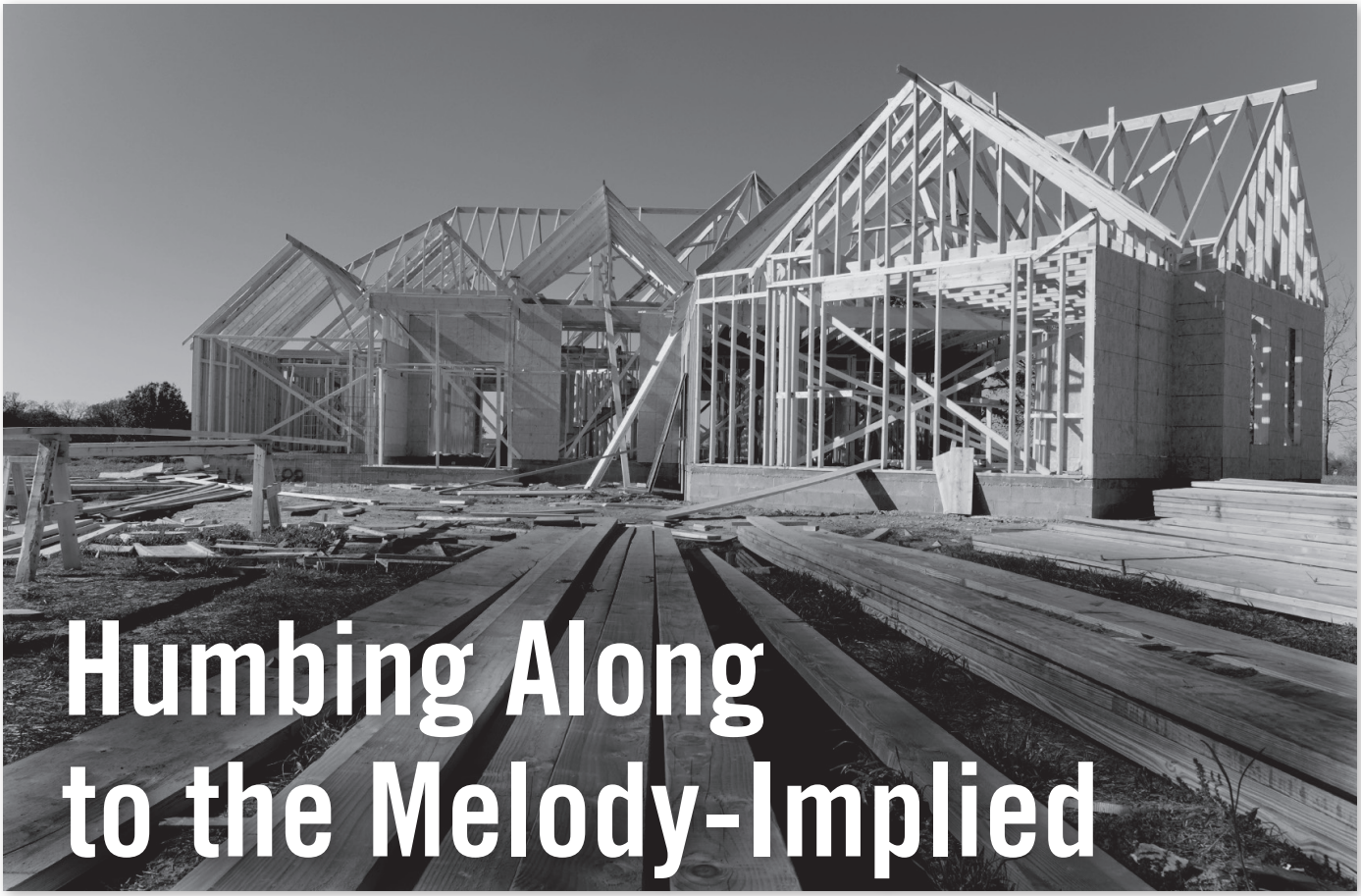

Humbing Along to the Melody-Implied Warranties in the Purchase of Homes and Construction Services in Texas*

By Hector A. Chavana Jr.**

In *Humber v. Morton*, the Texas Supreme Court rejected the doctrine of caveat emptor and recognized two implied warranties in sales of certain new homes—good and workmanlike performance and habitality.

I. Introduction

In Texas, the doctrine of caveat emptor required that a homebuyer act diligently before making a purchase.[1] Under this doctrine, a consumer had no remedy for faulty workmanship in a home, if a home seller did not expressly provide a warranty.[2]

In *Humber v. Morton,* the Texas Supreme Court rejected the doctrine of caveat emptor and recognized two implied warranties in sales of certain new homes—good and workmanlike performance and habitality.[3] Several years later, in *Melody Home Mfg.*, the supreme court first recognized the implied warranty of good and workmanlike services in the repair and the modification of tangible goods.[4] The supreme court stated, "the implied warranty of good and workmanlike construction in *Humber* and the implied warranty of good and workmanlike repair services in *Melody Home* are very similar, and yet… diverge drastically on appropriate public policy in this area."[5]

From 2003 to 2009, the implied warranties were partially superseded by a statutory scheme enacted by the Texas Residential Construction Commission Act.[6] However, the legislature allowed the statute to expire due to the ineffectiveness of the commission.[7] As a result, courts must again apply the common law implied warranties created by *Humber* and *Melody Home*.

Courts, however, have had difficulty applying these warranties, sometimes erroneously merging the two *Humber* warranties into a single warranty.[8] Courts have struggled because one warranty provided by *Humber* shares a name with the warranty provided by *Melody Home*.[9] Even so, the warranties arguably have different limitation periods and different rules regarding disclaimers.[10] This paper aims to shed light on the limitation periods, accrual periods and disclaimers in Texas' implied warranty claims as applied to builder-vendors and construction contractors.

II. Background Concepts

A. Introduction

In both practice and study, the law of implied warranties incorporates statutes and other areas of common law. As a result, a few background concepts will aid in fully understanding implied warranties. The *Humber* implied warranties apply to "builder-vendors," builders in the business of constructing residential homes and selling the homes to consumers along with the land. For the purposes of this paper, "construction contractors" are construction service providers that are not builder-vendors and may include residential remodeling companies or commercial contractors. The implied warranties for construction contractors are covered by the *Melody Home* implied warranty.

