Washington University Law Review

Volume 1978 | Issue 3

January 1978

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WASHINGTON UNIVERSITY
LAW QUARTERLY

VOLUME 1978 NUMBER 3 SUMMER

LEGAL ADVERTISING AND WARRANTY LIABILITY: "LET THE LAWYER BEWARE"

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I. INTRODUCTION

Whether the advent of advertising (and perhaps solicitation[1]) will relegate the legal profession to the level of a commercial enterprise is one of the major uncertainties to arise from the Supreme Court's deci-

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1. *See* Ohralik v. Ohio State Bar, 98 S. Ct. 1913 (1978); *In re* Primus, 98 S. Ct. 1893 (1978). In the *Ohralik* decision, the Court upheld the constitutionality of the Ohio Supreme Court's action in disciplining an attorney for in-person solicitation of clients for pecuniary gain. In *In re* Primus, however, the Court held that an attorney acted within her first amendment rights in advising a potential client of her legal rights and subsequently in writing her to advise that free legal assistance was available. The Court emphasized that in this case, unlike *Ohralik*, the solicitation was not for pecuniary gain, but was "undertaken to express personal political beliefs and to advance the civil-liberties objectives of the ACLU . . . ." *Id.* at 1900.

Drawing upon the Court's holdings, one may conclude that a state may fashion reasonable restrictions upon solicitation. The Court's language in *In re* Primus supports this assertion: "The State's special interest in regulating members of a profession it licenses, and who serve as officers of its courts, amply justifies the application of narrowly drawn rules to proscribe solicitation that in fact is misleading, overbearing, or involves other features of deception or improper influence." *Id.* at 1909. *See* Young, *Supreme Court Report*, 64 A.B.A.J. 1151 (1978).

For the purposes of this article, it appears that professional solicitation, like advertising, may well lead to the application of warranty standards. *See* notes 82-109 *infra* and accompanying text; Steinberg & Rosen, *Lawyers' Advertising and Warranties: Caveat Advocatus*, 64 A.B.A.J. 867 (1978).

sion in *Bates v. State Bar*.[2] Legal commentators have predicted that possible ramifications from advertising include smaller firms siphoning off business from larger firms, increased litigation, lower legal fees, increased specialization by members of the bar, and a decline in professional competence and standards.[3]

One possible consequence of the *Bates* decision which has attracted little, if any, comment, however, is that although lawyers have a first amendment right to advertise under certain circumstances, the exercise of this right may result in expanded liability for the rendition of substandard legal services that are procured through such advertising. In other words, an attorney who holds himself out through public advertisement as a specialist or one otherwise qualified to do the work involved—thereby creating certain reasonable expectations in potential clients—may be held to have expressly and impliedly warranted the quality of his product. And, if the quality of the attorney's work does not meet acceptable standards, he may be liable for breach of warranty.

This article will examine the realistic possibility of expanded lawyer liability by juxtaposing upon the clearly commercial flavor of legal advertising, the growing trend expanding warranty application under Article 2 of the Uniform Commercial Code by use of analogy.[4] It should

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2. 433 U.S. 350 (1977).

3. *See, e.g.*, Branca & Steinberg, *Attorney Fee Schedules and Legal Advertising: The Implications of* Goldfarb, 24 U.C.L.A. L. REV. 475, 518-21 (1977) (lower legal fees and increased litigation); Hansen, *Lawyers' Advertising: Beyond the Yellow Pages*, 13 IDAHO L. REV. 247, 262 (1977) (increased specialization, increased competition, and lower costs to the consumer); Spann, *The "Advertising Issue,"* 81 COM. L.J. 381, 381-82 (1976) (commercialization of the profession). Commenting on the conflict between traditional views of the legal profession as opposed to its commercialization, Branca & Steinberg made the following remarks with respect to the Supreme Court's opinion in Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), which held that attorney minimum fee schedules were a per se violation of § 1 of the Sherman Act, 15 U.S.C. § 1 (1976):

> In *Goldfarb*, the Court recognized a strong consumer interest in the manner in which the practice of law is conducted. The extent to which the Court is willing to protect this interest at the expense of relegating the legal profession to the level of a commercial enterprise remains to be seen. Whatever the eventual result may be, *Goldfarb* represents a new judicial attitude toward consumerism and the bar; it invites legislative participation in resolving the conflict between the bar's desire to be free from the usual constraints upon commercial enterprise and the public interest in competition.

Branca & Steinberg, *supra*, at 522.

4. Strict liability in tort (under the RESTATEMENT (SECOND) OF TORTS § 402A (1965)) and the theory of misrepresentation are beyond the scope of this article. The reason for declining to address these issues is that the plaintiff has a greater possibility of recovering under a warranty theory. Under an express warranty the plaintiff must prove that the defendant did not fulfill his representation, and under an implied warranty of merchantability, that his product did not meet the standards of the profession. Fault, negligence, or accidental events that render the perform-

be noted, however, that although this work focuses on attorney liability, the principles stated apply with equal force to other professionals who advertise.[5]

For background purposes, the article begins with a discussion of warranty liability in general. Next, it examines the traditional problems inherent in the extension of warranties to "service" transactions. Then, the work analyzes the recent and growing trend toward expansion of warranty liability and considers whether this trend should be extended to lawyers and other professionals who advertise.

II. WARRANTY LIABILITY IN GENERAL

An analysis of judicial application of the Uniform Commercial Code to cases involving the furnishing of legal services reveals that attorneys have traditionally found three areas of shelter from warranty liability. First, under the traditional interpretation of the Code, express and implied warranties arise only where there has been a transaction involving "goods."[6] Because lawyers and other professionals provide services, they accordingly have not been subject to warranty coverage.[7] Second, attorneys, as professionals, generally do not attract clientele through commercial advertising or solicitation.[8] Third, because of the

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ance unmerchantable or the representation unfulfilled provide no defense to the advertising lawyer sued under a warranty theory.

To recover under a theory of strict liability in tort, the plaintiff must prove that the defendant's service was defective in an unreasonably dangerous manner. Although this remedy may be appropriate in a personal injury suit against a physician or dentist, it is not as effective when the harm is solely economic. The claim of misrepresentation is difficult to substantiate in legal advertising cases because the plaintiff must prove that the lawyer was at least negligent in making his misrepresentation and, sometimes, that the lawyer intended to mislead.

Under the federal criminal code legislation now pending in Congress, S. 1437, 95th Cong., 2d Sess. § 1738 (1978), an attorney who advertises with the intent to "deceive or defraud a purchaser" may be guilty of the offense of consumer fraud.

For a further discussion of these issues, see J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 272, 295 (1972). *See also* note 53 *infra*.

5. Presumably based on the *Bates* decision, physicians and dentists are also beginning to advertise. *See* Wash. Post, Nov. 28, 1977, at A1, col. 1.

6. U.C.C. § 2-105.

7. *See, e.g.*, Gravely v. Providence Partnership, 549 F.2d 958 (4th Cir. 1977); La Rossa v. Scientific Design Co., 402 F.2d 937 (3d Cir. 1968); Thompson Farms, Inc. v. Corno Feed Prods., 366 N.E.2d 3 (Ind. App. 1977); Corceller v. Brooks, 347 So. 2d 274 (La. Ct. App. 1977); Magrine v. Krasnica, 94 N.J. Super. 228, 227 A.2d 539 (Hudson County Ct. 1967), *aff'd sub nom.* Magrine v. Spector, 100 N.J. Super. 223, 241 A.2d 637 (Super. Ct. App. Div. 1968); Perlmutter v. Beth David Hosp., 308 N.Y. 100, 123 N.E.2d 792 (1954); Milau Assocs. v. North Ave. Dev. Corp., 56 App. Div. 587, 391 N.Y.S.2d 628 (1977).

8. *See, e.g.*, Newmark v. Gimbel's, Inc., 54 N.J. 585, 258 A.2d 697 (1969), where the New

unpredictable nature and complexity of the law, attorneys are liable only for negligence or intentional misconduct.[9] As phrased by Chief Justice Traynor: "Those who hire [professionals] are not justified in expecting infallibility, but can expect only reasonable care and competence. They purchase service, not insurance."[10] Consequently, disgruntled clients traditionally have been relegated to negligence actions for redress of their grievances. To recover, the plaintiff had to show not only that counsel was negligent, but also that but for this negligence, he would have prevailed.[11] This burden has frequently proven insurmountable.[12]

Before considering the prospects of imposing warranty liability on attorneys who advertise or solicit, it is necessary to review the traditional definitions and applications of warranties and then to trace the trend of expanded warranty application. The Uniform Commercial Code recognizes two kinds of warranties: (1) express[13] and (2) implied, which in turn is divided into two categories: (i) the implied warranty of merchantability[14] and (ii) the implied warranty of fitness for a particular purpose.[15] Because the fitness for a particular purpose warranty requires that the seller both have reason to know the buyer's particular

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Jersey Supreme Court said in dictum that warranty liability should not apply to physicians and dentists because they are professionals and "[do] not and cannot advertise for patients." *Id.* at 596, 258 A.2d at 702. *See also* Comment, *Professional Negligence*, 121 U. PA. L. REV. 627, 633, 650 (1973).

