and justifiable reliance by consumers on a builder's expertise and implied representations.\textsuperscript{144}

In contrast, the implied warranty of workmanlike performance focuses on the service provider's conduct.\textsuperscript{145} Moreover, a gap filler con-

\begin{footnotes}
\textsuperscript{141} Id. at 93.
\textsuperscript{142} Id. at 93.
\textsuperscript{143} See discussion accompanying notes 126-129, supra.
\textsuperscript{144} See Smith v. Old Warson Dev. Co., 479 S.W.2d 795 (Mo. 1972); De Roche v. Dame, 413 N.E.2d 365 (N.Y. 1980); Humber v. Morton, 426 S.W.2d 554, 560-61 (Tex. 1968); Leo Bearman, Caveat Emptor in Sales of Realty—Recent Assaults Upon the Rule, 14 VAND. L. REV. 541 (1961); Paul G. Haskell, The Case for an Implied Warranty of Quality in Sales of Real Property, 53 GEO. L. J. 633 (1965); E.F. Roberts, The Case of the Unwary Home Buyer: The Housing Merchant Did It, 52 CORNELL L. REV. 835 (1967); Powell & Mallor, supra note 125; Shedd, supra note 121.
\textsuperscript{145} The distinctions between the two concepts has been described as follows: [The two warranties are distinct even though they seek the same result. 'Good and workmanlike' is a standard based on the subjective consideration of those in the construction field with average skill and intelli-
ceptualization of the workmanlike performance obligation would validate affording it an existence distinct from the warranty of habitability. When formulated as a gap filler, the warranty of workmanlike performance grows out of the contractual relationship between service-providers and service-recipients and the common sense performance expectations arising from the relationship. Therefore, the warranty provides remedies which preceded recognition of the warranty of habitability. Moreover, it constitutes a separate basis for granting relief for a service-provider's failure to comply with the implied standard of performance. Thus, notwithstanding that the concepts share similar ultimate goals, they are premised on different considerations and should be viewed as distinct. Because of this, it would seem theoretically unsound to absorb the warranty of workmanlike performance into the warranty of habitability in such a way that it loses its separate identity and as a consequence limits remedial options available to dissatisfied service recipients.

To the extent that such an encapsulation occurs, at a minimum it should occur only after consideration of the differences between the two concepts and a thorough examination of the implications of such an approach. In engaging in any such exercise, viewing the warranty of workmanlike performance as a gap filler provides a conceptual foundation and framework. This conceptualization can thus serve as a vehicle, or at least a point of departure, for exploring possible distinctions between it and the warranty of habitability. Starting with this conceptualization as a basis for examination, one can make reasoned decisions based on theoretical, common sense, and policy considerations concerning the interrelationship between the concepts.

146. With respect to common sense, it does not require much imagination to envision situations where defects in the construction of a house demonstrate the failure to use good workmanship even though the house is habitable. For instance, defects in a patio and driveway would not likely render a house uninhabitable but could result in breach of the workmanship warranty. Evans v. Stiles, Inc., 689 S.W.2d 399, 400 (Tex. 1985).

147. The overriding public policy justification for the creation and recognition of the warranty of habitability, affording greater protection to consumers, would also seem to warrant recognition of the concepts as providing an independent basis for recovery. Indeed, it would seem ironic to define the warranty of habitability in such a way that it limits and circumscribes an independent basis of recovery and thus limits a consumer's remedial options.
D. The Theoretical Basis of the Workmanlike Performance Warranty—Contract or Tort?

We now shift our examination to consider a principal issue with which courts grapple: does breach of the warranty give rise to liability and remedies which are based on contract or tort? As concerns the conceptualization of the warranty, the importance of resolving this question is two-fold. First, attempts to determine the substantive basis for actions arising out of breach of the warranty of workmanlike performance represent an effort to arrive at a formulation of the concept. However, as discussed below, these efforts tend to be deficient since critical analysis of the warranty's theoretical premise is tangential to other considerations. For instance, courts often focus not on the theoretical premise of the warranty of workmanlike performance but on the economic loss rule in determining whether improper performance gives rise to an action in tort or contract or both. Refer to discussion of text accompanying notes 172-175, infra.

Moreover, such judicial efforts often fail as a means of enhancing understanding of the warranty and as mechanisms for resolving the diverse issues which ensue from its application. Second, the import of judicial efforts to determine the theoretical premises of the warranty lies in the impact characterization of the warranty, as ex contractu or ex delicto, has on a party's rights and remedies. The latter point is discussed first.

1. Significance of Characterization

Important consequences flow from the substantive characterization assigned to the warranty of workmanlike performance. Determining the substantive nature of an action for breach of warranty is a prerequisite to determining whether to apply the tort statute of limitations, or the typically longer contract limitations period. Similarly, the substantive characterization afforded the warranty of workmanlike performance will determine the availability of comparative negligence and indemnification defenses in assessing fault and damages.

148. For instance, courts often focus not on the theoretical premise of the warranty of workmanlike performance but on the economic loss rule in determining whether improper performance gives rise to an action in tort or contract or both. Refer to discussion of text accompanying notes 172-175, infra.

149. KEETON, ET AL., supra note 8, at § 92, 664-65. Examples of the necessity of characterizing an action for breach of the warranty of workmanlike performance in order to determine the applicable statute of limitations may be found in: Velotta v. Leo Petronzio Landscaping, Inc., 433 N.E.2d 147, 150-51 (Ohio 1982); Securities-Intermountain, Inc. v. Sunset Fuel Co., 611 P.2d 1158, 1159-60 (Or. 1980). In Certain-Teed Products Corp. v. Bell, 422 S.W.2d 719, 721-22 (Tex. 1968), the Texas Supreme Court held that "a warranty which the law implies from the existence of a written contract is as much a part of the writing as the express terms of the contract, and the action to enforce such a warranty is governed by the statute pertaining to written contracts." See David L. Butler, Comment, The Implied Warranty of Habitability—Contract or Tort?, 31 BAYLOR L. REV. 207, 208 (1979).

The same is true with regard to the applicability of municipal immunities and the subject matter jurisdiction of tribunals.\textsuperscript{151} Finally, the nature of the damages recoverable rests to a large extent on the substantive characterization assigned to a claim for breach of the warranty of workmanlike performance.\textsuperscript{152} In short, determining whether actions for breach of the workmanlike performance obligation sound in tort or contract is relevant to significant substantive and procedural rights.

2. Current Status of Law—Ex Contractu or Ex Delicto?

A review of the cases indicates uncertainty as to the substantive cause or causes of action available for breach of the warranty of workmanlike performance. Failure to perform in a workmanlike manner has been said to give rise to an action sounding in contract only. Other courts have consistently held that breach of the workmanlike performance warranty gives rise to tort actions only. Still others find that remedies for breach of the warranty can be pursued under both tort and contract theory.

These divergent opinions reflect that the precise doctrinal dimensions of the warranty of workmanlike performance remains undefined, and also reveal a fundamental lack of comprehension of the concept’s underlying nature. As a result of confusion regarding the warranty’s content, it has fallen into a gray area where tort and contract intersect.

After examining the most significant doctrinal approaches which courts have taken in attempts to characterize the warranty, this article concludes that these efforts largely fail. It proposes, however, that conceptualizing the warranty of workmanlike performance as a gap filler provides a workable framework for enhanced understanding. Moreover, a gap filler formulation will facilitate judicial consideration of relevant factors often ignored in decisions defining the substantive basis of the warranty of workmanlike performance.

\textsuperscript{151} J.L. Healy Constr. Co. v. State, Dep’t of Rds., 236 Neb. 759, 463 N.W. 2d 813, 816 (Neb. 1990)(court’s subject matter jurisdiction for purposes of waiver of immunity is determined by whether claim rests on tort or contract); KEETON, ET AL., supra note 8, at § 92, 664.