B. Background on DTPA

In 1973, the Texas Legislature passed the Deceptive Trade Practices Act ("DTPA"),[11] codified in Chapter 41 of the Texas Business and Commerce Code.[12] The DTPA expressly covers implied warranties.[13] The DTPA benefits consumers who lease or buy goods or services, defined as "tangible chattels or real property."[14]

The DTPA provisions "are not exclusive. The remedies provided in [the DTPA] are in addition to any other procedures or remedies provided for in any other law."[15]

C. RCLA

The Residential Contractor's Liability Act was passed in 1987 and is codified in Chapter 27 of The Texas Property Code.[16] The act is not an independent cause of action, but is a set of prelitigation procedures and remedy caps, used to encourage non-litigious resolutions of construction defect claims.[17] Most agree, the Act provides significant protections for residential contractors.

The act applies to "any person contracting with a purchaser for the sale of a new residence constructed by or on behalf of that person."[18] Therefore, a sale by a builder-vendor is subject to the RCLA.[19] The RCLA also applies to "[c]ontractors," further defined as "a builder, as defined by Section 401.003," who construct or repair a new home or that repairs, alters, or adds to a new or existing home.[20] This definition is broad enough to include construction contractors, however, Section 401.033 has expired[21] and a practitioner could argue that such an ambiguity forecloses the RCLA from applying to construction contractors. Consequently, the RCLA's applicability to *Melody Home* transactions is an open question.[22]

D. TRCCA

In 2005, The Texas Residential Construction Commission (the Commission), created pursuant to the Texas Residential Construction Commission Act (TRCCA), promulgated statutory minimum residential construction performance standards and warranties. These provisions preempted the implied warranties created by the Texas Supreme Court. In 2009, however, the Texas Residential Construction Commission Act and the Commission were sunset, and ceased to exist.[23] While it existed, the Commission, which was not a true regulatory agency, imposed restrictions on implied warranties and created a state inspection process.[24] The Act also required homebuyers to participate in this inspection process before they could file suit.[25] Because it has expired, the Act is still relevant only to the extent that RCLA cross-references non-existent portions of the TRCCA.

III. *Humber and Melody Home:* The Warranties

In *Humber*, the Texas Supreme Court struck down the common-law doctrine of caveat emptor in new homes sold by builder-vendors.[26] *Humber* held that builder-vendors imply two warranties in contracts with consumers.[27] Those warranties are: 1) the warranty that construction services be performed in a good and workmanlike manner; and 2) that the home is suitable for human habitation.[28]

"The implied warranty of good workmanship focuses on the builder's conduct, while the implied warranty of habitability focuses on the state of the completed structure."[29] Subsequent decisions, however, often had difficulty explaining the exact scope of the implied warranty of good and workmanlike performance. It can perhaps be most easily explained best by a court's inability to distinguish it from a negligence standard.[30]

On the other hand, the warranty of habitability was significantly more identifiable and limited. This warranty applies to a latent defect that renders the house "unsuitable for its intended use as a home."[31] The court further characterized latent defects as defects unknown to the buyer at the time of sale.[32] The *Humber* court defined a builder-vendor as one who sells land and constructs new homes for members of the public who rely entirely on the builder-vendor for architecture, design and inspection expertise.[33]

Humber was generally applied strictly to the court's definition of builder-vendors.[34] For example, one court refused to extend *Humber* to a tenant-landlord scenario, despite an interesting dissent.[35] Even so, the Texas Supreme Court held that *Humber* could apply to subsequent buyers of new homes when the limitation period had not expired.[36]

In *Young v. Deguerin,* the court raised the question of whether a contractor who built a new home but who did not sell land could also be held liable under *Humber*.[37] The defendant argued that he did not meet the definition of a builder-vendor because he did not convey real estate in the condo sale.[38] The court

held that the builder had in fact transferred real estate and did not specifically rule on the question.[39] However, the court provided dicta indicating that *Humber*'s warranties should apply even if a builder failed to convey real estate.[40] The court mentioned that the policy rationale in *Humber* should extend to protect buyers of construction services even if the builder-vendor did not convey real estate.[41]

In 1987, the Texas Supreme Court provided new warranty relief for consumers that extended beyond that provided by *Humber*. In *Melody Home Mfg. Co. v. Barnes,* consumers sued the manufacturers of the modular pre-fabricated home they had purchased.[42] Representatives from Melody Home attempted to correct a defect in the home.[43] Unfortunately, the Melody Home representatives failed to fix the defect and actually caused more damage.[44] The consumers sued under the DTPA.[45]

In *Melody Home*, the Texas Supreme Court recognized *sua sponte* that an "implied warranty to repair or modify existing tangible goods or property in a good and workmanlike manner is available to consumers suing under the DTPA," a phrase that would later create confusion as to whether a plaintiff was required to bring suit under DTPA. [46] The court defined "services" as "work, labor or service purchased."[47]

In 1987, the Texas Supreme Court provided new warranty relief for consumers that extended beyond that provided by *Humber*.

Subsequent courts clarified that the DTPA prohibits the breach of an express or implied warranty, but it does not create warranties.[48] Courts or statutes must recognize a warranty before a litigant may successfully bring action under the DTPA.[49]

In sum, *Humber* created the warranties of good and workmanlike services and the warranty of habitability in contracts between builder-vendors and home-buying consumers.[50] *Melody Home*, however, created only the warranty of good and workmanlike services in purchases of work, labor or services.[51] As a result, courts since *Melody Home* have generally applied the *Humber* warranties to cases involving builder-vendors, and they have applied the *Melody Home* warranties to construction contractors who do not meet the definition of a builder-vendor. [52]

IV. Limitation Periods

Courts generally apply a four-year limitations period to the *Humber* warranties.[53] The limitation period for the *Melody Homes* warranty, however, has a greater lack of uniformity.