9. *See* Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), a widely criticized decision in which the California Supreme Court held that an attorney who failed to consider the rule against perpetuities, resulting in invalidation of a will, was not liable for negligence because the complexity of the rule made it a confusing trap for many attorneys. *Id.* at 592, 364 P.2d at 690, 15 Cal. Rptr. at 826. *See also* Dorf v. Relles, 355 F.2d 488 (7th Cir. 1966); Broyles v. Brown Eng'r Co., 275 Ala. 35, 151 So. 2d 767 (1963); House v. Maddox, 46 Ill. App. 3d 68, 360 N.E.2d 580 (1977); Corceller v. Brooks, 347 So. 2d 274 (La. Ct. App. 1977); Babbitt v. Bumpus, 73 Mich. 331, 41 N.W. 417 (1889); Denzer v. Rouse, 48 Wis. 2d 528, 180 N.W.2d 521 (1970).

10. Gagne v. Bertran, 43 Cal. 2d 481, 489, 275 P.2d 15, 20-21 (1954) (citations omitted).

11. *See* Eckert v. Schaal, 251 Cal. App. 2d 1, 5, 58 Cal. Rptr. 817, 819-20 (1967); Gillen, *Legal Malpractice*, 12 WASHBURN L.J. 281, 292 (1973); Comment, *supra* note 8, at 664-66.

12. *See* Note, *Attorney Malpractice*, 63 COLUM. L. REV. 1292, 1311-12 (1963). *But see* Rottman & Stern, *Purchasing Lawyer Malpractice Insurance*, 19 PRAC. LAW. 19 (1973), where the authors note that the number of attorney malpractice suits in recent years has increased with a corresponding increase in the amount and number of settlements and judgments. Another commentator asserts that the increase in malpractice actions is due largely to the greater sophistication of the average consumer, the widespread availability of malpractice insurance, and the increased complexity and specialization of the profession. Gillen, *supra* note 11.

13. U.C.C. § 2-313.

14. *Id.* § 2-314.

15. *Id.* § 2-315.

purpose and that the buyer is relying on his expertise,[16] this warranty will seldom arise in the typical attorney advertising or solicitation context.[17] Accordingly, this work primarily considers express warranties and implied warranties of merchantability.

Turning first to express warranties, section 2-313 of the Code provides that to recover under this theory the plaintiff must show that the seller made an affirmation of fact or promise, or offered a description, sample, or model which related to the goods and became "part of the basis of the bargain."[18] Although the section does not require plaintiff to show reliance upon the seller's representation for it to become part of the basis of the bargain,[19] courts, nevertheless, tend to be influenced by a showing of reasonable reliance.[20] Further, the text of section 2-313 and the accompanying comments reveal that express warranties rest on the dickered aspects of a transaction and that affirmations, promises, or descriptions that relate to the goods create the warranties.[21]

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16. *Id.* Section 2-315 provides:

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified under the next section, an implied warranty that the goods shall be fit for such purpose.

White and Summers note that the warranty of fitness for a particular purpose "is narrower, more specific, and more precise" than the implied warranty of merchantability. *See* J. WHITE & R. SUMMERS, *supra* note 4, at 297-99.

Reliance is an essential element of the implied warranty of fitness for a particular purpose. Not only must the buyer rely on the seller's skill and judgment, but the seller must: (1) have reason to know the buyer's particular purpose, Brescia v. Great Rd. Realty Trust, 373 A.2d 1310, 1312 (N.H. 1977); and (2) have reason to know that the buyer is relying on his skill and judgment. Lewis & Sims, Inc. v. Key Indus., Inc., 16 Wash. App. 619, 621, 557 P.2d 1318, 1321 (1976).

17. This, however, does not mean that an implied warranty of fitness for a particular purpose can never arise from legal advertising. An example of such a warranty is provided in the last section of this article. *See* text accompanying notes 107-09 *infra*.

18. *See* J. WHITE & R. SUMMERS, *supra* note 4, at 277.

19. Under the Uniform Sales Act (the predecessor to Article 2 of the Uniform Commercial Code), to recover in an express warranty case, the plaintiff had to show that he relied on the seller's statement. Section 12 of the Act provided: "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and *if the buyer purchases the goods relying thereon* . . . ." (emphasis added). The Uniform Commercial Code has dispensed with the reliance requirement. *See* note 21 *infra*.

20. White and Summers observe that reliance remains a relevant factor because courts have difficulty defining the "basis of the bargain." J. WHITE & R. SUMMERS, *supra* note 4, at 278; *see* Stamm v. Wilder Travel Trailers, 44 Ill. App. 3d 530, 358 N.E.2d 382 (1976).

21. *See* U.C.C. § 2-313, Comment 3, which provides in pertinent part:

> Affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement. Rather, any fact

The point most relevant to this inquiry is that it is settled law that advertisements can create express warranties.[22] Courts have arrived at this conclusion not only because the consumers' vigilance has been lulled through such advertising,[23] but also because advertisements create expectations on the part of the buyer that induce him to use and rely upon a particular product.[24] By advertising, the seller makes an affirmation of fact, promise, or description that relates to the goods and forms part of the basis of the bargain.[25]

Turning next to recovery under the implied warranty of merchantability, section 2-314 requires that a plaintiff show that: (1) he purchased the product from a merchant, (2) the product was not "merchantable" at the time of acquisition, (3) he incurred damages to himself or his property that were caused in fact and proximately by the product, and (4) he notified the seller of his injury.[26] The "merchant"[27] requirement is satisfied when the seller has held himself out as having knowledge or skill relevant to the practices involved in the transaction.[28] Lawyers, with their highly specialized training, fall within this definition.[29]

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which is to take such affirmations, once made, out of the agreement, requires clear affirmative proof. The issue normally is one of fact.

22. *See* J. WHITE & R. SUMMERS, *supra* note 4, at 279-80; Palmer, *Express Warranties Arising from Advertising*, 41 J. AIR L. & COM. 497 (1975).

23. *See, e.g.*, Nalbandian v. Byron Jackson Pumps, Inc., 97 Ariz. 280, 287, 399 P.2d 681, 686 (1965) (Lockwood, C.J., concurring); Lechuga, Inc. v. Montgomery, 12 Ariz. App. 32, 38, 467 P.2d 256, 262 (1970) (Jacobson, J., concurring).

24. In Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409 (1932), perhaps the landmark case on advertising warranties, the Washington Supreme Court stated:

> It would be unjust to recognize a rule that would permit manufacturers of goods to create a demand for their products by representing that they possess qualities which they, in fact, do not possess and then . . . deny the consumer the right to recover if damages result from the absence of those qualities, when such absence is not readily noticeable.

Id. at 459, 12 P.2d at 412. *See also* Fargo Mach. & Tool Co. v. Kearney & Trecker Corp., 428 F. Supp. 364 (E.D. Mich. 1977); Harris v. Belton, 258 Cal. App. 2d 595, 65 Cal. Rptr. 808 (1968); Capital Equip. Enterprises, Inc. v. North Pier Terminal Co., 117 Ill. App. 2d 264, 254 N.E.2d 542 (1969); Auto-Teria, Inc. v. Ahern, 352 N.E.2d 774 (Ind. Ct. App. 1976); Hawkins Constr. Co. v. Matthews Constr. Co., 190 Neb. 546, 209 N.W.2d 643 (1973); Brown v. Globe Laboratories, Inc., 165 Neb. 138, 84 N.W.2d 151 (1957); Eddington v. Dick, 87 Misc. 2d 793, 386 N.Y.S.2d 180 (Geneva City Ct. 1976); Klages v. General Ordinance Equip. Corp., 240 Pa. Super. Ct. 356, 367 A.2d 304 (1976).

25. A difficult distinction to draw is whether the seller's statement constitutes a warranty or is merely "puffing." *See* note 109 *infra*.

26. U.C.C. § 2-314.

27. *Id.* subsection (1).

28. *See id.* For a discussion of this definition, see Dolan, *The Merchant Class of Article 2: Farmers, Doctors, and Others*, 1977 WASH. U.L.Q. 1; Annot., 17 A.L.R.3d 1010, 1030 (1968).