\textsuperscript{152} Morrow v. L.A. Goldschmidt Assocs., Inc., 492 N.E.2d 181, 186 (Ill. 1986)(as a general matter, claim must be construed as alleging a tort in order to state a cause of action for punitive damages which typically are not recoverable in contract); Georgetown Realty, Inc. v. Home Ins. Co., 831 P.2d 7, 11 (Or. 1992)(whether a claim lies in contract, tort or both determines the damages which may be recoverable and the applicable statute of limitations); KEETON, ET AL., supra note 8, at § 92, 665 (“Generally speaking, the tort remedy is likely to be more advantageous to the injured party in the greater number of cases, if only because it will so often permit the recovery of greater damages. Under the rule of Hadley v. Baxendale, the damages recoverable for breach of contract are limited to those within the contemplation of the defendant at the time the contract was made. . . .”).
a. *Ex Contractu*

An approach embraced by one group of cases is to declare emphatically that breach of the warranty of workmanlike performance does not give rise to an action sounding in tort. Remedies for improper performance and breach of the warranty must be pursued on the basis of contract.

The reasoning employed in *Fuchs v. Parsons Construction Company*\(^\text{153}\) is representative of that relied upon by courts which have adopted this approach. Plaintiff alleged that his action against a contractor for improper construction of a building sounded in tort.\(^\text{154}\) The contractor asserted that the plaintiff's action was premised on contract.\(^\text{155}\) In agreeing with the contractor, the court initially focused on the contract as being the source of the duties which the contractor owed to the owner.\(^\text{156}\) In this regard, the court stated that "[t]he contract concerned in this case prescribed the scope and manner of completing the work to be done by the contractor. . . . The whole of the obligation of the contractor was contractual and any failure of performance afforded a resort to an action for breach of contract."\(^\text{157}\)

The court also rejected plaintiff's argument that the common law duty to perform work in a workmanlike manner transformed what would have been a contract action into one which sounded in tort.\(^\text{158}\) Employing an independent duty rationale to deny plaintiff's negligence claim, the court concluded that a tort action must be premised on the existence of a duty which arises independently of the contractual obligation.\(^\text{159}\) In 1988 the Nebraska Supreme Court reaffirmed the *Fuchs* reasoning in *L.J. Vontz Construction Co. v. State*.\(^\text{160}\)

This line of reasoning also surfaced in *Woodward v. Chirco Constr. Co.*\(^\text{161}\) a 1984 Arizona case, where the court held that failure to perform in a workmanlike manner does not give rise to an action sounding in tort.\(^\text{162}\) The distinction between the differing interests sought to

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\(^{153}\) 166 Neb. 188, 88 N.W.2d 648 (1958).

\(^{154}\) *Id.* at 191, 88 N.W.2d at 651.

\(^{155}\) *Id.*

\(^{156}\) *Id.* at 192, 88 N.W.2d at 652.

\(^{157}\) *Id.* at 193-194, 88 N.W.2d at 652.

\(^{158}\) *Id.* at 199-202, 88 N.W.2d at 654-56.

\(^{159}\) *Id.* at 199-202, 88 N.W.2d at 654-56.


\(^{161}\) 687 P.2d 1269 (Ariz. 1984).

\(^{162}\) *Id.* at 1270-71. It should be noted that in *Woodward*, the court examined the warranty of workmanlike performance in the context of the "warranty of workmanlike performance and habitability." Thus it appears that the court incorporated the warranty of workmanlike performance into the warranty of habitability concept rather than recognizing it as an independent duty. This should not, however, lessen the relevance of the court's analysis as to whether breach of the warranty gives rise to tort remedies and damages. Indeed, the argument could be made that in the case where the warranty of habitability is involved a tort action should
be protected pursuant to tort and contract, respectively, supplied the rationale for the court's holding. The service recipient's desire to protect its expectation interest was identified as underscoring the contractual nature of the workmanlike performance warranty. In this regard, the court stated "[w]here the plaintiff seeks only to receive what the builder promised to deliver, or damages to compensate him for [structural] deficiencies in the final product, [the action] arises from the contract of sale between the parties and is basically contractual in nature."

As in Fuchs, the court focused on the non-existence of an independent duty to support a tort action for negligence. Thus while the court noted the contractual nature of the warranty of workmanlike performance, it also recognized that in a proper case breach of the warranty could also give rise to a tort action. Yet the viability of a tort action for negligence would depend on the existence and breach of a duty independent of that created by virtue of the warranty of workmanlike performance. Applying this logic, the Arizona Supreme Court concluded that under such circumstances recovery would be permissible in tort but only to the extent that the resulting damage is to other property or persons. To illustrate this point, the court noted that if the fireplace was improperly constructed, plaintiff could recover in tort for damage to personal property or personal injury.

be available inasmuch as it represents the imposition of a duty premised on public policy considerations. Therefore, the court's decision not to recognize a tort cause of action arguably carries greater force.

163. Id. at 1270-71.

164. Id. at 1271 (quoting Duncan v. Schuster-Graham Homes, Inc., 578 P.2d 637 (Colo. 1978) where the court held breach of the workmanship warranty does not give rise to a tort cause of action).


166. Id.

167. Id.
caused by its collapse.\textsuperscript{168}

The \textit{Woodward} court also emphasized that the mere fact that the warranty of workmanlike performance and habitability is imposed or arises as a matter of law is an insufficient basis, alone, to transform this contractual obligation into one premised on tort.\textsuperscript{169} The court's characterization of the duty which is implied by virtue of the warranty of workmanlike performance comports with the conceptualization of the warranty as a gap filler. This significant issue is discussed in greater detail below.\textsuperscript{170} Suffice it to say, the court determined the substantive basis of the warranty of workmanlike performance to be contractual.\textsuperscript{171}

\textbf{b. Economic Loss Rationale}

Other courts have focused not only on the existence of an independent duty but have also explicitly relied on the economic loss doctrine to assist them in determining the substantive nature of the warranty of workmanlike performance. Such an approach was adopted by the Illinois Supreme Court in \textit{Morrow v. L.A. Goldschmidt Assoc.},\textsuperscript{172} where purchasers of townhouses alleged tort claims in addition to breach of express and implied warranty claims for construction defects in the townhouses.\textsuperscript{173} Defendant's failure to perform in a workmanlike manner provided the essence of plaintiffs' action.\textsuperscript{174} Rejecting plaintiffs' tort claim, the court found that the existence of a tort action was dependent on the breach of a duty independent of those arising by virtue of the contractual relationship. Distinguishing the remedial goals of tort and contract substantive actions and em-

\textsuperscript{168} Id.
\textsuperscript{170} See discussion infra accompanying notes 216-226.
\textsuperscript{171} Even though the \textit{Woodward} court stated that an action for breach of the warranty of workmanlike performance sounds in contract, it left open the possibility that a tort action might arise from the same set of facts. The existence of a tort action was deemed dependent on the nature of the resulting injury or damage to persons or property. This aspect of the decision creates uncertainty regarding the theoretical premise for the court's holding. The opinion suggests the court's conclusion that an action alleging breach of the warranty sounds in contract was based on its perception of the warranty's inherently contractual nature. Yet the court's focus on the nature of the resulting injury intimates that the economic loss doctrine contributed in large measure to the theoretical characterization which the court assigned the action.
\textsuperscript{172} 492 N.E.2d 181 (Ill. 1986).
\textsuperscript{173} \textit{Id.} at 182-83.
\textsuperscript{174} \textit{Id.} at 183.
ploying the economic loss rule to further explain this distinction, the court stated:

[Plaintiffs seek to recover only the costs of repairs to their homes caused by defendants' alleged faulty workmanship.... [T]he plaintiffs here have not alleged a harm "above and beyond disappointed expectations." (citation omitted). They do not complain that the defects caused an accident which resulted in physical injury or damage to other property. Indeed, contrary to the findings of the appellate court, nowhere in plaintiffs' complaint is it alleged that the defects were a threat to health or safety. As such, the plaintiffs essentially are complaining that they did not receive the benefit of their bargain—a harm which is appropriately remedied by bringing an action for breach of contract.... Where the construction defects do not cause physical injuries or damage to other property, we are unwilling to impose tort liability on a builder for breach of his contract with the purchaser, even if the breach was wilful and wanton.175

175. Id. at 185; see Redarowicz v. Ohlendorf, 441 N.E.2d 324 (III. 1982), where the court extended the economic loss concept as stated in Moorman Manufacturing Co. v. National Tank Co. 435 N.E.2d 443 (Ill. 1982) to preclude tort actions for economic loss based upon breach of the duty to perform in a workmanlike manner. The court based its denial of tort liability on the following reasoning:

To recover in negligence there must be a showing of harm above and beyond disappointed expectations. A buyer's desire to enjoy the benefit of his bargain is not an interest that tort law traditionally protects.... While the commercial expectations of this buyer have not been met by the builder, the only danger to the plaintiff is that he [will] be forced to incur additional expenses....