Prior to 1979, the DTPA contained no statutory limitations provision, and courts applied varying limitation periods to DTPA claims brought before that date.[54] However, the legislature expressly modified the limitations period in the DTPA and supplied a two-year statute of limitation, which applies to claims arising after August 27, 1979.[55] The DTPA is significant to implied warranties because at least one court has stated that *Melody Home* requires litigants to bring implied warranty claims under the DTPA.[56] While this court issued the opinion based on a misunderstanding of language in *Melody Home*, a litigant must be aware of this holding.[57] Many construction contracts do not involve builder-vendors. Therefore, implied warranty claims must be brought under *Melody Home* and not *Humber*.[58]

In *Cocke v. White*, the plaintiffs sued alleging breach of implied warranties in the purchase of a new home.[59] According to the court, the case did not involve the statute of limitations. Instead, the case raised the question of which version of the DTPA applied.[60] The court held that the 1979 amendments did not apply because the earnest money contract was signed five days before the effective date of those amendments.[61] The court, therefore, applied the *Humber* warranties via the DTPA.[62]

More recently, in *Southwest Olshan Found. Repair Co., LLC v. Gonzales,* the San Antonio Court of Appeals reviewed an implied service warranty claim based on foundation work.[63] The consumer claimed a breach of implied warranty under the DTPA, but also claimed that a four-year limitation period applied because she had asserted a construction claim.[64] The court cited language in *Melody Home* and stated "that an implied warranty to repair or modify existing tangible goods or property in a good and workmanlike manner *is available to consumers suing under the DTPA*."[65] On appeal, the Texas Supreme Court characterized the appellate court's holding as a *requirement* that a consumer bring an implied warranty of service claim via the DTPA.[66]

The supreme court, however, ruled on other grounds, and did not reach the question of whether an implied workmanlike service warranty *must* be brought under the DTPA. The San Antonio court, however, does not appear to be on solid ground, and it appears to base its view on an incomplete reading of *Melody Home*.[67]

Other courts both before and since *Gonzales* have concluded that the DTPA's two-year limitation period applies to construction contractors.[68] A recent, unpublished case shows that at least one court has expressly followed *Gonzales* and applied the DTPA's two-year statute to a residential construction contract.[69] In *Design Tech Homes, Ltd. v. Maywald*, consumers contracted with a builder to construct a home.[70] While not expressly stated, it seems that the Maywalds contracted the defendant to build on their own lot.[71]

The consumers later complained of foundation problems and brought claims based on breach of express and breach of implied warranty.[72] The court cited and followed the *Gonzales* rationale and held that a two-year statute of limitation applied to the warranty claims.[73]

The significance of this case is that the contractor built an entire home from the outset. Still the court applied *Melody Home* without any discussion of *Humber*. Like many opinions regarding implied warranty claims, the rationale is ambiguous.

The court does not distinguish between *Melody Home* and *Humber*, and does not expressly discuss whether the contractor was a builder-vendor. One could surmise that the contractor

was not a builder-vendor for two reasons: (1) either he did not convey real estate; or (2) the buyer relied on other experts in addition to the contractor.

On the other hand, the opinion could suggest simply that Maywald simply did not argue for the four-year limitation period or that he rested his claim entirely on the DTPA. It is clear, however, that Maywald alleged an implied warranty claim in a ground up construction contract, and that the court followed *Gonzales*, applying the DTPA's two year limitation period. The opinion illustrates the vagueness and the lack of analysis offered by most courts that struggle with implied warranties. Litigants are left to wonder what rationale the court used to apply the two-year limitation period.

In sum, courts generally apply a four-year limitation period to *Humber* claims. On the other hand, some courts are recognizing a poorly reasoned trend that requires a two-year limitation period in *Melody Home*. Despite this trend, a four-year limitation period may still apply to *Melody Home* cases if the litigant does not invoke the DTPA or if the litigant brings the claim under the common law in addition to bringing it under DTPA; though the point is arguable.[74]

V. Limitation Period: Accrual

A breach of warranty generally accrues when delivery is made, if a defect exists at the time of delivery.[75] The legal injury rule states that limitations begin to run "when a wrongful act causes some legal injury, even if the fact of injury is not discovered until later, and even if all resulting damages have not yet occurred."[76]

The discovery rule is a narrow exception to the legal injury rule and applies when a defect is inherently undiscoverable.[77] The DTPA codified the discovery rule in DTPA claims, and allows for accrual to run when the consumer actually discovered or, in the exercise of reasonable due diligence, should have discovered the "false, misleading, or deceptive act or practice."[78] Since *Melody Home*, Courts have read the DTPA's discovery rule to run when "the plaintiff knew or should have known...of the *wrongful injury*."[79] For both DTPA and common-law causes of action, accrual occurs when the plaintiff knew or should have known of the wrongful injury.[80] Thus, accrual operates similarly in both *Humber* and *Melody Home* claims whether the plaintiff invokes the DTPA or not.

In *Gonzales*, accrual began when the defendant's employee pointed out that the work performed by defendant was "the worst job he had ever seen."[81] However, courts do not require such an unequivocal declaration in order for accrual to begin. Under the discovery rule, the limitations clock may run once a claimant knows of a wrongful injury "even if the claimant does not yet know the specific cause of the injury; the party responsible for it; the full extent of it; or the chances of avoiding it."[82]

In *Dean v. Frank W. Neal & Associates, Inc.,* for example, multiple parties participated in designing and constructing a house for the buyers.[83] The buyers saw cracks in the foundation during construction in 1996.[84] In 1996 and 1997, after moving in, the buyers began meeting with the multiple parties who had designed and constructed the home regarding alleged defects.[85] The court noted that the buyers could have hired an independent engineer when they began their meetings.[86] For that reason the court held that the limitations period began to run in 1997.[87] The court held that the plaintiff filed well outside the limitation period when he filed in 2002.[88] Diligence required that the Deans should have known of the injury some time in 1996 or 1997.[89]

A new rule is emerging with respect to the discovery rule in implied warranties, however. In *Baleares v. GE Engine Servs.-Dallas*, the court held that "the discovery rule ordinarily should not apply when the injury in question is actually discovered within the limitations period that would apply under the legal-injury rule."[90] The court reasoned that if a plaintiff actually discovers the injury during the normal limitation period, the defect is likely not inherently undiscoverable.[91] Consequently, the court held that the plaintiffs could not rely on the discovery rule when it leased an airplane in April of 2002 and when the airplane experienced catastrophic engine failure in October 2003.[92] As support for its' holding, the court cited one of its unpublished opinions from 1999.[93]

A Houston court has expressly followed the Baleares reasoning in an unpublished auto repair case.[94] Under this view, if a plaintiff actually discovers a defect during the normal limitation period, he should rely on the legal injury accrual rule, and not the discovery rule.