29. *See* J. WHITE & R. SUMMERS, *supra* note 4, at 289. U.C.C. § 2-104, Comment 2 states in

Plaintiff must next show that the goods were not "merchantable." The most widely used standard of "merchantability" is that the goods be "fit for the ordinary purposes for which such goods are used."[30] Thus, a merchantable automobile should be fit for normal city and highway driving,[31] but need not be fit for drag racing. Further, one can determine a standard of merchantability by looking to trade custom and usage[32] or to the price charged by the merchant.[33] It must be emphasized, however, that a good can be merchantable and yet fall short of perfection. A lawyer can try a lawsuit in a merchantable manner[34] but still lose, or provide merchantable advice that fails to benefit his client. The criterion is not perfection, but whether the lawyer's performance would "pass without objection" in the trade.[35]

The third factor relevant to recovery under section 2-314 is that the buyer need not prove that he actually relied on the merchant's expertise nor that he communicated a particular purpose to the merchant.[36] Rather, reliance is replaced by the implicit requirement that the seller be a dealer in the kind of goods sold. It is then conclusively presumed that the buyer relied on the merchant's skill and judgment in deciding to purchase the good.[37] A lawyer may be analogously described as a dealer in legal services.

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pertinent part: "The professional status under the definition may be based upon specialized knowledge as to the goods, specialized knowledge as to business practices, or specialized knowledge as to both . . . ."

30. U.C.C. § 2-314(2)(c). *See generally* J. WHITE & R. SUMMERS, *supra* note 4, at 293; *see also* McClung v. Ford Motor Co., 333 F. Supp. 17 (S.D.W. Va.), *aff'd*, 472 F.2d 240 (4th Cir. 1971), *cert. denied*, 412 U.S. 940 (1973).

31. *See* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

32. *See* Kassab v. Central Soya, 432 Pa. 217, 246 A.2d 848 (1968).

33. Comment 7 to U.C.C. § 2-314 provides: "In cases of doubt as to what quality is intended, the price at which a merchant closes a contract is an excellent index of the nature and scope of his obligation under the present section." *See, e.g.*, Testo v. Russ Dunmire Oldsmobile, Inc., 16 Wash. App. 39, 554 P.2d 349 (1976); Sylvia Coal Co. v. Mercury Coal & Coke Co., 151 W. Va. 818, 156 S.E.2d 1 (1967).

Other factors relevant to the determination of merchantability include the quality of goods of the same class produced by other manufacturers and whether the good complies with government standards and regulations. *See* Woodbury Chem. Co. v. Holgerson, 439 F.2d 1052 (10th Cir. 1971).

34. *See* J. WHITE & R. SUMMERS, *supra* note 4, at 288-89.

35. U.C.C. § 2-314(2)(a); *see, e.g.*, Dillard Smith Constr. Co. v. Greene, 337 So. 2d 841 (Fla. Dist. Ct. App. 1976); Corceller v. Brooks, 347 So. 2d 274 (La. Ct. App. 1977); Keown v. West Jersey Title & Guar. Co., 147 N.J. Super. 427, 371 A.2d 370 (1977).

36. *See* Eichenberger v. Wilhelm, 244 N.W.2d 691 (N.D. 1976); J. WHITE & R. SUMMERS, *supra* note 4, at 286-96.

37. *See* Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653 (1957).

These factors traditionally have been considered only in connection with transactions involving the sale of goods, and as noted earlier, courts have been reluctant to extend warranty liability to transactions involving services. This distinction has tended to insulate lawyers and other professionals who advertise from liability. The following section will explore the traditional problems and considerations that courts have weighed in gradually extending warranties to service transactions.

III. EXTENSION OF WARRANTIES TO SERVICE TRANSACTIONS

Although Article 2 applies only to the sale of goods,[38] Comment 2 to section 2-313 explicitly states that the adoption of the Code should not disturb the developing case law extending warranties to nonsale transactions by use of analogy.[39] Many courts, however, have been reluctant to accept this invitation, particularly in cases involving pure service transactions.[40] Further, an examination of the pertinent case law reveals that a significant number of courts have been unwilling to apply warranty standards even in cases involving "hybrid" transactions, which entail the furnishing of both goods and services.[41]

As a general rule, courts have been more receptive to arguments for extending liability—either by categorizing the contract as a sale of goods or by use of analogy—when the hybrid transaction is commer-

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38. *See* notes 6-7 *supra* and accompanying text.

39. Comment 2 provides in pertinent part:

> [T]he warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract . . . . [T]he matter is left to the case law with the intention that the policies of this Act may offer useful guidance in dealing with further cases as they arise.

40. *See, e.g.*, Gravely v. Providence Partnership, 549 F.2d 958 (4th Cir. 1977); La Rossa v. Scientific Design Co., 402 F.2d 937 (3d Cir. 1968); Reliable Elec. Co. v. Clinton Campbell Contractors, Inc., 10 Ariz. App. 371, 459 P.2d 98 (1968); Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 491 P.2d 421, 98 Cal. Rptr. 837 (1971); Gagne v. Bertran, 43 Cal. 2d 481, 275 P.2d 15 (1954); Allied Properties v. John A. Blume & Assocs., 25 Cal. App. 3d 848, 102 Cal. Rptr. 259 (1972); Lindner v. Barlow, Davis & Wood, 210 Cal. App. 2d 660, 27 Cal. Rptr. 101 (1962); Roberts v. Karr, 178 Cal. App. 2d 535, 3 Cal. Rptr. 98 (1960); Ramp v. St. Paul Fire & Marine Ins. Co., 263 La. 774, 269 So. 2d 239 (1972); Babbitt v. Bumpus, 73 Mich. 331, 41 N.W. 417 (1889).

41. *See, e.g.*, Vergott v. Deseret Pharmaceutical Co., 463 F.2d 12 (5th Cir. 1972); Gautier v. General Tel. Co., 234 Cal. App. 2d 302, 44 Cal. Rptr. 404 (1965); Gulash v. Stylarama, Inc., 33 Conn. Supp. 108, 364 A.2d 1221 (C.P. 1975); Epstein v. Giannattasio, 25 Conn. Supp. 109, 197 A.2d 342 (C.P. 1963); Nitrin, Inc. v. Bethlehem Steel Corp., 35 Ill. App. 3d 577, 342 N.E.2d 65 (1976); Cutler v. General Elec. Co., 4 U.C.C. Rep. Serv. 300 (N.Y. Sup. Ct. 1967); Hoover v. Montgomery Ward & Co., 270 Ore. 498, 528 P.2d 76 (1974).

cial.[42] But when the defendant's service in the hybrid transaction is of a professional character, courts generally have declined to impose warranty liability.[43] A few examples will serve to illustrate these points.

A leading case extending warranty liability to a hybrid commercial transaction is the New Jersey Supreme Court's progressive decision in

42. *See, e.g.*, Kellogg Bridge Co. v. Hamilton, 110 U.S. 108 (1884); Sampson Constr. Co. v. Farmers Coop. Elevator Co., 382 F.2d 645 (10th Cir. 1967); J.A. Maurer, Inc. v. United States, 485 F.2d 588 (Ct. Cl. 1973); Aced v. Hobbs-Sesack Plumbing Co., 55 Cal. 2d 573, 360 P.2d 897, 12 Cal. Rptr. 257 (1961); Riffe v. Black, 548 S.W.2d 175 (Ky. Ct. App. 1977); M.K. Smith Corp. v. Ellis, 257 Mass. 269, 153 N.E. 548 (1926); Friend v. Childs Dining Hall Co., 231 Mass. 65, 120 N.E. 407 (1918); O'Laughlin v. Minnesota Natural Gas Co., 253 N.W.2d 826 (Minn. 1977); Hamilton Fixture Co. v. Anderson, 285 So. 2d 744 (Miss. 1973); Worrell v. Barnes, 87 Nev. 204, 484 P.2d 573 (1971); Newmark v. Gimbel's, Inc., 54 N.J. 585, 258 A.2d 697 (1969); Miller v. Winters, 144 N.Y.S. 351 (Sup. Ct. 1913); Carpenter v. Best's Apparel, Inc., 4 Wash. App. 439, 481 P.2d 924 (1971).

Courts have generally applied warranty standards of liability to two kinds of nonsale commercial transactions—the lease, bailment, or license of goods and the sale or lease of housing. As to the lease, bailment, or license of goods, *see, e.g.*, KPLR TV, Inc. v. Visual Elecs. Corp., 327 F. Supp. 315 (W.D. Ark. 1971), *modified*, 465 F.2d 1382 (8th Cir. 1972); Sawyer v. Pioneer Leasing Corp., 244 Ark. 943, 428 S.W.2d 46 (1968); Garcia v. Halsett, 3 Cal. App. 3d 319, 82 Cal. Rptr. 420 (1970); Whitfield v. Cooper, 30 Conn. Supp. 47, 298 A.2d 50 (Super. Ct. 1972); Johnson Equip. Co. v. United Airlines, Inc., 238 So. 2d 98 (Fla. 1970); Glenn Dick Equip. Co. v. Galey Constr. Inc., 97 Idaho 216, 541 P.2d 1184 (1975); All States Leasing Co. v. Bass, 96 Idaho 873, 538 P.2d 1177 (1975); Murray v. Kleen Leen, Inc., 41 Ill. App. 3d 436, 354 N.E.2d 415 (1976); Cintrone v. Hertz Truck Rental & Leasing Serv., 45 N.J. 434, 212 A.2d 769 (1965). *See generally* Comment, *Strict Liability of the Bailor, Lessor, and Licensor*, 57 MARQ. L. REV. 111 (1973).

