Note

Application of Strict Liability to the Production of Defective Realty

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Campaigning for consumer protection under the banner of products liability has been a popular trend in the last decade. After a harvest of revolutionary victories over sellers of defective chattels which cause personal injury or property damage to consumers,[1] the proponents of strict tort liability are seeking an extension of the doctrine into real property law. Whether a builder or vendor[2] will be held strictly liable in tort for constructing or selling defective realty which causes loss to the consumer remains unsettled. This analysis will explore and evaluate the applicability of strict tort liability to the manufacture or sale of defective realty.[3]

Beginning in 1965, New Jersey extended strict liability into the realty area.[4] In the interim only California[5] and Mississippi[6] have adopted the doctrine, but there are indications[7] and predictions[8] that

1. The victory of the proponents of strict liability in tort over the sellers of defective chattels became official when the American Law Institute adopted RESTATEMENT (SECOND) OF TORTS § 402A (1965). Although Dean Prosser added a benediction, Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791 (1966), the proponents of strict liability continue to salt the wounds. *See, e.g.*, Caruth v. Mariani, 11 Ariz. App. 188, 463 P.2d 83 (1970); Price v. Shell Oil Co., 2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970); Santor v. A&M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965).

2. The phrase "builder or vendor" as used in this note includes builders and builder-vendors who have constructed the realty as well as vendors who have not constructed the realty but have sold it to the consumer.

3. Hereinafter the discussion of all liability theories will be as applied to the manufacture and sale of defective realty unless otherwise noted.

4. Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965).

5. Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (Ct. App. 1969).

6. State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966).

7. *See* Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966); Humber v. Morton, 426 S.W.2d 554 (Tex. 1968).

8. W. PROSSER, THE LAW OF TORTS § 104, at 682 (4th ed. 1971).

other jurisdictions will follow this lead. An attempt will be made to provide an insight into the special nature of strict liability in the realty area for those courts considering such an extension in the future and for the three jurisdictions which must now structure parameters to the new rule.

The approach to the subject will be threefold. First, the history of post-completion liability of the builder will be explored from the standpoints of negligence, implied warranty and strict liability in order to assess the viability of each remedy. Then the traditional rationales which underlie strict liability will be examined in order to evaluate their validity within the realty context. Finally, the special problems inherent in the contemplated extension will be discussed.

HISTORICAL DEVELOPMENT AND APPLICATION OF THEORIES

Initially, the history of the post-completion liability of builders must be considered.[9] It would be erroneous to examine a move toward strict liability without first ascertaining the derivation and status of present law because the adequacy of existing remedies is a crucial inquiry in a contemplated extension of strict liability.

Negligence

Builders' liability has an extensive history,[10] but around 1825 it began to develop in parallel with the emerging negligence doctrine that persons owed a duty of care to those who might be affected by their activities.[11] Beginning in 1891, the development of liability for negligence was drastically impaired when the requirement of privity[12] was applied to realty sales in *Curtin v. Somerset.*[13] Thus the builder could be held liable only to the owner and not to other parties with whom he had no exchange of confidence.

This rule was followed faithfully at first,[14] but its Draconian nature encouraged the development of various exceptions.[15] After constant as-

9. The historical sketch in the text accompanying notes 10-71 *infra* is not an exhaustive historical documentation; rather, it is presented to familiarize the reader with the background of the problem. For a more complete historical analysis, see Bearman, *Caveat Emptor in Sales of Realty—Recent Assaults Upon the Rule*, 14 VAND. L. REV. 541, 572 (1961); Schwartz, *Defective Housing: Fall of Caveat Emptor*, 33 AM. TRIAL LAW. L.J. 122 (1970).

10. Winfield, *History of Negligence in the Law of Torts*, 42 L.Q. REV. 184, 187 (1926).

11. *Id.* at 195.

12. Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842). The general rule derived from *Winterbottom* was that a contracting party owed no duty, even in tort, to one not in privity of contract.

13. 140 Pa. 70, 21 A. 244 (1891).

14. Ford v. Sturgis, 14 F.2d 253 (D.C. Cir. 1926); Galbraith v. Illinois Steel Co., 133 F. 485 (7th Cir. 1904), *cert. denied*, 201 U.S. 643 (1906); Young v. Smith & Kelly Co., 124 Ga. 475, 52 S.E. 765 (1905); Daugherty v. Herzog, 145 Ind. 255, 44 N.E. 457 (1896).