Cases regarding the discovery rule in implied warranties are scarce.[95] Consequently, it does not appear that courts have applied the *Baleares* reasoning to implied warranties in any construction defect claim. However, nothing seems to prevent a court from applying the *Baleares* rule to construction claims.

***Melody Home* expressly held that a construction contractor couldn't waive or disclaim the implied warranty of good and workmanlike performance in service contracts.**

VI. Disclaimers of Warranties

The Texas Supreme Court has noted it has "not always been careful to distinguish between" the implied warranty of habitability and the implied warranty of good and workmanlike performance.[96] *Robichaux* expressly involved a builder-vendor.[97] In that case, the court sloppily treated the two *Humber* warranties as a singular warranty, and held that a builder could disclaim "the Humber warranty" when the agreement contained sufficiently clear language.[98]

Subsequently, *Melody Home* expressly held that a construction contractor couldn't waive or disclaim the implied warranty of good and workmanlike performance in service contracts.[99] Furthermore, *Melody Home* expressly overruled *Robichaux* to the extent the opinions conflicted.[100] Naturally, many authorities concluded that *Melody Home* completely overruled *Robichaux* and that the *Humber* warranties could not be disclaimed after *Melody Home*.[101]

The court in *Beucher*, however, clarified that *Melody Home* did not completely overrule *Robichaux* with respect to *Humber* disclaimers.[102] This was because *Humber* provided two warranties and *Melody Home* provided only one.[103] As a result, good workmanship disclaimers by builder-vendors are effective if the builder-vendor provides a sufficient express warranty.[104] The *Buecher* court stated, "the implied warranty of good workmanship [provided by builder-vendors] may be disclaimed by the parties when their agreement provides for sufficient detail on the manner and quality of the desired construction."[105] The court also held that the *Humber* warranty of habitability may not generally be disclaimed.[106]

From its inception, *Melody Home* expressly stated its warranties could not be waived or disclaimed.[107] In *Gonzales*, however, the supreme court recognized that construction contractors could "supersede" the *Melody Home* warranty by expressly providing a warranty.[108] The court explained that the *Melody Home* warranty provides a gap-filler and that the parties may fill the gap if they expressly agree to a warranty that sufficiently describes the manner, performance or quality of the work.[109]

In sum, courts now recognize that implied warranty of good and workmanlike performance under *Melody Home* cannot be disclaimed or waived, but can be "superseded" if the parties express agreement sufficiently describes the manner, performance or quality of work.[110] On the other hand, builder-vendors may generally disclaim the implied *Humber* warranty of good workmanship if they 1) provide an express warranty and 2) if they expressly disclaim any implied warranty.[111] Despite the different nomenclature (disclaim versus supersede) related to the *Humber* and *Melody Home* line of cases, courts allow the implied warranty of good and workmanlike performance to be replaced with certain express warranties. Generally, however, builder-vendors generally may not disclaim or supersede the *Humber* warranty of habitability.[112]

VII. Summary

In sum, litigants and courts have had difficulty understanding what implied warranties are available, their limitation periods, how time accrues and whether a contractor may disclaim them.

Courts and litigants should take care to fully consider the factors in *Humber* in order to determine whether a contractor meets the definition of a builder-vendor. That determination impacts which implied warranties a consumer may claim, their limitation period and whether or not the contractor may disclaim some warranties.

Opinions discussing implied warranties are limited in number and are often ambiguous or vague. Nonetheless, it is possible for litigants to analyze their claims and to present clear arguments to the courts. In the interest of clarity, courts should take care to express whether a contractor qualifies as a builder-vendor, especially in cases where the question is close. Increased clarity and a deeper analysis by both litigants and courts will provide a clearer body of law.

VIII. A Brief Summation and Practical Framework for Analysis

The statutory warranties that TRCCA codified have expired.[113] As a result, courts will have to decide questions of implied warranties based on the existing common law framework. If courts adopt the following systematic analysis, the law of implied warranty in construction law will become clearer and more helpful. The conclusions in this section of the paper are supported by the research in the prior sections of this paper.

A. Identification of the defendant's status as a builder-vendor.

If litigation involves a construction defect, courts and litigants should take care to fully consider the factors in *Humber* to determine whether a contractor meets the definition of a builder-vendor.[114] Courts have not made clear which or how many *Humber* factors are required to classify a party as a builder-vendor. However, courts can clarify this issue by systematically considering the issue in appropriate cases.

An initial analysis regarding a builder's status as a builder-vendor will aid litigants and courts to properly understand sub-issues. If the defendant operates as a builder-vendor, *Humber* and its progeny control. If the defendant does not operate as a builder-vendor, then it likely offers services or labor, and the *Melody Home* line of cases controls.[115]

B. Available warranties

If *Humber* applies, the plaintiff has a cause of action for breach of implied warranty of habitability or breach of implied warranty of workmanlike performance or both. On the other hand, if *Melody Home* applies, the plaintiff only has a cause of action for breach of implied warranty of good and workmanlike performance.[116]

C. Pre-litigation and post-petition procedures

If *Humber* applies, RCLA likely governs pre-litigation procedures. However, if *Melody Home* applies, RCLA may or may not apply due to RCLA's definition of "contractor," which cross-references an expired statute. Courts can clarify this point if the legislature does not act to correct this inconsistency.[117]

D. DTPA and statute of limitations

If *Humber* applies, the plaintiff may, but need not to, use the DTPA to bring suit. The normal limitation period for *Humber* claims is four years, but if a litigant chooses to bring suit under the DTPA, the limitation period is two years for that claim. Parties commonly bring one claim under common law as well as another claim under the DTPA, in which case the common law limitation period applies to the common law claim and a two-year limitation period applies to the DTPA claim.[118]

If *Melody Home* applies, a litigant could mention the San Antonio opinion, in which the court holds that *Melody Home* warranties must be brought under the DTPA.[119] However, the court should refuse to follow that holding for the reasons previously listed in this paper.[120] Instead, the court should hold that, like *Humber*, or any other warranty claim, a plaintiff may choose or choose not to bring a claim under the DTPA.[121] If the plaintiff brings a claim under the DTPA, then the limitation period is clearly two years.[122] However, if the plaintiff brings a common law claim a four-year limitation period may apply.[123]