As to the sale or lease of housing, *see, e.g.*, Wawak v. Stewart, 247 Ark. 1093, 449 S.W.2d 922 (1970) (sale); Pollard v. Saxe & Yolles Dev. Co., 25 Cal. 3d 374, 525 P.2d 88, 115 Cal. Rptr. 648 (1974) (sale); Duncan v. Shuster-Graham Homes, Inc., 563 P.2d 976 (Colo. Ct. App. 1977) (sale); Vernal v. Centralla, 28 Conn. Supp. 476, 266 A.2d 200 (Super. Ct. 1970) (sale); Theis v. Heuer, 280 N.E.2d 300 (Ind. 1972) (sale); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965) (lease); Lane v. Trenholm Bldg. Co., 267 S.C. 497, 229 S.E.2d 728 (1976) (sale); Foisey v. Wyman, 83 Wash. 2d 22, 515 P.2d 160 (1973) (lease). *See generally* Levine, *The Warranty of Habitability*, 2 CONN. L. REV. 61 (1969); Note, *The Home Owners Warranty Program: An Initial Analysis*, 28 STAN. L. REV. 357 (1976).

For an excellent discussion of the extension of warranty liability by analogy, see Farnsworth, *supra* note 37, at 667-69. Some of the reasons Professor Farnsworth cites to explain the advantages of reasoning by analogy include the adjustment of legal principles to changing social conditions, avoidance of the awkward application of sales principles, and extension of warranty standards to nonsales transactions. *Id.*

43. *See, e.g.*, Heirs of Fruge v. Blood Servs., 506 F.2d 841 (5th Cir. 1975); Mauran v. Mary Fletcher Hosp., 318 F. Supp. 297 (D. Vt. 1970); Fogo v. Cutter Laboratories, Inc., 68 Cal. App. 3d 744, 137 Cal. Rptr. 417 (1977); Silverhart v. Mount Zion Hosp., 20 Cal. App. 3d 1022, 98 Cal. Rptr. 187 (1971); Carmichael v. Reitz, 17 Cal. App. 3d 958, 95 Cal. Rptr. 381 (1971); Magrine v. Krasnica, 94 N.J. Super. 228, 227 A.2d 539 (Hudson County Ct. 1967), *aff'd sub nom.* Magrine v. Spector, 100 N.J. Super. 223, 241 A.2d 637 (Super. Ct. App. Div. 1968), *aff'd*, 53 N.J. 259, 250 A.2d 129 (1969); Ruybe v. Gordon, 18 U.C.C. Rep. Serv. 889 (N.Y. Sup. Ct. 1976); Batiste v. American Home Prods. Corp., 32 N.C. App. 1, 231 S.E.2d 269 (1977); Barbee v. Rogers, 425 S.W.2d 342 (Tex. 1968).

Newmark v. Gimbels, Inc.[44] Plaintiff was injured when an employee at defendant's beauty salon applied a defective permanent wave solution to her hair. Acknowledging that the transaction involved both a sale of goods and the rendering of a service, the court noted that there was no justifiable reason to limit implied warranty liability to "the intricacies of the law of sales."[45] In holding the beauty salon liable, however, the court stated in dictum that public policy would be ill served by imposing this same warranty liability on physicians and dentists.[46]

Countering *Newmark* is *Magrine v. Krasnica*,[47] an earlier New Jersey case, in which the court held that a dentist was not liable under an implied warranty theory when a hypodermic needle broke and became imbedded in his patient's jaw.[48] Similarly, in *Perlmutter v. Beth David Hospital*,[49] although plaintiff contracted homologous serum jaundice after receiving a blood transfusion at the defendant hospital, he could not recover. The court found that the transfusion was primarily a service and not a transfer of goods; therefore an implied warranty theory was inapplicable.[50] These decisions and others following them[51] are

44. 54 N.J. 585, 258 A.2d 697 (1969). *Newmark* has received extensive commentary. *See, e.g.*, Greenfield, *Consumer Protection in Service Transactions—Implied Warranties and Strict Liability in Tort*, 1974 UTAH L. REV. 661; Note, *Products and the Professional: Strict Liability in the Sale-Service Hybrid Transaction*, 24 HASTINGS L.J. 111 (1972) [hereinafter cited as *Products and the Professional*]; Note, *The Application of Implied Warranties to Predominantly "Service" Transactions*, 31 OHIO ST. L.J. 580 (1970).

45. 54 N.J. at 594, 258 A.2d at 701.

46. *Id.* at 597, 258 A.2d at 702-03. The court stated: "The beautician is engaged in a commercial enterprise; the dentist and doctor in a profession . . . . The dentist or doctor does not and cannot advertise for patients . . . . Neither medicine nor dentistry is an exact science; there is no implied warranty of cure or relief." *Id.* After *Newmark*, a number of courts extended warranty liability to hybrid goods-service transactions which were predominantly commercial in character. *See, e.g.*, Jerry v. Borden Co., 45 App. Div. 2d 344, 358 N.Y.S.2d 426 (1974); Ellibee v. Dye, 64 Pa. D. & C. 2d 158 (C.P. 1973); Carpenter v. Best's Apparel, Inc., 4 Wash. App. 439, 481 P.2d 924 (1971).

47. 94 N.J. Super. 228, 227 A.2d 539 (Hudson County Ct. 1967), *aff'd sub nom.* Magrine v. Spector, 100 N.J. Super. 223, 241 A.2d 637 (Super. Ct. App. Div. 1968), *aff'd*, 53 N.J. 259, 250 A.2d 129 (1969).

48. *Id.* at 242, 227 A.2d at 547; *accord*, Silverhart v. Mount Zion Hosp., 20 Cal. App. 3d 1022, 98 Cal. Rptr. 187 (1971). *See also* Ruybe v. Gordon, 18 U.C.C. Rep. Serv. 889 (N.Y. Sup. Ct. 1976) (intrauterine device); Cutler v. General Elec. Co., 4 U.C.C. Rep. Serv. 300 (N.Y. Sup. Ct. 1967) (pacemaker); Batiste v. Home Prods. Corp., 32 N.C. App. 1, 231 S.E.2d 269 (1977) (oral contraceptive).

49. 308 N.Y. 100, 123 N.E.2d 792 (1954).

50. In denying recovery, the court stated: "It was not for blood—or iodine or bandages—for which the plaintiff bargained, but the wherewithal of the hospital staff and the availability of hospital facilities to provide whatever medical treatment was considered advisable." *Id.* at 106, 123 N.E.2d at 795. The *Perlmutter* decision has been widely followed. *See, e.g.*, Heirs of Fruge v. Blood Serv., 506 F.2d 841 (5th Cir. 1975) (based on Louisiana statute extinguishing causes of

based on at least two considerations: First, professional services are experimental in nature and often depend on complex factors beyond the professional's control. A professional, therefore, should not be deemed a guarantor of his work.[52] Second, the necessity of having these services readily available to the public outweighs the policy considerations favoring the extension of warranty liability.[53]

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action arising from blood transfusions); McDaniel v. Baptist Memorial Hosp., 469 F.2d 230 (6th Cir. 1972) (based on Tennessee statute extinguishing causes of action arising from blood transfusions); Whitehurst v. American Nat'l Red Cross, 1 Ariz. App. 326, 402 P.2d 584 (1965) (based on *Perlmutter*); Fogo v. Cutter Laboratories, Inc., 68 Cal. App. 3d 744, 137 Cal. Rptr. 417 (1977) (based on California statute requiring courts to construe a blood transfusion as a service). *But see* Hoffman v. Misericordia Hosp., 439 Pa. 501, 267 A.2d 867 (1970), where the court held that the defendant hospital had breached an implied warranty in transfusing the patient with impure blood. In permitting recovery, the court said it was immaterial whether the transaction was in the nature of a sale of goods or a service. *Id.* at 507, 267 A.2d at 870. *Accord*, Russell v. Community Blood Bank, Inc., 185 So. 2d 749 (Fla. Dist. Ct. App. 1966), *aff'd as modified*, 196 So. 2d 115 (Fla. 1967); Cunningham v. MacNeal Memorial Hosp., 47 Ill. 2d 443, 266 N.E.2d 897 (1970); Jackson v. Muhlenberg Hosp., 96 N.J. Super. 314, 232 A.2d 879 (1967); Reilly v. King County Cent. Blood Bank, Inc., 6 Wash. App. 172, 492 P.2d 246 (1971).