Redarowicz v. Ohlendorf, 441 N.E.2d 324, 327 (Ill. 1982). Accord J.L. Healy Constr. Co. v. State Dep't of Rds., 236 Neb. 759, 463 N.W.2d 813, 816-17 (1989)(breach of contract action asserting a failure to perform will not give rise to tort action unless there are allegations of loss to person or property. Action based on breach of universal duty to perform in reasonable manner sounds in contract); La Vontz Constr. Co., Inc. v. State, 230 Neb. 377, 382, 432 N.W.2d 7, 11-12 (1988)(allegation of breach of warranty of workmanlike performance does not give rise to tort action absent loss or damage to property or persons); Aronsohn v. Mandara, 484 A.2d 675, 683 (N.J. 1984)(suggesting in dictum that breach of implied warranty of workmanlike performance, absent damage to other property or personal injury, only gives rise to contract action); New Mea Constr. Corp. v. Harper, 497 A.2d 554, 540-41 (N.J. Super. 1985), quoting dictum in Aronsohn; Spillman v. American Homes of Mocksville, Inc., 422 S.E.2d 740 (N.C. App. 1992)(tort action does not lie in favor of party alleging failure to properly perform a contractual obligation); Warfield v. Hicks, 370 S.E.2d 669, 694 (N.C. App. 1988)(economic loss rule precludes action in tort for improper performance of building contract where there was no damage to other property or injury to persons); Flint Ridge Dev. Co. v. Benham-Blair & Affiliates, Inc., 775 P.2d 797, 800-01 (Okla. 1989)(citing Woodward, the court ruled that the nature of defendant's conduct and the injury determines whether tort action exists for breach of the warranty of workmanlike performance. Tort liability is unavailable where defendant's default or injury fail to implicate a duty existing independent of the contractual relationship. Therefore, if injury is only to subject matter of contract, plaintiff is restricted to contract action); Simpson v. Sumner County, 669 S.W.2d 667 (Tenn. App. 1983)(interpreting prior Tennessee authority to suggest that action for breach of implied warranty of workmanlike performance sounds in contract and absent damage to other property a tort claim is not cognizable).

In short, the court concluded that absent the breach of a duty owed to plaintiffs independent of those created by virtue of their contractual relationship, plaintiffs' tort cause of action must fail.

c. **Ex Contractu and Ex Delicto**

i. **Nature of Damage Limitation**

Often it is stated in the abstract that a contractor's breach of the warranty of workmanlike performance will give rise to tort and contract claims. More often than not, such blanket statements are misleading inasmuch as the plaintiff's right to seek tort remedies is circumscribed by the economic loss doctrine.

A series of Kansas cases illustrates the conceptual and practical un-

where the North Carolina Supreme Court rejected the economic loss rule as the determining factor in characterizing an action in tort and contract. The court held that a builder may be held liable in tort for breach of the warranty of workmanlike performance despite the fact that the buyer only suffers economic losses if one of three conditions are present: "(1) the builder has violated an applicable building code; (2) the builder has deviated from industry standards; or (3) the builder has constructed housing that he knows or should know will pose serious risks of physical harm." *Id.* at 738. According to the court, any one of the foregoing will provide a basis for establishing the existence of a duty independent of contract which is essential to the viability of a tort claim.

By virtue of the definition of when and how breach of the warranty of workmanlike performance occurs, the second criteria presented by the court would arguably always provide the basis for a tort action since the plaintiff need only establish that the builder failed to comply with the community standard of care. Spillman v. American Homes of Mocksville, 422 S.E.2d 740 (N.C. App. 1992), casts doubt on how expansively the *Kennedy* factors will be interpreted. There the court, in refusing to permit a tort action to go forward in a case involving alleged improper construction and installation of a mobile home, stated "a tort action does not lie against a party to a contract who simply fails to properly perform the terms of the contract, even if the failure to properly perform was due to the negligent or intentional conduct of that party, when the injury resulting from the breach is damage to the subject matter of the contract." *Kennedy* v. Columbia Lumber & Mfg. Co., 384 S.E.2d 730, 740 (N.C. 1989). The court chose not to cite to *Kennedy* and perhaps inferentially limits the *Kennedy* ruling to new home purchases.

*See also* Lempke v. Dagenais, 547 A.2d 290 (N.H. 1988), where the court denied recovery for economic loss premised on a negligence claim. *Id.* at 290-91. However, the court permitted recovery of purely economic loss for breach of warranty of workmanlike quality which it seems to equate to or fold into the warranty of habitability. *Id.* at 296-97; Frantz v. Real Estate Marketing, Inc., 1993 WL 23593 (Ky. App. 1993)(characterizing the warranty of workmanlike performance as encompassed within the warranty of habitability which it labels the implied warranty of workmanlike construction using suitable materials, court holds that pure economic loss is recoverable for breach of the warranty); Arden Hills N. Homes Assoc. v. Pemton, Inc., 475 N.W.2d 495, 499 (Minn. App. 1993)(economic loss rule only applies to transactions within parameters of the Uniform Commercial Code and therefore does not preclude tort action to recover loss due to premature deterioration of siding on townhouse).
certainties arising from such a vague generalization. In *In Re Talbott's Estate*, the Kansas Supreme Court reaffirmed earlier precedent in holding that a plumbing subcontractor impliedly warranted to perform services in a good and workmanlike manner. Recognizing that such an obligation was implied into the parties' contract, the court noted the contractual nature of the duty. The court held that breach of this contractual duty to use appropriate skill and to do a workmanlike job stated a breach of contract cause of action.\footnote{177}

While adhering to the general rule that a service provider impliedly warrants to perform in a workmanlike manner, subsequent Kansas cases cast doubt on the *Talbott* court's characterization of the cause of action as contractual. For instance in *Gilley v. Farmer*, the Kansas Supreme Court extended the implied warranty of workmanlike performance to services rendered by insurers.\footnote{178} In discussing application of the warranty in the contractor/contractee context, the court concluded that

> [where negligence on the part of the contractor results in breach of the implied warranty, the breach may be tortious in origin, but it also gives rise to a cause of action ex contractu. An action in tort may likewise be available to the contractee and he may proceed against the contractor either in tort or in contract; or he may proceed on both theories.\footnote{180}]

A similar statement was echoed several years later in *Corral v. Rollins Protective Services, Co.*\footnote{181} a case involving services associated with the installation and service of a fire and burglary alarm system.\footnote{182}

\footnote{176. 337 P.2d 986 (1959). Judicial statements, without limitation or explanation, pronouncing the availability of tort and contract claims for breach of the workmanlike performance obligation are not uncommon. See, e.g., *Corral v. Rollins Protective Servs. Co.*, 732 P.2d 1260 (Kan. 1987); *Mascarenas v. Jaramillo*, 806 P.2d 59 (N.M. 1991). Closer examination reveals, however, the presence in many of these cases, of the types of resulting damage which removes the economic loss rule as a barrier to pursuing tort remedies and thereby limits the scope of such broad statements of the rule. For example, in *Davis v. New England Pest Control Co.*, 576 A.2d 1240 (R.I. 1990), the court without explanation or limitation held that breach of the warranty gives rise to actions sounding both in tort and contract. But the case involved physical damage to property unrelated to the service provided such that the economic loss rule would not operate preclusively with respect to a tort claim. *Accord National Chain Co. v. Campbell*, 487 A.2d 132, 136 (R.I. 1985)(holding trial court erred in not instructing jury on negligence count in matter in which failure to hang wallpaper in workmanlike manner resulted in damage to other property).}

\footnote{177. In *Re Talbott's Estate*, 337 P.2d 986, 991 (Kan. 1959).}

\footnote{178. 485 P.2d 1284 (1971).}

\footnote{179. *Id.* at 1289.}

\footnote{180. *Id.* at 1289.}

\footnote{181. 732 P.2d 1260, 1268 (Kan. 1987)(holding breach of the implied warranty of workmanlike performance may give rise to both tort and contract actions).}

\footnote{182. The *Corral* court relied on precedent in *Talbott* to first extend the implied duty to perform in a workmanlike manner to the situation before it. *Id.* at 1268-69. It relied on *Gilley* in finding that breach of the duty gives rise to contract or tort}
Closer analysis reveals, however, that the holding of Gilley and Corral are reconcilable with the contractual imprimatur the Talbott court attached to actions asserting breach of the warranty of workmanlike performance. The general rule pronounced in Gilley and Corral belies the fact that the nature of the injury resulting from breach of the obligation to perform in a workmanlike manner governs the availability of tort remedies. Thus a tort action will be recognized only where the service provider breaches a duty independent of its contractual obligation to perform in a workmanlike manner.