E. Accrual

Accrual analysis does not differ greatly between the *Humber* and *Melody Home* lines of cases. The general rule is that a breach of warranty accrues when delivery is made, if a defect exists at the time of delivery. However, the common law discovery rule and the DTPA discovery rule are important exceptions to the general rule and may toll accrual of the limitation period. Furthermore, some courts have said that if a claimant actually becomes aware of a defect during the limitation period, he may not avail himself of the discovery rule.[124]

F. Disclaimers

The *Melody Home* warranty of good and workmanlike performance cannot be disclaimed, but it can be superseded by certain express warranties. The *Humber* warranty of good and

workmanlike performance may be disclaimed if the agreement provides for sufficient detail on the manner and quality of the desired construction. On the other hand, the *Humber* warranty of habitability generally may not be disclaimed or superseded.[125]

G. Summation of the current framework

Courts and litigants can create clarity in the law by initially determining the status of the defendant as a builder vendor. Thereafter, many sub-issues arise, and the answers to these issues remain unclear. However, courts can clarify many questions if they commit to determining the builder status initially and following the analysis in points B-F of this section.

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1 Humber v. Morton, 426 S.W.2d 554, 557 (Tex. 1968). Texas had recognized implied warranties of *goods* earlier. *Humber* states that caveat emptor was on the wane with respect to goods as early as 1856. *Id.* at 558. *See generally* Walker v. Great Atl. & Pac. Tea Co., 112 S.W.2d 170 (Tex. 1938)(adopting Williston's position on no-fault liability imposed on grocers through implied warranties of canned goods).

2 *Humber,* 426 S.W.2d at 557.

3 *Id.*

4 Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 354 (Tex. 1987).

5 Centex Homes v. Buecher, 95 S.W.3d 266, 270 (Tex. 2002).

6 Sunset Advisory Comm'n, Sunset Hearing Material Tex. Residential Constr. Comm'n, at 4 (Tex. 2008).

7 *Id.*

8 *Id.*

9 *See Humber* 426 S.W.2d 554 *and Melody Home Mfg.* 741 S.W.2d 349.

10 *See* discussion *infra* Part IV, V.

11 Richard M. Alderman, The Texas Deceptive Trade Practices Act In Context: Not All That Bad 3 (October 23, 2009) (unpublished paper) (available at https://www.law.uh.edu/peopleslawyer/2009consumer-law-basics/presentations/RichardAlderman-paper.pdf) (Noting that the formal name of the act was Texas Deceptive Trade Practices—Consumer Protection Law).

12 The general consumer protections begin at Tex. Bus. & Com. Code §17.41 (West 1973). The sections beginning before §17.41 deal with specific commercial transaction types.

13 Tex. Bus. & Com. Code § 17.50(a)(2) (West 2005).

14 *See* Alderman *supra* note 11 at 8 (citing § 17.45 Tex. Bus. & Com. Code (West 2007)).

15 Tex. Bus. & Com. Code Ann. § 17.43 (West 1995).

16 Tex. Prop. Code tit. 4, Ch. 27.

17 *Id.*; Tex. Prop. Code § 27.005 (West 1999).

18 Tex. Prop. Code § 27.001(5)(A)(ii) (West 2007).

19 *See infra* note 33 for discussion of builder-vendor.

20 Tex. Prop. Code § 27.001(5)(A)(i) (West 2007).

21 *See infra* note 23.

22 David Funderburk*, Residential Construction Liability in Texas-Current State of the Law*; Tex. Legal Liab. Advisor 2 (Fall 2013); Mark Courtois and David Funderburk.

23 Richard M. Alderman, The Lawyer's Guide to the Texas Deceptive Trade Practices Act §8.062 (2ed. LexisNexis 2015).

24 Sunset Advisory Comm'n, Sunset Hearing Material Tex. Residential Constr. Comm'n, at 1 (Tex. 2008).

25 *Id.*

26 *Humber,* 426 S.W.2d at 561 ("If at one time in Texas the rule of caveat emptor had application to the sale of a new house by a vendor-builder, that time is now past.").

27 *Buecher*, 95 S.W.3d at 271.

28 *Id.*

29 *Id.* at 272.

30 *Coulson v. Lake L.B.J. Mun. Util. Dist.,* 734 S.W.2d 649, 651 (Tex. 1987)("We are unable to discern any real difference between the District's claim that Coulson's efforts were not good and workmanlike and did not meet the standards of reasonable engineering practice and its claim that Coulson was negligent in his performance of professional services."). Though not expressed, this case actually dealt with a *Melody Home* warranty. The difference between the *Melody Home* and the *Humber* warranty does not seem to have a great distinction in the courts, but at least one academic say that a simple negligence standard is inadequate to understand the substantive protection of the warranties. *See* Timothy Davis, *The Illusive Warranty of Workmanlike Performance: Constructing A Conceptual Framework*, 72 Neb. L. Rev. 981, 984 (1993). *See also* Mark L. Kincaid, *Recognizing an Implied Warranty That "Professional'" Services Will Be Performed in A Good and Workmanlike Manner*, 21 St. Mary's L.J. 685, 707 (1990)(arguing that the culpability standard in a Melody Home case can be lower than a standard negligence case if brought under the DTPA: "[T]he causation standard for recovery under the [Melody Home] implied warranty theory differs from that for negligence. Negligence requires a showing that the conduct was a *proximate* cause of the damages; *producing* cause is the standard for a warranty claim brought under the DTPA. The difference is that foreseeability is an element of the former but not the latter.").

31 *Buecher*, 95 S.W.3d at 272, 273.

32 *Id.*

33 *Humber*, 426 S.W.2d at 555 ("It conclusively appears that defendant Morton was a 'builder-vendor.' The summary judgment proofs disclose that he was in the business of building or assembling houses designed for dwelling purposes *upon land owned by him*. He would then sell the completed houses together with the tracts of land upon which they were situated to members of the house-buying *public*...When a vendee buys a development house *from an advertised model*…[h]e has no architect or other *professional adviser* of his own, he has no real competency to inspect on his own.") (emphasis added). *Accord* Richard Clough *et al.,* Construction Contracting: A Practical Guide to Company Management §1.62 (Wiley, ed. 7th edition 2005)("A builder-vendor is a business entity that designs, builds and finances the construction of structures for sale to the general public. The most common example of this is tract housing, where the builder-vendor acquires land builds housing units...[T]he builder-vendors act as their own prime contractors, build dwelling units on their own accounts and often employ sales forces to market their products...In much of this type of construction, the builder-vendor constructs for an unknown owner...The usual construction contract between owner and prime contractor is not present in such cases because the builder-vendor occupies both roles. The source of business for the builder-vendor is entirely self-generated, as opposed to the professional contractor, who obtains its work in the open construction marketplace."). *See also infra* notes 115 and 116 for a more complete list of factors used when deciding whether a party is a builder-vendor.