51. In addition to the cases cited in note 50 *supra*, *see, e.g.*, Shepard v. Alexian Bros. Hosp., Inc., 33 Cal. App. 3d 606, 109 Cal. Rptr. 132 (1973); Lovett v. Emory Univ., Inc., 116 Ga. App. 277, 156 S.E.2d 923 (1967).

52. *See* Greenfield, *supra* note 44, at 686. *See also* Broyles v. Brown Eng'r Co., 275 Ala. 35, 151 So. 2d 767 (1963).

53. *See Products and the Professional, supra* note 44, at 129-31; Comment, *supra* note 8, at 634-35. *See also* Goodman & Mitchell v. Walker, 30 Ala. 482, 495 (1857); Carmichael v. Reitz, 17 Cal. App. 3d 958, 979, 95 Cal. Rptr. 381, 393 (1971); Dibblee v. Dr. W.H. Groves Latter-Day Saints Hosp., 12 Utah 2d 241, 243-44, 364 P.2d 1085, 1087 (1961).

In *Newmark*, the New Jersey Supreme Court, in dictum, enunciated these considerations:

> Defendants suggest that there is no doctrinal basis for distinguishing the services rendered by a beauty parlor operator from those rendered by a dentist or a doctor, and that consequently the liability of all three should be tested by the same principles. On the contrary there is a vast difference in the relationships. The beautician is engaged in a commercial enterprise; the dentist and doctor in a profession. The former caters publicly not to a need but to a form of aesthetic convenience or luxury, involving the rendition of non-professional services and the application of products for which a charge is made. *The dentist or doctor does not and cannot advertise for patients*; the demand for his services stems from a felt necessity of the patient . . . . Neither medicine nor dentistry is an exact science; there is no implied warranty of cure or relief. There is no representation of infallibility and such professional men should not be held to such a degree of perfection . . . . Thus their paramount function—the essence of their function—ought to be regarded as the furnishing of opinions and services. Their unique status and the rendition of these *sui generis* services bear such a necessary and intimate relationship to public health and welfare that their obligation ought to be grounded and expressed in a duty to exercise reasonable competence and care toward their patients. In our judgment, the nature of the services, the utility of and the need for them, involving as they do, the health and even survival of many people, are so important to the general welfare as to outweigh in the policy scale any need for the imposition on dentists and doctors of the rules of strict liability in tort.

54 N.J. at 596-97, 258 A.2d at 702-03 (emphasis added). The remedy of strict liability in tort is most appropriate in cases involving dentists and physicians because plaintiffs usually allege physi-

Notwithstanding these considerations, some courts and commentators have urged that warranty liability in pure service transactions be extended to include professionals. The following discussion develops this proposition.

IV. TREND TOWARD EXPANSION OF WARRANTY LIABILITY

Despite the traditional "sale of goods" requirement, a minority of courts have used analogy to expand the warranty coverage of Article 2 to include professional services. A leading case in this area is *Guilmet v. Campbell*,[54] in which the Michigan Supreme Court held that the evidence presented was sufficient for the jury to conclude that the defendant surgeon had expressly warranted the success of the plaintiff's operation. The surgeon had told the plaintiff that the operation, which was to treat a peptic ulcer, would solve his medical problems.[55] After the surgery, the plaintiff suffered a ruptured esophagus, contracted hepatitis, and lost eighty-two pounds.[56] Although finding no ascertainable negligence, the jury found that the surgeon breached an express warranty. The Michigan Supreme Court held there was sufficient evidence for the jury to have reasonably concluded that the defendant had contracted to "cure" the plaintiff.[57]

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cal injury. In legal advertising cases, however, the injury will almost invariably be economic. Accordingly, the greatest likelihood of recovery will be under a warranty theory. Addressing this issue, White and Summers note:

> The most obvious difference between the two standards [strict liability in tort and implied warranty liability] is that the strict tort standard is considerably narrower in scope. It does not purport to reach all defective goods but only those that are not only defective but also "unreasonably dangerous," that is those that have the capacity to cause personal injury or property damage as opposed to those which cause only economic loss . . . .

J. WHITE & R. SUMMERS, *supra* note 4, at 295. *See* Note, *The Application of Implied Warranties to Predominantly "Service" Transactions*, *supra* note 44, at 593.

54. 385 Mich. 57, 188 N.W.2d 601 (1971).

55. *Id.* at 62, 188 N.W.2d at 603. According to plaintiff, and apparently accepted by the jury, the gist of the surgeon's representation was:

> Once you have an operation it takes care of all your troubles. You can eat as you want to, you can drink as you want to, you can go as you please. Dr. Arena and I are specialists, there is nothing to it at all—it's a very simple operation. You'll be out of work three to four weeks at the most. There is no danger at all in this operation. After the operation you can throw away your pill box. In twenty years if you figure out what you spent for Maalox pills and doctor calls, you could buy an awful lot. Weigh it against an operation.

Id. at 68, 188 N.W.2d at 606.

56. *Id.* at 64, 188 N.W.2d at 604.

57. *Id.* at 69, 188 N.W.2d at 606. Perhaps equally important to the court's finding is the extent to which the surgeon induced the patient to undergo the operation. The doctor's claim to

Also of interest is the dissenting opinion in *Magrine v. Spector*,[58] the case where a hypodermic needle inserted by the defendant dentist caused injury. Although the dissenting judge applied strict tort liability to service transactions,[59] his reasoning applies analogously to the extension of warranty liability to professionals: "As between an innocent patient and a dentist who causes injury by a defective instrument the law should require the loss to be borne by the dentist, even if he is not negligent."[60]

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specialty expertise and his urging of the patient to weigh the costs between having and foregoing an operation resemble a sales pitch bordering on solicitation. *See* note 55 *supra*.

For a discussion of the ramifications of *Guilmet*, see Note, *Torts—Medical Malpractice—Express Warranty of Particular Results of an Operation*, 41 TENN. L. REV. 964 (1974). *Guilmet* was severely criticized in Tierney, *Contractual Aspects of Malpractice*, 19 WAYNE L. REV. 1457 (1973), where the author contends that under the facts presented liability was wrongfully imposed upon the defendant surgeon. In light of the court's holding, the author invited

> state legislatures to review the rights and duties of professionals and those who deal with them, and to ensure by statute that a professional will be held to have warranted a particular result only on the clearest proof, and that his patient or client will have no legal ground for claiming the benefit of such a warranty in the absence of such proof.

Id. at 1480.

However, other courts, citing *Guilmet*, followed the Michigan Supreme Court's ruling. *See* Sullivan v. O'Connor, 363 Mass. 579, 296 N.E.2d 183 (1973); Tschirhart v. Pethtel, 61 Mich. App. 581, 233 N.W.2d 93 (1975); Marchlewicz v. Stanton, 50 Mich. App. 344, 213 N.W.2d 317 (1973). *But see* Rogala v. Silva, 16 Ill. App. 3d 63, 305 N.W.2d 571 (1973). *See also* Annot., 43 A.L.R.3d 1221, 1225, 1229-33 (1972).

The Michigan legislature subsequently enacted a statute that in effect overturns *Guilmet* and its progeny (but only on the issue of medical care or treatment). The law, 1974 Mich. Pub. Acts No. 343, amended the Michigan Statute of Frauds, MICH. STAT. ANN. § 26.922(g) (Supp. 1978), to render void any "agreement, promise, contract or warranty of cure relating to medical care or treatment" which is not in writing and signed by the party to be charged or some person authorized by him. The amendment took effect December 21, 1974, but, of course, has no application to contracts entered into before that date.

58. 100 N.J. Super. 223, 225, 241 A.2d 637, 638 (Super. Ct. App. Div. 1968) (Botter, J., dissenting), *aff'd*, 53 N.J. 259, 250 A.2d 129 (1969).

59. *Id.* at 240, 241 A.2d at 646. As authority for this proposition, the dissenting opinion relied on the reasoning in Farnsworth, *supra* note 37, at 667-69.

60. 100 N.J. Super. at 225, 241 A.2d at 639. In arguing that liability should be imposed upon the defendant dentist, the dissenting opinion contended that he was best able to bear the costs of the plaintiff's injury. *Id.* at 231, 241 A.2d at 642. In asserting that warranty liability should be extended to the professional, one commentator said:

> Professionals are not engaged in a charitable enterprise. They derive financial benefit from their work in the same manner as those who render commercial services. In the usual situation, these individuals can spread their losses to the defective product's manufacturer. When this is not possible because of some failing on the defendant's part, then it seems clear that the defendant, rather than the innocent consumer, should bear the loss.

Products and the Professional, supra note 44, at 132. *See also* Murray, *Under the Spreading Analogy of Article 2 of the Uniform Commercial Code*, 39 FORDHAM L. REV. 447 (1971).