The foregoing conclusion finds support in Haysville S.D. No. 261 v. GAF Corp.,\textsuperscript{183} which involved claims against a roofing manufacturer, architect and roofing contractor for damages occasioned by cracks which appeared after the installation of new roofs. The plaintiff school district alleged, among other things, that GAF breached its service and inspection obligations. Determining the substantive nature of defendant’s obligations was deemed necessary to reaching a determination of whether the plaintiff’s comparative fault could be used to reduce the defendant’s potential liability. Comparative negligence and apportionment of fault is relevant to a tort action but not to a contract action.\textsuperscript{184} The Kansas Supreme Court concluded that for either express or implied warranties, absent proof of a breach causing personal injury, death or physical damage to other property such that an independent duty was implicated, the resulting damage would constitute economic loss. Consequently, the liability and damages would be governed by contract principles and the comparative negligence statute would not apply.\textsuperscript{185}

Wyoming cases provide another illustration of the type of theoretical and practical uncertainties which may potentially emanate from generalized statements to the effect that breach of the warranty of workmanlike performance is cognizable both in tort and contract. In Cline v. Sawyer,\textsuperscript{186} the court considered whether comparative negligence should be taken into account in an action alleging breach of the implied warranty to perform in a skillful and workmanlike manner.\textsuperscript{187} A plumber contracted with builders of a trailer to install plumbing.\textsuperscript{188} The builder’s complaint sounded in contract.\textsuperscript{189} The

\textsuperscript{184} Id. at 731-32.
\textsuperscript{185} Id. at 731.
\textsuperscript{186} 600 P.2d 725 (Wyo. 1979).
\textsuperscript{187} Id. at 731-32.
\textsuperscript{188} Id. at 731.
\textsuperscript{189} Id. at 731.

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The trial court without explanation found that the improper installation resulted in breach of contract and negligence liability. The Wyoming Supreme Court held that "[w]here negligence on the part of the contractor results in a breach of [the warranty of workmanlike performance], a cause of action ex contractu and a tortious action premised on negligence, or both, are available to the contractuee." Any doubts at to the availability of a tort action for breach of the warranty of workmanlike performance in Wyoming were recently removed in Schneider National, Inc. v. Holland Hitch Co. There the Wyoming Supreme Court explained and accordingly limited its holding in Cline. The court stated that the specific negligence in Cline consisted of the injury to the builder's property accruing from improper workmanship. This, according to the court, gave rise to a tort action and transformed the action from one based on contract to one which lies in ex contractu, ex delicto, or both. Thus the court viewed breach of the warranty of workmanlike performance as cognizable in tort only when a duty is breached independent of the contract. The essence of the court's conclusion is that the warranty of workmanlike performance does not give rise to an independent duty absent damage to other property. The court's focus on the nature of the resulting injury and the interest sought to be protected as determining the circumstances under which breach of the warranty will present a tort claim was buttressed by its reaffirmation of the rule that purely economic loss is not recoverable in tort.

ii. Summary

Although Kansas, Wyoming, and other courts may broadly hold that breach of the workmanlike performance warranty gives rise to both contract and tort causes of action, the availability of the latter is typically limited to situations involving damage or loss to property other than the subject matter of the transaction. In such instances, the service provider is deemed to have breached an independent duty, separate and distinct from the workmanlike performance warranty which alone merely gives rise to a contract cause of action. Other

190. Id.
191. Id. at 732.
192. Id.
194. Id. at 585-86.
195. Id. at 586.
196. This interpretation finds support in Ware v. Christenberry, 637 P.2d 452, 455 (Kan. App. 1981), where breach of the breach of the warranty of workmanlike performance was recognized as giving rise to both tort and contract claims. The court noted, however, that the applicability of the foregoing rule depended on the nature of the interest sought to be protected. See, Grey v. Bradford-White Corp.,
courts arrive at the same conclusion by focusing on whether the damages claimed constitute economic loss. Yet the gist of the inquiry is the same—absent the existence of a duty imposed by law to protect a party against the risk of personal or property harm, a cause of action will lie only in contract. However, other courts have employed an independent duty analysis only to find that breach of the warranty sounds in tort and not contract. The discussion turns now to an examination of this category of cases.

d. Ex Delicto Only

i. Duties Implied in Law Rationale

Certain courts have examined the warranty of workmanlike performance and conceptualized it as a tort concept. Courts employ variations on a central theme to reach this conclusion. This theme and the resulting tort formulation of the warranty rests on the premise that tort law is intended to protect against breaches of duties implied by law. It is, therefore, assumed that inasmuch as the duty to perform in a workmanlike manner is implied into agreements as a matter of law, breach of the warranty gives rise to tort liability and remedies. The operative effect of this reasoning is to treat a gap filler term as the functional equivalent of a tort duty which is imposed as a matter of public policy. Consistent with this premise is the conclusion that an implied contractual term, which arises as a matter of law, necessarily promotes an important public interest and therefore ought to give rise to an independent tort obligation.

The notion that tort duties, operating independently of contractual obligations, are created when a contract incorporates a general standard of performance because of the contracting parties' failure to expressly so provide, surfaced in Securities-Intermountain, Inc. v. Sunset Fuel Co.197 There the assignee of a general contractor sued an architect and subcontractor for the installation of a defective heating system. Plaintiff sought damages, inter alia, for the costs of redesigning the system and costs associated with delay. Plaintiff alleged no injury to persons or other property.

197. 611 P.2d 1158, 1169 (Or. 1980).
Defendant sought to characterize plaintiff's action as sounding in tort rather than contract in order to assert the two year tort statute of limitations. As background for its decision, the court initially reviewed a number of cases from other jurisdictions articulating varying approaches taken by courts in attempting to determine the substantive nature of the cause of action. The court initially noted that the nature of the damages demanded may impact the characterization of an action as tort or contract. To this it added that characterization of an action as tort or contract may rest on whether or not the parties' agreement incorporates a general standard of care or expressly prescribes the applicable standard of care. It concluded that where the contract incorporates by reference or implication a general standard of care to which a party would be bound independent of the contract, breach of such a duty is noncontractual. Conversely, if the parties articulate in the contract the performance expected, failure to comply would render a party liable in contract.

The court concluded that the parties had expressly spelled out the architect's obligations in detail. Therefore, the action sounded in contract since it was unnecessary to incorporate the generally applicable standard of care into the agreement. Finally, as dictum, the court concluded the phrase "unworkmanlike performance" is a general standard and therefore "appears to invoke a negligence standard or general professional duty of care and skill rather than a contractual standard." The court's dictum suggests that breach of the duty to perform in a workmanlike manner gives rise to a tort cause of action when it is necessary to imply it as a general standard of care into an agreement.

The Oregon Supreme Court recently clarified any confusion created by its dictum in Securities-Intermountain. In Georgetown Realty, Inc. v. Home Insurance Co., the court explained its reasoning and the result reached in Securities-Intermountain. It first concluded that even though a relationship may arise out of contract, an injured party may sue in tort if the breaching party is subject to a standard of care independent of the express terms of the contract.

The court next outlined the circumstances in which such an independent duty might arise. "If the plaintiff's claim is based solely on a breach of a provision in the contract, which itself spells out the party's obligation, then the remedy normally will be only in contract,

198. Id. at 1163.
199. Id. at 1167.
200. Id. at 1167.
201. Id.
202. Id. at 1169.
204. Id. at 12.
with contract measures of damages and contract statutes of limitation." Thus the court indirectly reaffirmed the conceptually flawed conclusion in Securities-Intermountain that failure to specifically describe the manner of performance will give rise to a tort action.