15. The first exception to develop was the fraud analogy. Bryson v. Hines, 268 F. 290 (4th Cir. 1920); Pennsylvania Steel Co. v. Elmore & Hamilton

saults the rule of nonliability to third parties began to fade. Finally, in 1932 *Wright v. Holland Furnance Co.*[16] initiated a trend toward elimination of the privity rule. The wife was in privity with the contractor, but her husband and sons also filed suit to recover for loss of personalty caused by the contractor's negligence. The court held that their lack of privity would not preclude recovery.

The decision in *Wright* has now developed into an almost universal rule:[17] a contractor or builder is liable to all those who may foreseeably be injured by the structure both when his work is negligently performed[18] and when he negligently fails to disclose dangerous conditions.[19] In addition, vendors or grantors, while not generally liable for defective conditions after transfer of control and possession to the vendee, may be liable for negligence if they knowingly fail to disclose latent defects when there is reason to believe that the defects will not be discovered by the vendee.[20]

Conceding that the injured party may have a cause of action for negligence, the problem becomes whether the negligence theory provides sufficient protection by shifting losses to the builders. It is helpful to compare and contrast the positions of a plaintiff suing a chattel manufacturer for negligence and with a plaintiff suing a homebuilder for negligence since their problems and solutions are similar. In each case, establishing grounds for a shift of loss involves problems both of pretrial

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Constr. Co., 175 F. 176 (C.C.N.D.N.Y. 1909); Bray v. Cross, 98 Ga. App. 612, 106 S.E.2d 315 (1958); O'Brien v. American Bridge Co., 110 Minn. 364, 125 N.W. 1012 (1910); Ryan v. St. Louis Transit Co., 190 Mo. 621, 89 S.W. 865 (1905); Lechman v. Hooper, 52 N.J.L. 253, 19 A. 215 (Sup. Ct. 1890).

It was followed by the implied privity concept. McGuire v. Dalton Co., 191 So. 168 (La. App. 1939); Grodstein v. McGivern, 303 Pa. 555, 154 A. 794 (1931); *cf.* Barabe v. Duhrkop Oven Co., 231 Mass. 466, 121 N.E. 415 (1919).

The "inherently dangerous product" exception was then added. McCloud v. Leavitt Corp., 79 F. Supp. 286 (E.D. Ill. 1948); Johnston v. Long, 56 Cal. App. 2d 834, 133 P.2d 409 (1943); Cox v. Ray M. Lee Co., 100 Ga. App. 333, 111 S.E.2d 246 (1959); Holland Furnace Co. v. Nauracaj, 105 Ind. App. 574, 14 N.E.2d 339 (1938); Foley v. Pittsburgh-Des Moines Co., 363 Pa. 1, 68 A.2d 517 (1949).

Other novel devices used were the nuisance theory, Davey v. Turner, 55 Ga. App. 786, 191 S.E. 382 (1937); Ackerman v. Ellis, 81 N.J.L. 1, 79 A. 883 (Sup. Ct. 1911); Thompson v. Gibson, 7 M.&W. 456, 151 Eng. Rep. 845 (1841), and trespass, Little v. Argus Prod. Co., 78 F.2d 955 (10th Cir. 1935); Van Alstyne v. Rochester Tel. Corp., 163 Misc. 258, 296 N.Y.S. 726 (Rochester City Ct. 1937); Konskier v. B. Goodman, Ltd., [1928] 1 K.B. 421 (1927).

16. 186 Minn. 265, 243 N.W. 387 (1932).

17. W. PROSSER, *supra* note 8, at 681.

18. Moran v. Pittsburgh-Des Moines Steel Co., 166 F.2d 908 (3d Cir.), *cert. denied*, 334 U.S. 846 (1948); Hale v. Depaoli, 33 Cal. 2d 228, 201 P.2d 1 (1948); Hunter v. Quality Homes, 6 Terry 100, 68 A.2d 620 (Del. 1949); Kapalczynski v. Globe Constr. Co., 19 Mich. App. 396, 172 N.W.2d 852 (1969).

19. Rogers v. Scyphers, 251 S.C. 128, 161 S.E.2d 81 (1968); Gasteiger v. Gillenwater, 57 Tenn. App. 206, 417 S.W.2d 568 (1966).