In *Berry v. G. D. Searle & Co.*,[61] the Illinois Supreme Court also extended warranty liability to a service transaction. The plaintiff alleged that she had suffered a stroke and consequent paralysis as a side effect of the oral contraceptives that a birth control clinic had prescribed and sold. In the suit against the manufacturer and the clinic, the court found that the clinic's prescription and dispensation of the pills constituted a sale and, as such, the transaction carried with it the Code's warranty provisions.[62]

Notwithstanding the *Berry* holding, courts generally have refused to apply the Code's implied warranties in birth control cases. In *Batiste v. American Home Products Corp.*,[63] a North Carolina appellate court found that a physician's prescription of an oral contraceptive to a woman who later suffered a severe stroke, allegedly as a result of taking the contraceptive, was not covered by the Code's implied fitness and merchantability warranties. Accordingly, the court held that the physician was not liable for breach of warranty.[64]

Similarly, in *Ruybe v. Gordon*,[65] a New York court held that the sale and insertion of an intrauterine device did not carry an implied warranty of merchantability. In reaching its decision, the court relied on the traditional goods-service and commercial-professional distinctions:

> A treating physician who fits a woman with a birth control device at her request does not thereby become a merchant with respect to the equipment used in treatment. The doctor performs a professional service. The surgical or therapeutic device he employs is incidental to his medical treatment. An intrauterine fitting is in the same category as eyeglasses furnished by an ophthalmologist who treats a patient for diseases and defects of the eyes. The lenses and frames furnished by the doctor, although included in the fees he charges, are incidental to his management of the disorder.[66]

In a nonprofessional context, the Michigan Court of Appeals held that implied warranties of fitness and merchantability extended to electric utility services.[67] Although the transaction was commercial and although the court limited its holding to the sale of electricity, its lan-

61. 56 Ill. 2d 548, 309 N.E.2d 550 (1974).
62. *Id.* at 554-55, 309 N.E.2d at 554.
63. 32 N.C. App. 1, 231 S.E.2d 269 (1977).
64. *Id.* at 7, 231 S.E.2d at 273.
65. 18 U.C.C. Rep. Serv. 889 (N.Y. Sup. Ct. 1976).
66. *Id.* at 889-90.
67. Buckeye Union Fire Ins. Co. v. Detroit Edison Co., 38 Mich. App. 325, 329, 196 N.W.2d 316, 318 (1972).

guage was significantly broad: "[W]e see no reason why the concepts of implied warranty should depend upon a distinction between the sale of a good and the sale of a service."[68]

In a case involving professional services, the Alabama Supreme Court held that a group of civil engineers had impliedly warranted the adequacy of its plans and specifications for the drainage of a proposed housing project subdivision.[69] While recognizing that some courts are reluctant to impose implied warranty liability upon the contractual dealings of professionals, the court stated that the ultimate consideration should be "the nature of the employment and the particular services to be rendered."[70] Referring specifically to lawyers, the court expressed doubt that their activities would give rise to implied warranty liability:

> Lawyers, in the practice of their profession, are dependent on the legal pronouncements of judicial agencies of government. Interpretation of law is and cannot be an exact and accurate science. There is generally no formula to follow. Even when Code forms are used in the drafting of a complaint, questions often arise as to whether or not the correct form for the client's case has been used. The courts from state to state, and among the judges on a particular court, often disagree in their interpretation as to the effect of judicial pronouncements or legislative enactments. Trial lawyers are dependent on the reactions of jurors to factual presentations and the application of law thereto.[71]

The court indicated, however, that depending on the circumstances, an implied warranty might be imposed:

> *It is possible that an implied warranty of results by an attorney could exist.* Without committing ourselves, a court might hold that an attorney who is entrusted with drawing a will and its proper execution impliedly insures its proper execution by sufficient number of witnesses signing their names as such—a very simple mandate of law that requires no room for divi-

68. *Id.* at 329, 196 N.W.2d at 318; *accord*, Pioneer Hi-Bred Corn Co. v. Northern Ill. Gas Co., 16 Ill. App. 3d 638, 306 N.E.2d 337 (1973); Insurance Co. of North America v. Radiant Elec. Co., 55 Mich. App. 410, 222 N.W.2d 323 (1974). *But see* Texas State Optical, Inc. v. Barbee, 417 S.W.2d 750 (Tex. Ct. App. 1967), *aff'd sub nom.* Barbee v. Rogers, 425 S.W.2d 342 (Tex. 1968) (no implied warranty exists in the fitting of contact lenses because the optometrist renders a professional service).

69. Broyles v. Brown Eng'r Co., 275 Ala. 35, 151 So. 2d 767 (1963). For a thorough discussion of the definition of "professionals," see Comment, *supra* note 8, at 629-33.

70. 275 Ala. at 38, 151 So. 2d at 771.

71. *Id.*, 151 So. 2d at 771.

sional interpretation.[72]

More recently, in *Texsun Feed Yards, Inc. v. Ralston Purina Co.*,[73] the Fifth Circuit extended warranty liability to a manufacturer of cattle feed supplements who provided professional nutritional advice and assistance on how to fatten cattle by using its product. In holding that the Code's implied warranties were applicable, the court relied on the commercial flavor of the transaction:

> [Ralston's] assignment of nutrition consultants . . . was designed to promote increased sales and to cultivate the good will of potential and existing customers. It is commercially unrealistic to treat separately the sale of the ration supplement and the rendering of professional advice and assistance . . . . [If] Texsun relied on those [inaccurate] instructions to its economic detriment, we can perceive no reason for preventing Texsun's recovery under a breach of warranty theory.[74]

Compelling arguments support the logic employed by those courts that have extended warranty liability by analogy to professional service transactions. First, the societal interest in preserving the life, safety, health, and prosperity of its members is independent of the categorization of a transaction. Because the same harm may result from either transaction, there is an equivalent interest in imposing warranty liability upon those who provide services as upon those who sell goods.[75] Second, regardless of the label placed on a transaction, the defendant professional usually is better able to predict the merchantability or defectiveness of the good or service.[76] Third, the plaintiff's reliance on the merchant's expertise and reputation is perhaps more extensive and justified in transactions involving professional services than in those involving goods. The advent of professional advertising can only increase this reliance. Finally, although the cost of professional liability insurance is increasing,[77] the defendant professional remains in a better

72. *Id.* at 39, 151 So. 2d at 771 (emphasis added). *Cf.* Bloomsburg Mills, Inc. v. Sordoni Constr. Co., 401 Pa. 358, 361, 164 A.2d 201, 203 (1960) (architect impliedly warrants the sufficiency of his plans and specifications for a structure's intended purpose and the exercise of ordinary skill and ability in the profession to effectuate the work properly); Hill v. Polar Pantries, 219 S.C. 263, 271, 64 S.E.2d 885, 888 (1951) (party who holds himself out as specially qualified to perform work of a particular kind impliedly warrants his work in quality and fitness for its intended use). *See also* Dyess v. Weems, 178 So. 2d 785 (La. Ct. App. 1965).

73. 447 F.2d 660 (5th Cir. 1971).

74. *Id.* at 668.

75. *See* Greenfield, *supra* note 44, at 688.

76. *Id. See also* Farnsworth, *supra* note 37, at 672; *Products and the Professional, supra* note 44, at 131-32.

77. *See* Rottman & Stern, *supra* note 12, at 19.

position to bear the loss than his innocent client or patient.[78]

A number of commentators[79] including White and Summers[80] have predicted that courts eventually will extend warranty liability to professional services. These authorities, however, have urged that courts do so by analogy rather than by awkwardly stretching the Code's definition of a sale of goods to encompass the service rendered in a particular case.[81]

Although there are sound arguments for the extension of warranties to professionals, this article will not offer a judgment on that issue. Rather, the section following asserts that warranty liability should extend to those lawyers (and other professionals) who engage in commercial advertising and solicitation.

V. LEGAL ADVERTISING AND WARRANTY LIABILITY

The preceding sections have established a foundation upon which to argue that warranty liability should be extended to attorneys who advertise or solicit. The first section examined how merchant advertising may create express or implied warranties.[82] The second and third sections indicated that the traditional shelters from warranty liability enjoyed by professionals may be crumbling as courts become increasingly receptive to the extension of liability to pure service transactions by use of analogy.[83] On this foundation, the relationship between legal ad-

78. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 495 (4th ed. 1971):

> The problem is dealt with as one of allocating a more or less inevitable loss to be charged against a complex and dangerous civilization, and liability is imposed upon the party best able to shoulder it. The defendant is held liable merely because, as a matter of social adjustment, the conclusion is that the responsibility should be his.

79. *See, e.g.*, Greenfield, *supra* note 44, at 707-08; Murray, *supra* note 60, at 480. *Products and the Professional*, *supra* note 44, at 132. *See also* note 88 *infra* (quoting ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-9).

80. *See* J. WHITE & R. SUMMERS, *supra* note 4, at 288-89.

81. *See id.*; Greenfield, *supra* note 44, at 707-08; Murray, *supra* note 60, at 480; *Products and the Professional*, *supra* note 44, at 132.

82. *See* notes 18-37 *supra* and accompanying text.