Analogous reasoning was employed in National Fire Insurance Co. v. Westgate Construction Co., wherein a federal district court concluded that Delaware courts would hold that breach of the implied duty to perform in a good and workmanlike manner creates concurrent tort and contract remedies. Plaintiff alleged improper performance by a contractor retained to construct a fireplace. The warranty of workmanlike performance was characterized as "an implied condition or duty," establishing the manner in which services were to be rendered. As such, an action lie in both tort and contract for failure to perform up to the standard. The basis underlying this conclusion was set forth in a footnote wherein the court stated a tort action for breach of a duty imposed by law which arises independently of the express contract terms (the warranty of workmanlike performance) would not be precluded simply because the duty arose from the

205. Id.
206. Other courts have followed the approach or one similar to that which has been adopted in Oregon. In Pepsi Cola Bottling Co. v. Superior Burner Service Co., 427 P.2d 833, 841-42 (Alaska 1967), plaintiff sued for negligent repair services. The court first concluded that whether the action sounded in tort or contract, the standard for determining breach would be the same. This standard, the duty to exercise skill and workmanlike performance, was imposed as a matter of law. Accordingly, the court held that plaintiff's action lie in tort. Id. at 841-42. It is worthy of mention that notwithstanding the foregoing conclusion, the court distinguished duties arising out of contract and independent tort duties imposed as a matter of social policy. This and other language in the opinion suggest the court recognized a principle akin to the economic loss doctrine.

Accord St. Paul Fire & Marine Ins. Co. v. Sauer Elec., Inc., 648 F. Supp. 959, 961 (D. Alaska)(gravamen of action alleging breach of duty imposed by law to perform in workmanlike manner is tort); Bowen & Bowen, Inc. v. McCoy-Gibbons, 363 S.E.2d 827 (Ga. App. 1987)(interpreting the warranty of workmanlike performance to create a duty independent of contractual obligations and therefore giving rise to a tort cause of action); accord Sam Finley, Inc. v. Barnes, 275 S.E.2d 380, 382 (Ga. App. 1980). But see Flintkote Co. v. Dravo Corp., 678 F.2d 942 (11th Cir. 1982)(concluding that apparently conflicting Georgia appellate court opinions which addressed whether a failure to perform in a workmanlike manner gives rise to a tort action can be reconciled to hold that nature of damages suffered determines whether a suit may be brought in both tort and contract); Arden Hills N. Homes Assoc. v. PEMTON, Inc., 475 N.W.2d 495, 500 (Minn. Ct. App. 1991)(contractor has a duty independent of the contract itself, to erect a building in a reasonably good and workmanlike manner). See George B. Gilmore Co. v. Garrett, 582 So.2d 387, 391 (Miss. 1991)(breach of the common law duty to perform with care, skill and reasonable experience, which arises by operation of law is a tort as well as a breach of contract)(citations omitted).

208. Id.
209. Id. at 838.
ii. Warranty of Habitability Rationale

We must include within the foregoing category of cases finding breach of the warranty gives rise to actions *ex delicto*, those in which courts fail sufficiently to distinguish between the concepts embodied in the warranty of habitability versus a warranty of workmanlike performance. *Velotta v. Leo Petronzio Landscaping, Inc.*, is representative of this group of cases.211 There the Ohio Supreme Court held that an action alleging the failure of a builder-vendor to construct a completed residence in a workmanlike manner gives rise to a tort rather than a contract cause of action.212 The court’s conclusion was grounded on the premise that the warranty of workmanlike performance is imposed by law as a matter of public policy.

The court’s logic is sound to the extent that the warranty of workmanlike performance is elevated to something akin to the warranty of habitability, which is precisely what occurred in *Velotta*. The court refused to characterize the duty which a builder-vendor owes to a home purchaser as an implied warranty of habitability. Rather it chose to label the builder-vendor’s duty vis-a-vis the owner of a completed residence as an obligation to perform in a workmanlike manner. The following reasoning supported the court’s conclusion that the action arises *ex delicto*:

The duty implied in the sale between the builder-vendor and the immediate vendee is the duty imposed by law on all persons to exercise ordinary care. In an action [alleging poor workmanship] . . . the essential allegation is, viz, the builder-vendor’s negligence proximately caused the vendee’s damages. The action, therefore, arise *ex delicto* . . . . The obligation to perform in a workmanlike manner using ordinary care may arise from or out of a contract, i.e., from the purchase agreement, but the cause of action is not based on contract;


212. *Velotta* has been followed by subsequent decisions in Ohio. Courts applying *Velotta* refuse to create a warranty that a structure when completed will be suitable for its intended purpose. They conclude, however, that a duty is implied by law that a builder-seller of a completed residence will construct the residence in a workmanlike manner. This duty gives rise to an action *ex delicto*. In certain instances, courts have extended the applicability of *Velotta* beyond claims alleging failure of a builder-vendor to construct a completed residence in workmanlike manner. See infra discussion and cases cited in note 213.
as noted above, the characterization of the builder-vendor's obligation to perform in a workmanlike manner as a basis for tort liability is correct if viewed from the perspective that the obligation embodies the concept typically denominated as an implied warranty of habitability, which is a duty imposed pursuant to public policy considera-


The Velotta court limited its holding to cases involving the sale of a completed structure. Subsequent intermediate Ohio appellate decisions disagree on whether failure to perform in a workmanlike manner gives rise to a contract or tort action in cases other than those involving the sale of a completed structure. For instance, in Elizabeth Gamble Deaconess Home Ass'n v. Turner Constr. Co., 470 N.E.2d 950 (Ohio Ct. App. 1984), the court extended the reasoning in Velotta to hold that plaintiff's assertion that defendant breached its implied warranty of workmanlike performance in the erection of a garage gave rise to a tort cause of action and, therefore, the tort rather than contract statute of limitations applied. Id. at 956-57. The court noted "[w]hile the Supreme Court reserved the question of the applicability of [the tort statute of limitations] to a claim arising from negligence in future construction work . .., we believe the logical extension of the holding that the implied warranty of good workmanship as to a completed residence creates a right in tort must apply to the same warranty as to future construction." Id. at 957. Similarly, in Ohio Historical Soc'y v. General Maintenance & Eng'g Co., 583 N.E.2d 340 (Ohio Ct. App. 1989), the court held that the failure to perform roofing repair services in a workmanlike manner sounds in tort and not in contract. Accord Kirk v. Jim Walter Homes, Inc., 534 N.E.2d 1235, 1236 (Ohio Ct. App. 1987) (breach of implied warranty to construct in a workmanlike manner gives rise to a tort action where relationship involved contract to construct shell of a residence).

Other courts have rejected the foregoing reasoning. In Barton v. Ellis, 518 N.E.2d 18 (Ohio Ct. App. 1986), the court refused to extend the Velotta characterization of the workmanlike performance warranty beyond cases involving the sale of completed structure. There a contractor entered into a contract to remodel the plaintiff's home. After numerous problems developed, the plaintiffs filed suit seeking the cost of repair. In concluding that the action arose ex contractu, the court stated "[a]bsent express or implied warranties as to the quality or fitness of work performed, the liability of a builder-vendor of a completed structure for failure to exercise reasonable care to perform in a workmanlike manner sounds in tort, and arises ex delicto. The essential allegation is that the builder-vendor's negligence proximately causes the vendee's damages. (citations omitted). By contrast, in the provision of future services, liability arises ex contractu as an implied bargain, provision, condition, or term of sale." (emphasis supplied). Id. at 18, 20. The Barton court relied upon Vandershirier v. Aaron, 140 N.E.2d 819, 821 (Ohio Ct. App. 1957), and Mitchem v. Johnson, 218 N.E.2d 594 (Ohio 1965) which viewed the warranty of workmanlike performance as an implied term or condition of a contract. Accord Lloyd v. William Fannin Builders, Inc., 320 N.E.2d 738 (Ohio Ct. App. 1973) (the duty imposed to build structures in a workmanlike manner arises from an implied bargain, an implied provision, an implied condition, or an implied term; it is a duty which is implied in law and comes from the contract between the builder-vendor); see Cincinnati Gas & Elec. Co. v. General Elec. Co., 656 F. Supp. 49, 60-61 (S.D. Ohio 1986) (duty to perform in workmanlike manner creates a contract cause of action and not tort since the breach of such a duty is not breach of a duty independent of those which arise by virtue of the contract) (emphasis added).
tions. In Velotta, however, grounds for characterizing the action as a tort were undercut by Ohio precedent in which the Ohio Supreme Court had found that the builder-vendor's duty arose out of a contract of sale and not out of a general duty owed to the public at large.214