34 *See, e.g.*, G-W-L, Inc. v. Robichaux, 643 S.W.2d 392, 392 (Tex. 1982)(applying *Humber* to a new home constructed by a builder-vendor).

35 Johnson v. Highland Hills Drive Apartments, 552 S.W.2d 493, 496 (Tex. App.—Dallas 1977, writ ref'd).

36 Gupta v. Ritter Homes, Inc.*,* 646 S.W.2d 168, 168 (Tex. 1983).

37 Young v. DeGuerin, 591 S.W.2d 296, 299 (Tex. App.—Houston [1st Dist.] 1979, no writ).

38 *Id.*

39 *Id.*

40 *Id.*
41 *Id.*
42 *See generally* Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349 at 349 (Tex. 1987). *See supra* note 30 for a brief explanation of the scope of the warranty.
43 *Melody Home Mfg. Co.,* 741 S.W.2d at 351.
44 *Id.*
45 *Id.*
46 *Id.* at 356; s*ee infra* note 67 for further discussion of Melody Home and the DTPA.
47 *Melody Home*, 741 S.W.2d at 352.
48 Parkway Co. v. Woodruff, 901 S.W.2d 434, 438 (Tex. 1995)(citing Tex. Bus. & Com. Code § 17.50(a)(2) (West 2005))(other citations omitted).
49 *Id.*
50 Gonzales v. Sw. Olshan Found. Repair Co., LLC, 400 S.W.3d 52, 56 (Tex. 2013).
51 *Melody Home Mfg. Co.*, 741 S.W.2d at 351.
52 *See e.g.* Barnett v. Coppell N. Texas Court, Ltd., 123 S.W.3d 804, 822-823 (Tex. App.—Dallas 2003, pet. denied)(holding that the *Melody Home* implied service warranties apply to ground-up construction contracts in a commercial building); *see* also Design Tech Homes, Ltd. v. Maywald, 09-11-00589-CV, 2013 WL 2732068 (Tex. App.—Beaumont June 13, 2013, rev. denied)(applying DTPA limitation period to a ground-up construction contractor who built a residential home on the consumer's lot (not on builder's lot)).
53 *See e.g.,* Richman v. Watel, 565 S.W.2d 101, 102 (Tex. App. — Waco 1978, writ ref'd.); *see also* Certain-Teed Products Corp. v. Bell, 422 S.W.2d 719, 721 (Tex. 1968); *Walker*, 853 F.2d 355, at 363 (5th Cir 1988) (explaining further the holding in *Certain-Teed Products Corp.* and its modern relevance).
54 Tex. Bus. & Com. Code Ann. § 17.565 (West); *see also* Miller v. Dickenson, 677 S.W.2d 253, 257 (Tex. App.—Fort Worth 1984, writ ref'd.).
55 *Dickenson*, 677 S.W.2d at 257.
56 *Melody Home Mfg.,* 741 S.W.2d at 356; *see infra* note 67 for further discussion of *Melody Home* and the DTPA limitation period.
57 *See infra* note 67 for further discussion of Melody Home and the DTPA limitation period.
58 *See infra* note 68.
59 Cocke v. White, 697 S.W.2d 739, 741 (Tex. App.—Corpus Christi 1985, writ ref'd).
60 *Id.* at 745.
61 *Id.*
62 *Id.* at 743.
63 Sw. Olshan Found. Repair Co., LLC v. Gonzales, 345 S.W.3d 431 (Tex. App.—San Antonio 2011*, aff'd.* 400 S.W.3d 52 (Tex. 2013)).
64 *Id. at 436.*
65 *Id.* (emphasis added).
66 Gonzales v. Southwest Olshan Found. Repair Co., LLC, *400* S.W.3d 52 at 55 (Tex. 2013).
67 The court in *Melody Home* said, "an implied warranty to repair or modify existing tangible goods or property in a good and workmanlike manner is available to consumers suing under the DTPA." A court could reasonably read this phrase in isolation to understand that a litigant is required to bring such a claim via the DTPA. This is how the San Antonio court in *Gonzales* construed the phrase.

In support of its conclusion, *Gonzales* and other courts cite a phrase in *Melody Home* that says consumers of repair services "do not have the protection of a statutory or common law implied warranty scheme." The *Gonzales* court and other courts misconstrued these phrases and understood that no common law warranty of good workmanlike services existed or could exist, and that plaintiffs could bring such a claim only through the DTPA. Such a construction contravenes the principle that "[t]he DTPA prohibits the breach of an express or implied warranty...but it does not create warranties." *Parkway Co.*, 901 S.W.2d at 438.

More significantly, the court fails to fundamentally understand what occurred in *Melody Home*. When the *Melody Home* court correctly stated that litigants "do not have the protection of a statutory or common law implied warranty scheme," it was only to illustrate how, unless the court in *Melody Home* created the warranty, consumers would be unprotected. The phrase did not to suggest that the supreme court was restrained from creating the warranty, as the court in *Gonzales* suggests. The concurrence, in fact, lamentably admits that the *Melody Home* court created a new warranty. *Melody Home Mfg.*, 741 S.W.2d at 356, Gonzales, J., concurring. Furthermore, the statement that the warranty was "available… under the DTPA" did not mean that litigants were required to bring the claim under the DTPA.

A better construction of what occurred in Melody Home is that the court created a new, independent warranty, which a plaintiff could pursue through the DTPA, if he so chooses. A complete reading of the opinion and other authorities supports this position. *See, e.g.*, Walker v. Sears, Roebuck & Co., 853 F.2d 355, 363 (5th Cir. 1988) ("[W]e have found a number of cases in which plaintiffs have joined other causes of action with their DTPA claims and the Texas courts have, without comment, applied the DTPA's statute of limitations to the DTPA claims and non-DTPA statutes of limitations to those other claims.)(Citations omitted).