83. *See* notes 38-81 *supra* and accompanying text. As noted, however, most courts remain unwilling to extend warranty liability when the nature of the transaction is primarily professional. This approach does not conflict with the proposition advanced in this article. It is not contended that warranty liability should extend to all professionals in all circumstances. Rather, it is asserted that liability should attach to those professionals who engage in commercial advertising or solicitation.

It should be noted that traditional bastions of professional privilege are falling rapidly. In Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), the Supreme Court held attorney minimum fee schedules to be per se illegal price-fixing. *See* note 3 *supra*. The Court has invalidated advertising bans imposed by statute or by professional associations. Bates v. State Bar, 433 U.S. 350

vertising and warranty liability will be explored.

Although the Supreme Court in *Bates v. State Bar*[84] noted that advertising claims relating to the quality of services may be inappropriate,[85] it held that price advertising of routine services has first amendment protection. Further, the American Bar Association's Code of Professional Responsibility expressly authorizes advertising of an attorney's specialty both in the print media and on radio.[86] In light of

(1977); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Bigelow v. Virginia, 421 U.S. 809 (1975). It has also held that an attorney's solicitation of clients in certain contexts is protected by the first amendment. *In re* Primus, 98 S. Ct. 1893 (1978); *see* note 1 *supra*.

84. 433 U.S. 350 (1977).

85. *Id.* at 383-84, where the Court noted:

> [B]ecause the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising. For example, advertising claims as to the quality of services—a matter we do not address today—are not susceptible of measurement or verification; accordingly, such claims may be so likely to be misleading as to warrant restriction. (footnotes omitted)

86. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-101(B)(2) (1977). In August 1977 the American Bar Association House of Delegates amended the ABA Code of Professional Responsibility to allow lawyer advertising in the printed media and on radio. (The ABA Code provisions are, of course, not specifically enforceable upon any lawyer, but serve as a model for state bar associations and may be adopted by state supreme courts as the appropriate standards for lawyers in those jurisdictions.)

In adopting standards, the House of Delegates considered two proposals submitted by a special ABA Task Force on Lawyer Advertising. A regulatory proposal specifically authorized prescribed forms of advertising. A directive proposal took a broader approach and allowed dissemination of all information that is not "false, fraudulent, misleading or deceptive," while providing guidelines for the determination of improper advertisements. The House of Delegates adopted the regulatory proposal, but decided that the directive proposal should be distributed to state and local bar associations for informational purposes.

The amended ABA Code of Professional Responsibility now authorizes printed and radio advertising that is not "false, fraudulent, misleading, deceptive, self-laudatory, or [an] unfair statement or claim," ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-101(A), and is "presented in a dignified manner." *Id.*, DR 2-101(B). A lawyer may advertise the following specialization information: "One or more fields of law in which the lawyer or law firm practices, a statement that practice is limited to one or more fields of law, or a statement that the lawyer or law firm specializes in a particular field of law practice, to the extent authorized under DR 2-105." *Id.*, DR 2-101(B)(2).

Finally, *id.*, DR 2-105 establishes limits on claims of specialization that lawyers may make:

> (A) A lawyer shall not hold himself out publicly as a specialist, as practicing in certain areas of law or as limiting his practice permitted under DR 2-101(B), except as follows:
>
> (1) A lawyer admitted to practice before the United States Patent and Trademark Office may use the designation "Patents," "Patent Attorney," "Patent Lawyer," or "Registered Patent Attorney" or any combination of those terms, on his letterhead and office sign.
>
> (2) A lawyer who publicly discloses fields of law in which the lawyer or the law firm practices or states that his practice is limited to one or more fields of law

these developments, it is difficult to conclude that an attorney who avails himself of such advertising is not engaged in a commercial enterprise.

Considering express warranties first, it should be observed that attorneys who advertise that they are specialists and can perform a service for a stated fee believe that potential clients will be attracted by these factors. Thus by offering speciality services at reasonable fees, the attorney's business will become more profitable. Clearly, as long as the client receives such speciality care at these bargain prices, he too benefits from this commercialization of the profession.[87] Advertising, however, adds a new ingredient to the transaction. The consumer exposed to advertising probably believes that the representations made are true.[88] As a result, his vigilance is lulled and he forms a reasonable—and clearly foreseeable—expectation of receiving specialty services at wholesale prices.[89] These expectations may induce the client to

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shall do so by using designations and definitions authorized and approved by [the agency having jurisdiction of the subject under state law].

(3) A lawyer who is certified as a specialist in a particular field of law or law practice by [the authority having jurisdiction under state law over the subject of specialization by lawyers] may hold himself out as such, but only in accordance with the rules prescribed by that authority.

Fees may also be advertised. *See id.*, DR 2-101(B)(22)-(25). Further, a lawyer may expand the information allowed by applying to and receiving approval from the agency having jurisdiction under state law. *Id.*, DR 2-101(C).

At this writing, only Maryland, Indiana, Ohio, Colorado, Wisconsin, Louisiana, Mississippi, and the District of Columbia have set standards for legal advertising. None have adopted verbatim the ABA regulatory proposal.

87. *See* Branca & Steinberg, *supra* note 3. "Competition would inevitably tend to drive down prices, raise the level of demand, and perhaps even create demand for new types of service." *Id.* at 518-19 (footnotes omitted).

88. The amended ABA Code of Professional Responsibility recognizes that legal advertising will result in consumer reliance upon the information provided in such advertising:

> The lack of sophistication on the part of many members of the public concerning legal services, the importance of the interests affected by the choice of a lawyer and prior experience with unrestricted lawyer advertising, require that special care be taken by lawyers to avoid misleading the public and to assure that the information set forth in any advertising is relevant to the selection of a lawyer. The lawyer must be mindful that the benefits of lawyer advertising depend upon its reliability and accuracy . . . . Since lawyer advertising is calculated and not spontaneous, reasonable regulation of lawyer advertising designed to foster compliance with appropriate standards serves the public interest without impeding the flow of useful, meaningful, and relevant information to the public.

ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-9.

89. The Supreme Court in *Bates* implicitly recognized the consumer's heavy reliance upon attorney advertising in procuring legal assistance: "We do not foreclose the possibility that some limited supplementation, by way of warning or disclaimer or the like, might be required of even an advertisement of the kind ruled upon today so as to assure that the consumer is not misled." 433 U.S. at 384.

An interesting question is whether those attorneys who advertise or solicit for clients for the

seek legal assistance from the advertising attorney. In the absence of such advertising he might not have developed such aspirations, or he might have utilized the services of another attorney, or he might have refrained from employing an attorney altogether.[90] In view of the reasonableness and foreseeability of the consumer's reliance, it is only equitable that the attorney be held to his representation, namely, the rendering of specialty legal service at the advertised price. Thus the advertisement creates an express warranty.

The next question that arises is that of the plaintiff's burden of proof. To recover against the advertising lawyer on a breach of express warranty claim, what must the plaintiff show? Briefly, the plaintiff need only prove that he did not receive specialty legal assistance or, if such assistance was rendered, it was not performed at the advertised price. The issue of negligence is wholly irrelevant. It is no defense that the client did not receive specialty assistance due to factors beyond the lawyer's control.[91] The inquiry should be limited to whether the client received the quality of legal assistance customarily practiced by similar specialists in that community at the price advertised.[92] If, for any rea-

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purpose of rendering nonprofit legal assistance should be held to the same warranty standards. The pro bono attorney ordinarily does not advertise either fees or specialization. Instead, because presumably motivated by social or public policy considerations, he does not induce reliance by statements about the quality of his services. He informs the public only that his services are available at affordable cost. Accordingly, because fewer representations are made, the poverty lawyer probably should not be held to the same warranty standards. *See generally In re* Primus, 98 S. Ct. 1893 (1978).

90. *See* J. WHITE & R. SUMMERS, *supra* note 4, at 272. *See also* note 4 *supra*.

91. *See* notes 51-53 *supra* and accompanying text.

92. *See generally* Note, *supra* note 12, where the commentator contended that this legal standard was not being applied by the courts:

> The crucial question whether the average attorney in the defendant's position would have acted as did the defendant is most often answered without actually judging the defendant's conduct against the only reasonable standard, that of the skill and diligence customarily exercised by other attorneys in the same community. The defense that mere "errors of judgment" were made has generally been sustained uncritically. The defendant should be required to demonstrate that his choice of alternatives, though subsequently revealed to be mistaken, was not unreasonable, for only then is the allegation of negligence rebutted.
>
> The difficult problem of the standard to be applied to legal specialists has not yet been acknowledged by the same courts that for years have required a higher duty of care of medical specialists . . . .

Id. at 1312 (footnotes omitted). For an extended discussion of the professional negligence standard, see Comment, *supra* note 8.