More importantly, the court's characterization of the duty illustrates the conceptual implications flowing from the definition given the concept typically referred to as the warranty of habitability. In Velotta, the doctrinal definition given the warranty of workmanlike performance depended on the doctrinal definition given the concept normally referred to as a warranty of habitability. Apparently the court was unable to distinguish between an implied warranty of habitability and an implied warranty of workmanlike construction. As pointed out by one commentator:

The essential assertion is not that the builder vendor's negligence proximately caused the vendee's damages, but that the vendee did not receive what he bargained for—quality workmanship. The builder implicitly warrants that he will use ordinary care and skill and insure quality workmanship, and the vendee agrees to compensate the builder for this warranty. If a defect occurs that was caused by the builder's failure to exercise ordinary care, the builder vendor has violated this warranty. The action, therefore is ex contractu. . . . Apparently the court was unable to distinguish between an implied warranty of habitability and an implied warranty of workmanlike construction. To avoid extending an implied warranty of habitability, the result which would make the builder an insurer, the court felt it had to use tort language.215

In short, courts have reached divergent formulations of the warranty of workmanlike performance. Moreover, the doctrinal basis of the warranty is often defined differently even though courts deploy the same approach, such as an independent duty approach. This appears due in part to divergent views as to the underlying nature of the warranty of workmanlike performance.

E. Application of Gap Filler Conceptualization

1. Evaluating the Independent Duty Approach

The immediately preceding discussion illustrates the substantial degree of inconsistency resulting from application of the independent duty analysis as a means of determining the substantive cause or causes of action available for breach of the warranty of workmanlike performance. The foregoing survey also demonstrates that application

214. Insurance Co. of N.Am., v. Bonnie Built Homes, 416 N.E.2d 623, 624 (Ohio 1980); Mitchem v. Johnson, 218 N.E.2d 594 (Ohio 1966). To this extent, the Velotta court intended to provide the types of protections afforded by the warranty of habitability for the reasons typically stated, its willingness to ignore existing precedent appears sound.

of the independent duty approach serves as a convenient mechanism to avoid addressing considerations pertinent to assessing the substantive nature of the warranty of workmanlike performance. As discussed below, accepting the premise that the warranty or workmanlike performance constitutes a gap filler may facilitate broader evaluation of these considerations.

Most courts which conclude that, since the warranty of workmanlike performance creates an independent duty imposed by law, its breach should give rise to a negligence action, typically fail to engage in the weighing of interests which has traditionally served as a predicate for recognizing the existence or creation of duties giving rise to a negligence cause of action. In deciding whether to impose liability for negligence, courts, particularly modern courts, have generally drawn upon rationales of fairness and deterrence embedded in tort law's negligence tradition and upon the modern loss-distribution rationale. The broad considerations are aimed at determining whether society as a matter of public policy deems a plaintiff's interests worthy of protection from a defendant's conduct. Often courts consider these factors in the context of duty analysis which is a means for determining whether to protect a plaintiff's interest by virtue of a negligence action. As articulated by one court:

In the decision of whether or not there is a duty, many factors interplay: the hand of history, our ideals of morals and justice, the convenience of administration of the rule, and our social ideas as to where the loss should fall. In the end the court will decide whether there is a duty on the basis of the mores of the community, always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind.


217. KEETON ET AL., supra note 8 at 357-58.

218. Prior to 1960, the concept of duty was frequently deployed by courts as a means of denying negligence liability. Schwartz, supra note 216 at 658. Professor Schwartz concludes that although use of this approach receded after 1960, since 1980 there has been a resurgence in the deployment of a duty approach to determining negligence liability and more often than not as a means of denying such liability. Id. at 659-60. See note 219, infra for illustrations of cases employing duty analysis.

See also, KEETON ET AL., supra note 8, at 357, wherein it is suggested that focusing on the existence or non-existence of a duty begs the question. "[D]uty is only a conclusion embodying policies making a defendant civilly liable for failure to protect a plaintiff against an injury." Donaca v. Curry County, 734 P.2d 1339, 1342 (Or. 1987).

Only in a few discrete instances, most notably Texas,\textsuperscript{220} have courts engaged in this type of weighing of interests in characterizing the obligation to perform in a workmanlike manner as an independent tortious duty. And to the extent that after the principal policy considerations are taken into account, a conclusion that the warranty constitutes an independent tort duty is objectionable only if one disagrees with the relative weight afforded the competing interests.

However, the overwhelming majority of decisions in which the warranty of workmanlike performance is deemed to give rise to a negligence action which operates independent of contractual obligations fail to engage in this thorough and necessary form of analysis. The superficial analysis employed no doubt contributes to the conceptually flawed reasoning which can be described as follows. Since the obligation to perform in a workmanlike manner is a term implied by law, it logically follows that it amounts to an independent duty which gives rise to a tort cause of action upon its breach. The fact that the parties have entered into a contract is not crucial to the viability of this duty.

The implications of such reasoning are several. First, as stated above, courts are engaged in the process of creating negligence liability without weighing competing policy interests. Failure to engage in a thorough consideration of whether to impose a duty may result in superficial consideration of factors and concepts such as the economic loss rule and the differences in the respective functions served by tort and contract.

This reasoning also highlights the misunderstanding of the underlying basis of the warranty of workmanlike performance, in particular its function as a gap filler provision. This misunderstanding in turn tends to delegitimize and constrict the function of this and, indirectly, other gap filler provisions. In addition, this approach fails to recognize that the mere incorporation of a standard for determining performance into an agreement does not automatically elevate the standard to providing the basis for tort liability and thereby transform its underlying nature.

To reiterate, the warranty of workmanlike performance defines the level of performance expected when the parties fail to provide in

\begin{itemize}
\item (Ill. 1990); Phillips v. City of Billings, 758 P.2d 772, 775 (Mont. 1988); Greater Houston Transp. Co. v. Phillips, 801 S.W.2d 523, 525 (Tex. 1990).
\item Texas courts have tended to thoroughly consider and weigh the competing policy interests implicated by expanding the applicability of the warranty of workmanlike performance. For instance, the weighing of such interests has appropriately led courts to characterize the warranty of workmanlike performance in the context of repair services as more tortious in nature than contractual. The court's discussion of the reasons underlying its application of a warranty of workmanlike performance to repair services in Melody Homes provides just such an example. See also discussion accompanying notes 11-16 supra.
\end{itemize}
the express terms of the contract.\textsuperscript{221} In this sense, it does not create an independent duty cognizable in tort any more than the implied duty to perform a contract within a reasonable period of time when the parties fail to specify a time for performance would ordinarily give rise to a tort action for such a failure.