The court in *Melody Home* used the "under the DTPA" language to answer some very specific questions, not to say that the DTPA was obligatory. For example, the opinion first wrestles with the notion of whether or not the plaintiff was entitled to the discretionary damages in the DTPA. *Melody Home Mfg.*, 741 S.W.2d at 351. ("Melody Home appealed the award of DTPA discretionary damages."). Additionally, the defendant challenged the status of the plaintiffs as consumers, a challenge that, if successful, would make the DTPA inapplicable. *Id.* Furthermore, the case was mostly about the creation of this new warranty. *Id.* at 353 ("The issue presented in this case is whether the protection of Texas consumers requires the utilization of an implied warranty that repair services of existing tangible goods or property will be performed in a good and workmanlike manner as a matter of public policy.") The plaintiffs had sued under the *Humber* (without even pleading for the recognition of a new warranty) using the DTPA. Therefore, the question was whether the plaintiffs could maintain a cause of action under the DTPA, not whether the parties were required to bring suit under the DTPA. So the court was answering the former question when it created the new warranty of good and workmanlike services and clarified that the new warranty "is available… under the DTPA."

Further, a plain language reading reveals that the *Melody Home* court did not say the warranty is *only* available under the DTPA. Instead, the court says "*[a]llowing* consumers to sue under [DTPA] section 17.50(a) for breach of an implied warranty that repair services will be done in a good and workmanlike manner is a logical, consistent, and intended interpretation of the [DTPA]." *Id.* at 355-56 (emphasis added). In this portion of the opinion, the court's language is permissive. The San Antonio court in *Gonzales* did not seem to consider that *Melody Home* both created a common law warranty and simultaneously announced that a litigant could bring this new common law warranty claims through the DTPA if he so chooses.

Finally, the DTPA uses permissive language in many sections. Tex. Bus. and Com. Code § 17.50(a) (West 2005)("a consumer may maintain an action;" Tex. Bus. and Com. Code § 17.43 (West 1995) ("The provisions of this subchapter are not exclusive. The remedies provided in this subchapter are in addition to any other procedures or remedies provided for in any other law"). Thus, the San Antonio court's interpretation contravenes the express language of the DTPA, which should take precedent over any common law mandate.

The San Antonio court, while errant, is in good company. It lists five courts in its string cite which share its misunderstanding. Those cases, however, either do a poor job of analyzing the cases or follow the similarly flawed reasoning expressed by the San Antonio court.

See also Brief on the Merits at 4-5, Sw. Olshan Found. Repair Co., LLC v. Gonzales, 345 S.W.3d 431 (2011) (No. 11-0311) ("By holding that [Gonzales'] breach of its common law implied warranty claim can only be pursued under the DTPA, the court of appeals has effectively overruled over a quarter century of Texas Supreme Court precedent that holds that the DTPA does not create any warranties…Since an implied warranty must first exist at common law to be actionable under the DTPA, [Gonzales] was free to pursue her implied warranty claims at common law as well as under the DTPA. *(CR 360)* Under the reasoning of the [San Antonio] court of appeals, if the DTPA were repealed by the Texas legislature, these warranties would simply cease to exist.")(Citation omitted).

68 Barnett v. Coppell N. Texas Court, Ltd., 123 S.W.3d 804, 822-823 (Tex. App.—Dallas 2003, pet. denied) (holding that the *Melody Home* implied service warranties apply to ground-up construction contracts in a commercial building, and applying two-year DTPA limitation period); Cocke v. White, 697 S.W.2d 739, 745 (Tex. App.—Corpus Christi 1985, writ ref'd)(applying *Humber* via the DTPA and acknowledging difference in statute of limitation for DTPA claims that accrued before 1979). *But see* Ben Fitzgerald Realty Co. v. Muller, 846 S.W.2d 110, 119 (Tex. App.—Tyler 1993, writ denied)(ambiguously mentioning that a four year statute of limitation applies to new construction, but holding that the DTPA "necessarily include[s] actions such as this one under [DTPA] section 17.50(a)(2) for breach of warranty").

69 Design Tech Homes, Ltd. v. Maywald, No. 09-11-00589-CV, 2013 WL 2732068 (Tex. App.—Beaumont 2013, rev. denied).

70 *Id.* at 1.

71 *See Id.* at 1 ("the Maywalds and DTH signed a third contract: the "Residential Construction Contract (with Transfer of Lien to Lender).").

72 *Id*. at 1.

73 *Id.* at 4.

74 *See Walker*, 853 F.2d at 363 (explaining that the claim arises from a debt, for which a four year period is appropriate*); accord* Timothy, *The Illusive Warranty of Workmanlike Performance: Constructing A Conceptual Framework*, 72 Neb. L. Rev. 981, 996 (1993)(explaining that warranty should theoretically sound in contract); *see also Certain-Teed Products Corp.* 422 S.W.2d at 721 (holding that warranties implied by *Humber* were subject to a four year limitation period if they arose from a written contract); Brief on the Merits at 4-5, Sw. Olshan Found. Repair Co., LLC v. Gonzales, 345 S.W.3d 431; Tex. Bus. & Com. Code § 2.725(West 1968)(express warranties subject to four-year limitation period).

There seems to be no published Texas case law expressly applying common law limitation periods in a *Melody Home* without referencing the DTPA. However, an argument can be made that a two-year limitation should apply, even without applying the DTPA. Mark S. Mcquality, CONSTRUCTION LITIGATION – LIVE AND WELL? 15-16 (June 19, 2015) (unpublished paper)(available at http://files.eventsential.org/ce342f66-b6b8-459b-a3cd-6f6c4b1040a3/event-390/73324771-ConsumerCommercial_Construction_McQuality.pdf)(implying the limitation period is two years because it sounds in negligence, and because of a statutory two year limitation period on negligence). Indeed, there exists support for analogizing the good and workmanlike warranty to *professional* negligence. *Coulson*, 734 S.W.2d at 651-52 (Tex. 1987)(analogizing the good and workmanlike warranty to a reasonably prudent professional standard). Furthermore, the supreme court has held that implied warranties sound in tort, not in contract. *Humber*, 426 S.W.2d at 556; *Beucher*, 95 S.W.3d at 271 (describing an "alternative tort remedy"); *Melody Home Mfg. Co*., 741 S.W.2d at 352 (Tex. 1987)("Implied warranties are created by operation of law and are grounded more in tort than in contract."). Courts have held that a two-year limitation period applies to professional malpractice claims, regardless of whether a party may label the cause of action as malpractice, fraud or breach of fiduciary duty. Murphy v. Gruber, 241 S.W.3d 689, 696-98 (Tex. App.—Dallas 2007, pet. denied).