There is, however, recent indication that a higher standard for lawyers is being defined. In Wright v. Williams, 47 Cal. App. 3d 802, 121 Cal. Rptr. 194 (1975), the California Court of Appeals held that:

> One who holds himself out as a legal specialist performs in similar circumstances to

son, the plaintiff did not receive assistance commensurate with that standard, he should be entitled to recover for breach of an express warranty.

In the context of implied warranties, it is clear that lawyers may be considered "merchants" for purposes of the Code.[93] Most courts, however, have been unwilling to extend implied warranty liability to professionals.[94] As noted, some of the justifications for this reluctance are that professionals are not engaged in a commercial enterprise,[95] they cannot advertise their services,[96] and there is no analogous mass production of goods or services.[97] Hence, according to these courts, because the professional does not perform routine or mechanical services, but rather must apply his best judgment to unique circumstances, he engages in a noble venture removed from the blight of the commercial world.[98]

Although this perspective might have been true in the past, it is inapplicable to today's advertising attorney. There can be little question that the lawyer who advertises in a local newspaper is as involved in the commercial world as is the realtor who advertises the houses he wishes to sell. Each is promoting his product. To distinguish them on

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other specialists but not to general practitioners of the law. We thus conclude that a lawyer holding himself out to the public and the profession as specializing in an area of the law must exercise the skill, prudence, and diligence exercised by other specialists of ordinary skill and capacity specializing in the same field.

Id. at 810, 121 Cal. Rptr. at 199.

Michigan recently enacted a statute which establishes a two-part malpractice standard applicable to all professionals. 1977 Mich. Pub. Acts No. 272. The standard established for the general practitioner is that of acceptable public practice in the community where he practices. Specialists, however, would be required to meet the recognized standard of care within the specialty in the community where the specialist practices or in a similar community. *See* Comment, *New Developments in Legal Malpractice*, 26 AM. U.L. REV. 408, 450 (1977).

93. *See* notes 27-28 *supra* and accompanying text.

94. *See* notes 43, 47-53, 63-66, & 71 *supra* and accompanying text.

95. *See, e.g.*, Ruybe v. Gordon, 18 U.C.C. Rep. Serv. 889 (N.Y. Sup. Ct. 1976).

96. *See, e.g.*, Newmark v. Gimbel's, Inc., 54 N.J. 585, 596, 258 A.2d 697, 702 (1969).

97. *See, e.g.*, La Rossa v. Scientific Design Co., 402 F.2d 937 (3d Cir. 1968), in which the Third Circuit held that the doctrines of implied warranty and strict liability in tort were inapplicable under the circumstances of that case. In so holding, the court noted:

> Professional services do not ordinarily lend themselves to the doctrine of tort liability without fault because they lack the elements which gave rise to the doctrine. There is no mass production of goods or a large body of distant consumers whom it would be unfair to require to trace the article they used along the channels of trade to the original manufacturer and there to pinpoint an act of negligence remote from their knowledge and even their ability to inquire . . . .

Id. at 942.

98. *See, e.g.*, Broyles v. Brown Eng'r Co., 275 Ala. 35, 38, 151 So.2d 767, 771 (1963); Newmark v. Gimbel's, Inc., 54 N.J. 585, 597, 258 A.2d 697, 703 (1969).

the ground that the realtor's service is commercial while the lawyer's is professional is to ignore the realities of the contemporary business world. To differentiate legal services on the ground that each case is unique fails to account for the fact that many of these advertised services are routine and entail the use of mass produced forms. Although even routine cases may vary somewhat, the widespread use of standardized forms for furnishing a variety of routine services minimizes the variance.[99] Also relevant is that although the plaintiff in an implied warranty of merchantability claim need not prove reliance, it nevertheless is reasonably foreseeable that in procuring legal assistance he will rely on an advertisement's representations of a lawyer's skill and expertise.[100]

Considered together, the commercial flavor of legal advertising, the widespread use of standardized forms, and the foreseeable reliance of the potential client make the case for extending implied warranty standards to lawyers who advertise all the more compelling. It is only equitable that the attorney who voluntarily injects himself into a commercial forum be held, like others, to deliver on his claims.

Assuming the implied warranty of merchantability is extended to lawyers who advertise, the next area to consider is whether the services rendered were "merchantable."[101] As noted, merchantability does not imply perfection.[102] Rather, the legal product must pass without objection in the trade.[103] This standard requires that an attorney who claims to be a specialist must represent his client in a manner that similar specialists would consider to be satisfactory.[104] The plaintiff need not prove negligence.[105] Further, it is irrelevant that the cause of the lawyer's failure to render merchantable service was beyond his control.[106]

A final Code warranty that may be applicable to attorneys is the

99. The use of these standardized forms along with the advent of legal advertising may decrease the costs of routine legal services. *See* Branca & Steinberg, *supra* note 3, at 519 n.234; Note, *Advertising, Solicitation, and the Profession's Duty to Make Legal Counsel Available*, 81 YALE L.J. 1181, 1205-08 (1972).

100. *See* notes 36-37 *supra* and accompanying text.

101. *See* notes 30-35 *supra* and accompanying text.

102. *See* notes 34-35 *supra* and accompanying text.

103. *See* note 35 *supra* and accompanying text.

104. *See* note 92 *supra* and sources cited therein. This standard requires that the lawyer's performance pass without objection in the trade. In the legal context, "trade" should be defined as those lawyers who specialize in the advertising attorney's area of expertise.

105. *See* notes 51-53 *supra* and accompanying text.

106. *Id.*

implied warranty of fitness for a particular purpose.[107] Although this warranty will not ordinarily arise from a legal advertisement or solicitation, it may be available in limited situations. To illustrate, suppose a lawyer advertises that he is a tax specialist. The advertisement is read by a businessman considering a corporate merger who then contacts the advertising attorney and inquires whether he is a corporate tax specialist. Upon receiving an affirmative answer, the businessman hires the attorney. It is at least arguable that the attorney has impliedly warranted the fitness of his services for the particular purpose of obtaining specialized advice on corporate tax matters. That is, the client is relying upon the attorney's stated expertise, and the attorney has reason to know of the client's reliance on this expertise for the particular purpose of securing advice on whether and how to consummate the merger. Note, however, that the warranty did not arise from the advertisement alone. Rather, the advertisement activated the client's reliance process and facilitated the initial contact with the lawyer. The warranty then arose from the resulting communication between the attorney and the client.

If a lawyer advertises that he is a specialist, he should be held to have warranted that clients will receive a commensurate level of performance. Anything less will enable him to exploit the benefits of the commercial world without adhering to its obligations. As shown, price and specialty advertising may give rise to express and implied warranties. Further, if "quality" advertising is subsequently approved,[108] any such unfulfilled statement may result in warranty liability.[109] In light of these considerations, it is prudent for the professional who advertises to embark upon that commercial road in a most cautious and circumspect manner.

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107. *See* note 16 *supra* for text and discussion of U.C.C. § 2-315.

108. As noted, the Supreme Court in *Bates* declined to address the issue of quality advertising. The Court, however, noted that such advertising may mislead the client and thus may warrant restriction. 433 U.S. at 372-75; *see* notes 85-86 *supra*.

109. Statements that give rise to a warranty are distinguishable from "puffing." *See* Thompson Farms, Inc. v. Corno Feed Prods., 366 N.E.2d 3 (Ind. Ct. App. 1977); Klages v. General Ordinance Equip. Corp., 240 Pa. Super. 356, 367 A.2d 304 (1976). The consumer usually has reason to believe that the representations made in an attorney's advertisement are true statements. They should, therefore, be strictly construed against the professional. The puff-warranty distinction frequently involves an assessment of the reasonableness and the foreseeability of the consumer's reliance. Reliance on attorney advertising by the potential client is usually reasonable and foreseeable. Accordingly, the attorney should be held to his representations. *See generally* J. WHITE & R. SUMMERS, *supra* note 4, at 277-82.

VI. CONCLUSION

Although lawyers (and other professionals) have a first amendment right to advertise, its exercise may entail the application of warranty standards. By actively engaging in advertising and thereby triggering consumer reliance, it is only equitable that the lawyer, like others in the commercial world, be held to have warranted his product. The extent of this warranty should depend on the nature of the representations made in the advertisement. Representations of specialty should impose an affirmative obligation to render merchantable specialty legal services. If, for any reason, the client does not receive services commensurate with that level of performance, his attorney should be liable for breach of warranty. Representations relating to the quality of service offered should impose yet more stringent obligations. If statements are made that the client will receive expert, advantageous legal representation at a low cost, then the client is entitled to precisely that quality of performance at that cost. Anything short of this expectation should subject the attorney to warranty liability.

In summary, it is clear that representations made in advertisements may impose liability upon professionals. Attorneys and other professionals should be cognizant of this possibility. Indeed, it can be said that although the rule for those seeking legal services has been the ancient standard of *caveat emptor*, the new standard for attorneys who advertise may well be *caveat advocatus*—let the lawyer beware!