Moreover, this approach tends to penalize parties with a tort action when they fail to specify in their contract the manner in which they are obligated to perform. This is contrary to contract theory which acknowledges and accepts contractual incompleteness as a reality of commercial transactions and of contract law.\textsuperscript{222} Imposing a tort obligation on those parties who fail to expressly provide for a manner of performance in determining breach shifts inordinate risks to such parties. It is also inconsistent with the generally recognized premise that default rules/gap filler provisions are not only efficient in that they result in lower transaction costs, but also comport with commercial realities.\textsuperscript{223} It imposes the sanction of tort liability on parties who engage in conduct considered acceptable and expected in the commercial context.\textsuperscript{224}

Characterization of the warranty of workmanlike performance as a gap filler perhaps shifts the focus from the nature of the injury to the policies related to the utility of gap fillers and the underlying assumption that parties enter into contracts without fully expressing all terms and attempting to provide for each and every contingency which may arise.\textsuperscript{225} At a minimum, the characterization of the warranty as a gap filler should require analysis of these issues as well as those arising in the context of the traditional distinctions between tort and contract.\textsuperscript{226}

In summary, a service provider's obligations pursuant to an implied warranty of workmanlike performance are not founded in the breach of a general public duty, imposed by law, to use due care which creates a tort claim. Rather, the obligations and liabilities rest in contract, arising either from express promises or promises implied in law based on the factual relationship between the parties. Conceptualizing the implied warranty of workmanlike performance sharpens this distinction and requires courts to explicitly address public policy considerations relevant to the creation of an independent duty for breach of the warranty of workmanlike performance.

\begin{itemize}
\item \textsuperscript{221} See supra text accompanying notes 58-71.
\item \textsuperscript{222} See supra text accompanying note 68.
\item \textsuperscript{223} See supra text accompanying note 67.
\item \textsuperscript{224} See supra text accompanying notes 197-210.
\item \textsuperscript{225} See supra text accompanying note 68.
\item \textsuperscript{226} Indeed it is arguable that the policies which encourage the use of background rules and their efficient operation may in and of themselves provide sufficient justification for denying tort recovery for breach of the warranty of workmanlike performance.
\end{itemize}
2. Evaluating the Economic Loss Approach

Similar observations can be made with respect to the economic loss rule. As alluded to above, the economic loss doctrine has been relied on by courts to support a contractual characterization of the warranty of workmanlike performance. As is true of the independent duty rationale, of which it is a corollary, the economic loss approach has proved to be deficient as a mechanism for determining the substantive basis of actions for breach of the warranty of workmanlike performance.

The economic loss rule operates to preclude the recovery of purely economic loss under tort principles. Economic loss has been defined as connoting "all losses except those from personal injury or damage to property other than the allegedly defective property." \(^{227}\) Under the doctrine, the availability of tort remedies is contingent on the presence of personal injury or damage to other property,\(^ {228}\) as opposed to damage or injury which is limited to the item which is the subject of a

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227. Michael D. Leider, Constructing a New Action for Negligent Infliction of Economic Loss: Building on Cardoza and Coase, WASH. L. REV. 937, 938 n.1 (1991). Economic loss has been specifically defined to include diminution in value of an item due to its defectiveness, the costs of repair or replacement, loss of use, and loss of profits and good will. Leider, supra. Similarly in Anderson Elect. v. Ledbetter Erection Corp., 503 N.E.2d 246, 247 (Ill. 1986), economic loss was defined to include damages for "inadequate value, costs of repair, and replacement of the defective product or consequent loss of profits, without any claim of personal injury or damage to other property." Accord, Sidney R. Barrett, Jr., Recovery of Economic Loss in Tort for Construction Defects: A Critical Analysis, 40 S.C. L. REV. 891, 895 (1989)(Economic loss occurs when a product is of inferior quality or fails to work for its intended purpose); Casa Clara Condominium Ass'n, Inc., 620 So. 2d 1244, 1246 (Fla. 1993)("economic losses are 'disappointed economic expectations,' which are protected by contract law, rather than tort law"); Moorman Mfg. Co. v. National Tank Co., 435 N.E.2d 443, 449 (Ill. 1982)(defining economic loss as "damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits—without any claim of personal injury or damage to other property").

228. The presence of damage to other property determines whether economic loss can be brought within the ambit of those damages and interests which the law in the form of tort theory protects against infringement. Barrett, supra note 227, at 896. The conceptualizations of what constitutes damage to other property are varied. See William Powers, Jr. & Margaret Niver, Negligence, Breach of Contract, and the "Economic Loss" Rule, 23 TEX. TECH L. REV. 477, 481 (1992)(noting the disagreement concerning the boundaries of property and economic loss).

In East River Steamship Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986), a maritime dispute regarding a defective product, the Supreme Court summarized the three prevalent approaches employed to determine if a products liability action is cognizable when a product injures only itself: a) no recovery in tort if damage is purely monetary and only product itself is damaged; b) tort recovery permitted if defective product creates a potential danger to persons or other property even though loss is only to product itself; and c) tort recovery permitted for injury to product itself regardless of whether defect creates risk of harm.
contractual relationship. Consequently, the "economic loss doctrine states that when only the work product itself is damaged as a result of its defective nature, the damage is defined as 'economic' rather than as 'property damages' and is not recoverable in tort."\(^{230}\)

The theoretical underpinnings of the doctrine have been described as follows:

The economic loss doctrine marks the fundamental boundary between contract law, which is designed to enforce the expectancy interests of the parties, and tort law, which imposes a duty of reasonable care and thereby encourages citizens to avoid causing physical harm to others. Simply stated, the economic loss doctrine holds that one may not recover "economic" losses under a tort theory. . . . The crux of the doctrine . . . is the premise that economic interests are protected, if at all, by contract principles, rather than tort principles.\(^{231}\)

In the construction context, the economic loss doctrine arises as a barrier to the successful assertion of tort claims in two factual settings. First, a nonparticipant in the construction process, such as a tenant, sues a participant with whom it lacks contractual privity for economic losses resulting from the latter's supposed improper performance.\(^{232}\) The recovery of economic loss in this setting has been challenged on grounds that tort law's policing mechanism for limiting recovery, the foreseeability limitation, functions ineffectively to limit a defendant's potential liability for economic losses.\(^{233}\) Another reason offered in favor of the economic loss rule focuses on the presumably better position of plaintiffs than defendants to evaluate the former's susceptibility to pure economic loss and to protect against it through first-party insurance.\(^{234}\)

Second, the economic loss doctrine arises as an issue when a party to a contract or a participant in the construction process such as a contractor or subcontractor sues an architect or engineer for economic losses allegedly caused by another participant such as an architect or engineer.\(^{235}\) Proponents of the application of the economic loss rule in this setting argue that the bargaining process in the contractual con-

\(^{229}\) Barrett, supra note 227, at 896.

\(^{230}\) Id. at 896-97.

\(^{231}\) Id. at 894-96.

\(^{232}\) See Leider, supra note 125, at 939. In this factual setting, the parties are strangers to the transaction. Id.

\(^{233}\) Powers & Niver, supra note 228, at 481.

\(^{234}\) Id. at 481-82. "Related to this rationale is the argument that businesses vary in their susceptibility to economic loss. Thus, a rule favoring liability benefits some businesses more than others. To the extent that everyone ultimately shares in the cost of liability through third party insurance premiums or higher prices for goods and services, a rule favoring liability effects a subsidy from low-susceptibility plaintiffs to high-susceptibility plaintiffs." Id.

\(^{235}\) Thus the doctrine applies both to parties to a contractual relationship as well as to those situations involving parties who are indirect parties to the particular transaction even though they are not technically in contractual privity. Powers & Niver, supra note 228, at 482.
text is a preferable mechanism for allocating risk for loss of expectancy than tort law which is premised on social norms. Thus the doctrine is said to operate to prevent disproportionate liability and protect freedom of contract by permitting the parties to allocate their risks contractually. Finally, the use of the doctrine is no doubt motivated by the desire simply to honor the traditional spheres of contract which concerns itself with bargains and expectations and tort which concerns itself with harm caused to persons and property.

The debate and resulting controversy generated by the varying po-

236. Powers & Niver, supra note 228, at 482. Powers and Niver argue, however, that a sound argument can be advanced that tort law concepts provides a suitable basis for assigning risks as does forcing the parties to assign risks pursuant to their contracts. Powers & Niver, supra note 228 at 488.

Professor Barrett maintains, however, that a deleterious effect of permitting the recovery of economic loss in tort in the construction context is to impose incrementally greater costs on society which would be internalized and allocated among consumers of construction related services. Barrett, supra note 227 at 933. Requiring the consuming public as a whole to bear the cost of economic losses suffered by those failing to bargain for adequate contractual remedies in the construction context has been criticized as imprudent for at least three reasons: a) owners are capable of protecting themselves contractually; b) practical obstacles such as the inability of contractors to obtain liability insurance for economic loss, impede shifting the risk of economic losses; and c) judicially administering a duty to prevent economic loss will be extremely difficult. Barrett, supra note 227 at 933-38.