Partly because courts have tended to rely on the faulty reasoning exhibited in *Gonzales (see infra* note 67), courts have seemingly not produced a definitive, well-reasoned answer to the question of the statute of limitations on a purely common law *Melody Home* claim. Even so, one court, without reasoning or supporting authority, has held that other implied warranties (fitness and suitability) are subject to a two-year limitation period, regardless of whether they were brought under the DTPA or the common law. Jeffery v. Walden, 899 S.W.2d 207, 213 (Tex. App.—Dallas 1993), *rev'd on other grounds* 907 S.W.2d 446 (Tex. 1995).

Thus, the question of the limitation period applicable to common law *Melody Home* claims seems to be susceptible to the reasoning in this footnote, and may be expressly answered at some time in the future.

75 *See* PPG Indus., Inc. v. JMB/Houston Centers Partners Ltd. P'ship, 146 S.W.3d 79, 92 (Tex. 2004)(citing Tex. Bus. & Com. Code § 2.725 (West 1967)).

76 Rivera v. Countrywide Home Loans, Inc*.,* 262 S.W.3d 834, 840 (Tex.App.—Dallas 2008, no pet.).

77 Computer Assocs. Int'l, Inc. v. Altai, Inc*.,* 918 S.W.2d 453, 457 (Tex. 1996).

78 Tex. Bus. & Com. Code § 17.565 (West 1987).

79 *Gonzales*, 345 S.W.3d at 437; *See also* KPMG Peat Marwick v. Harrison County Fin. Corp., 988 S.W.2d 746, 749 (Tex.1999).

80 *KPMG Peat Marwick*, 988 S.W.2d at 749-50.

81 *Gonzales*, 400 S.W. 3d at 54.

82 Dean v. Frank W. Neal & Associates, Inc*.,* 166 S.W.3d 352, 357 (Tex. App. —Ft. Worth 2005, no pet.).

83 *Id.* at 354.

84 *Id.*

85 *Id.* at 355.

86 *Id. at 357.*

87 *Id.*

88 *Id.* The court did not engage in a meaningful discussion about which limitation period applied.

89 *Id*.

90 Baleares Link Exp., S.L, v. GE Engine Servs.-Dallas, 335 S.W.3d 833, at 838 (Tex. App.—Dallas 2011).

91 *Id.* The court also mentioned that there exists little case law regarding inherently undiscoverable injuries in implied warranties, but distinguished an opinion from the Fourteenth Court of Appeals which held that damage to an undergrounds water line was inherently undiscoverable.

92 *Id.*

93 *Id.*

94 Kingsbury v. A.C. Auto., Inc*.,* No. 01-14-00205-CV, 2015 WL 1457538, at *6 (Tex. App.—Houston [1st Dist.] Mar. 26, 2015, no pet.).

95 Baleares Link Exp., S.L, v. GE Engine Servs.-Dallas, 335 S.W.3d 833, at 838 (Tex. App.—Dallas 2011).

96 *Buecher*, 95 S.W.3d at 272.

97 *Robichaux*, 643 S.W.2d at 392.

98 *Id.* at 393.

99 *Melody Home Mfg. Co.*, 741 S.W.2d at 355.

100 *Id.*

101 *Buecher*, 95 S.W.3d at 270 ("Some have concluded that after *Melody Home* the *Humber* warranties could no longer be waived or disclaimed"). Beucher cited the following sources which took that view: *Haney v. Purcell Co.,* 796 S.W.2d 782, 786 n. 3 (Tex.App.-Houston [1st Dist.] 1990, writ denied) (*Melody Home* overruled *Robichaux* "with regard to the issue of waiver of warranty"); William Dorsaneo III, Texas Litigation Guide 18 § 270.121[1][b], at 270–113 (2002) (*Humber* warranties may not be waived or disclaimed, citing *Melody Home*); Herbert S. Kendrick and John J. Kendrick, Jr., Texas Transaction Guide 20 § 83A:21[3] at 83A–18 (2002) (same).").

102 *Buecher*, 95 S.W.3d at 270.

103 *Id*.
104 *Id.* at 275.
105 *Id.*
106 *Buecher*, 95 S.W.3d at 274-275.
107 *Melody Home Mfg. Co.*, 741 S.W.2d at 355.
108 *Gonzales*, 400 S.W.3d 52, 53 (Tex. 2013).
109 *Id.*
110 *Id.* The warranty may be superseded if the parties manner, performance or quality of the service.
111 *See Buecher* at 275.
112 *Id.* at 274-275
113 *See* Alderman *supra* note 23 at § 8.062.
114 *See generally Humber*, 426 S.W.2d 554, at 561. The factors cited throughout the opinion are: whether the defendant is in "the business of building or assembling houses;" whether the house is for dwelling purposes; whether the house was built on land owned by the builder; whether the builder would "then sell the completed houses together with the tracts of land;" whether the buyer was a member of the house-buying public; whether the buyer bought a home from an advertised model; whether the buyer has no architect or other professional adviser or no real competency to inspect on his own or whether the buyer was "in a position" to discover a defect; whether the buyer could engage in meaningful negotiations regarding the conveyance documents.
115 *See supra* Section III.
116 *Id.*
117 *See supra* Section II C.
118 *Walker*, 853 F.2d 355, at 363 (5th Cir 1988) (citing Johnston v. Barnes, 717 S.W.2d 164, 165–66 (Tex.App.—Houston [14th Dist.] 1986, no writ); Xarin Real Estate, Inc. v. Gamboa, 715 S.W.2d 80, 85 (Tex.App.—Corpus Christi 1986, no writ)).
119 *See supra* note 67.
120 *Id.*
121 *Id.*
122 *Walker*, 853 F.2d 355, at 363 (5th Cir 1988)..
123 *See supra* note 74.
124 *See supra* Section V.
125 *See supra* section VI.