Consistent with this view are those articulated by Judge Posner who, in rejecting a tort claim for economic loss in Rardin v. T. & D. Mach. Handling, 890 F.2d 24 (7th Cir. 1989), reasoned that the doctrine operates as a mechanism which permits business persons to distribute risks as they see fit. Id. at 29. He argued that contract law permits a potential victim to bargain for suitable and alternative arrangements. Id. at 29-30. But see William C. Way, Note, The Problem of Economic Damages: Reconceptualizing the Moorman Doctrine, U. ILL. L. REV. 1169 (1991)(arguing that Posner's assertions are sound only in situations where parties are in contractual privity and therefore have the opportunity to enter into alternative protective arrangements. Where privity is lacking the opportunity to contractually allocate risks is unavailable).

237. Lieder, supra note 125 at 940-41. Lieder concludes that these and other reasons fail, when subjected to critical analysis, to justify adequately rejection of tort claims for economic loss. Applying an economic analysis, he urges the creation of a direct cause of action for the recovery of economic loss. In the construction context, "such as action should protect the injured party's reliance on the builder's services; it should restrict the parties who can sue to a limited group of persons whose reliance the builder could particularly foresee; and it should limit the builder's exposure to a reasonable, defined period of time, and the recoverable damages to those reasonably foreseeable by the builder." Id. at 992-93.

238. Jones, supra note 116 at 1058. While noting the desire to maintain tradition, Professor Jones properly concludes substantive concerns are also at issue. Contract is more sensitive to variables, such as variations in quality and price, which might be overlooked in tort. He provides the following illustration. A buyer paying a low price for a minimal structure should not be able to assert in tort that it lacked the standard features common in the industry or in a more expensive structure. Jones, supra note 116 at 1058. Professor Jones concludes that while tort may be
sitions on the wisdom of the economic loss rule have influenced some courts to relax application of the doctrine. Nevertheless, the doctrine continues to be employed in some form in virtually all states. This has resulted in the invariably inconsistent applications of the doctrine and, at times, an absence of coherent reasoning supporting application or non-application of the doctrine.

When courts adopt an economic loss approach as the mechanism adapted to address such an issue by the creation of an appropriate standard of care, contract is a preferred mechanism. Jones, supra note 116 at 1058.

In East River Steamship Corp. v. Transamerica Delaval, 476 U.S. 858 (1986), the United States Supreme Court recognized the differences between the competing regimes of contract and tort. In this matter involving a defective product in the maritime context, the court concluded "[w]hen a product injures only itself the reasons for imposing a tort duty are weak and those for leaving the party to its contractual remedies are strong." Id. at 871. The reasons referred to by the court for not recognizing extracontractual remedies included the ability of commercial parties contractually to allocate between themselves the risks of defects. Id. at 872-73. It further added that a commercial party can always insure against the risk posed. More fundamentally, the court reasoned that extra contractual remedies are not justified inasmuch as the injury suffered when a product fails properly to function is the essence of a warranty action which provides the mechanism for pursuing the benefit of the bargain. Id. at 867-68.

In another maritime case, Employers Ins. of Wausau v. Avondale, 866 F.2d 752 (5th Cir. 1989), the Fifth Circuit extended the rule and reasoning of East River to a contract to provide professional services. Focusing on the ability of commercial parties to allocate risks of defective performance, the court refused to permit the plaintiff to recover a purely economic loss pursuant to a theory of negligent performance of a contract for professional services. Id. at 765. The court noted the Supreme Court's concern as expressed in East River for preserving the integrity of contract law in the commercial context is equally applicable to professional services where the defect is only to the product itself. Id. at 762.

For citations to arguments proposed by proponents and opponents of the economic loss rule see Lieder, supra note 125 at 939 n.3; Powers & Niver, supra note 228, at 481 (noting the controversial nature of the economic loss rule).

See generally Lieder, supra note 125, and Barrett, supra note 227 (describing the inconsistency in judicial application of the doctrine). Typically courts adopt one of three approaches in applying the economic loss doctrine. Most jurisdictions have adopted the rule enunciated in Seely v. White Motor Co., 433 P.2d 145 (Cal. 1965) which precludes the recovery of economic loss in tort. Others align with the contrasting view expressed in Santor v. A. & M. Karagueusian, Inc., 207 A.2d 304 (N.J. 1965), in which the New Jersey Supreme Court permitted a consumer to sue in strict liability to recover economic loss associated with a defective carpet. (In Spring Motors Distributors, Inc. v. Ford Motor Co., 489 A.2d 660 (N.J. 1985), the court refused to extend Santor to commercial transactions). What has been defined as an intermediate position has been adopted by other jurisdictions. Under the intermediate position, economic loss is recoverable if the loss was occasioned by a defect which created a potential danger to persons or property. Thus in Cloud v. Kit Mfg. Co., 563 P.2d 248 (Alaska 1977) damage to the product itself was recoverable under strict liability in tort where the injury resulted from a fire. See generally, East River Steamship Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986)(describing the three approaches taken by jurisdictions).
for determining the substantive causes of action available for breach of the warranty of workmanlike performance, an opportunity exists for analysis and exploration of the distinctions between tort and contract. Yet critical analysis of such distinctions and their implications is often lacking. Even in instances where a court undertakes a thorough analysis it often fails to focus on the underlying nature and purposes behind the implication of the workmanlike performance obligation into agreements. It therefore fails to consider related issues such as the efficiency of gap fillers and the implications for permitting tort recovery for breach of such a term. This, and the uneven application of the economic loss doctrine, limit its usefulness as a means of achieving not only greater predictability but for understanding the complete realm of theoretical, policy, and practical considerations implicated by the warranty of workmanlike performance.

Arguably, by shifting the focus of analysis to these considerations in determining whether to permit an action in tort, one can avoid certain problems associated with the inconsistent results involved in determining whether to apply the economic loss rule so as to preclude actions in tort. Yet a prerequisite to doing so is to formulate the warranty in a way that precisely defines its doctrinal basis and content.

Formulating the implied warranty of workmanlike performance as a gap filler or default rule may assist in accomplishing this goal. First, such a formulation seems doctrinally sound. In addition, at a minimum, such a characterization will add another level of factors for courts to consider in determining whether to permit action in tort for breach of the warranty. Certain of these factors will intersect with policy considerations examined in assessing the relative benefits and deleterious effects of the economic loss doctrine. Yet characterization of the warranty of workmanlike performance brings into consideration additional factors such as those which argue in favor of the widespread use of background rules. Without engaging in a complete consideration of all relevant factors, it is difficult for a court to assess the ramifications of transformation of a contractually implied background rule into a premise for the imposition of tort liability.

243. See Barrett, supra note 228 (discussing the extent to which some courts which adopt or refuse to adopt the economic loss doctrine neglect to provide rationales for such determinations).

244. As pointed out by one commentator:

Historically, it is clear that tort law never imposed a duty on the part of construction contractors to protect owners from economic losses arising from buildings that lose their value or require repairs. As such, any decision to extend a tort duty to construction contractors is an exercise in judicial policy-making and should be made only after weighing all competing interests and policies. . . .

Barrett, supra note 227 at 932.
V. CONCLUSION

The foregoing discussion demonstrates that uncertainty continues to surround the precise doctrinal dimensions of the warranty of workmanlike performance. This uncertainty has resulted in divergent formulations of the concept. Varying conceptualizations of the warranty, particularly of its substantive basis, have produced unpredictable judicial determinations concerning procedure and rights available to parties in when breach of the warranty is at issue.

Formulating the warranty of workmanlike performance as a gap filler or default rule will not provide a panacea for all the issues which courts address in the context of the warranty. A gap filler conceptualization can assist courts in defining the precise doctrinal dimensions of the warranty of workmanlike performance. As such it can also function as a point of departure for addressing the diverse issues which arise out of the warranty of workmanlike performance. Ultimately it may lead to greater predictability and more even application of the warranty of workmanlike performance.

245. Although discussion of them is beyond the scope of this article, it should be noted that conceptualizing the warranty of workmanlike performance as a gap filler may assist courts in addressing issues related to damages arising out of breach of this obligation, what constitutes breach of this doctrine and the relationship between breach of the warranty and the substantial performance doctrine.