20. *See, e.g.*, United States v. Inmon, 205 F.2d 681 (5th Cir. 1953); Parrott v. United States, 181 F. Supp. 425 (S.D. Cal. 1960); Combow v. Kansas City Ground Inv. Co., 218 S.W.2d 539 (Mo. 1949) (dictum); Sarnicandro v. Lake Developers, Inc., 55 N.J. Super. 475, 151 A.2d 48 (App. Div. 1959); McCabe v. Cohen, 294 N.Y. 522, 63 N.E.2d 88 (1945); Palmore v. Morris, 182 Pa. 82, 37 A. 995 (1897) (dictum). *Contra*, Smith v. Tucker, 151 Tenn. 347, 270 S.W. 66 (1925); Otto v. Bolton & Norris, 2 K.B. 46 (1936).

procedure and of proof. The major differnce is that the problems are not as acute in the case of a builder.

Once the plaintiff has a claim, he must determine the proper defendants. In the chattel manufacturing and distribution process, the product usually reaches the consumer only after being handled by a series of wholesalers, retailers and transporters. Under these circumstances, determining the negligent party is extremely difficult. A builder, however, must build the structure upon the site, after which he or his agent normally sells the home directly to the consumer. Since the agent is merely the representative of the builder, the latter is usually the only necessary defendant.

As important as finding the proper party is obtaining jurisdiction. In the chattel situation the plaintiff might experience difficulty in obtaining jurisdiction over an out-of-state manufacturer;[21] at least, it would be more difficult than obtaining jurisdiction over a builder who not only must build his product within the state but also must obtain a license to do so.[22] At the pretrial stage, then, the plaintiff usually faces greater difficulties in suing a chattel manufacturer than in suing a builder for negligence.

Once jurisdiction is obtained, the plaintiff experiences the same problems of proof of negligence whether he is suing a chattel manufacturer or a builder. It has been stated that negligence is the least difficult element of proof in a negligence action.[23] The problem of proof has been summarized as follows:

> It is true that [the plaintiff] has the burden of proof in the issue of negligence. It is true also that he seldom, if ever, has any direct evidence of what went on in the defendant's plant. But in every jurisdiction, he is aided by the doctrine of *res ipsa loquitur* . . . . And in cases against manufacturers, once the cause of harm is laid at their doorstep, a jury verdict for the defendant on the negligence issue is virtually unknown.[24]

Negligence theory has been expanded into a very broad and useful avenue of recovery for consumers or users of real property. Whether or not a user is in privity with the builder, he usually may recover his loss with the use of *res ipsa loquitur* and without proof of actual negligence as long as he is able to show proximate cause.

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21. The minimum contacts theory of jurisdiction has made great strides in some jurisdictions. *See generally* International Shoe Co. v. Washington, 326 U.S. 310 (1945); Phillips v. Anchor Hocking Glass Corp., 100 Ariz. 251, 413 P.2d 732 (1966); Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961); Hoagland v. Springer, 75 N.J. Super. 560, 183 A.2d 678 (App. Div. 1962). In many states the theory has not, however, replaced the "doing business" concept. *See* F. JAMES, JR., CIVIL PROCEDURE § 12.12 (1965).

22. *E.g.*, ARIZ. REV. STAT. ANN. § 32-1151 (1956).

23. Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099, 1114 (1960).

24. *Id.* at 1114-15 (citations omitted).

Implied Warranties

Due to the reign of caveat emptor, the theory of implied warranties in sales of realty was accepted much later than the negligence theory, but since its advent it has experienced rapid expansion. Almost all jurisdictions, however, continue to apply implied warranties narrowly in line with traditional warranty rules.[25]

Implied warranties in realty sales are of English origin, traceable to dictum in *Miller v. Cannon Hills Estates Ltd.*[26] After allowing recovery for an express warranty, the court continued by stating that in the sale of an *incomplete* home, the buyer is entitled to an implied warranty of fitness for habitation. As a later English case explained, the implied warranty is recognized because a buyer cannot inspect work which is incomplete and his contract of sale requires that the work be done in a workmanlike manner.[27]

The *Miller* rule was adopted by American courts without change.[28] Although there was a time lag between the introduction and acceptance of the rule, several jurisdictions applied it to the sale of incomplete structures.[29] Eventually, implied warranties underwent a significant change when the Supreme Court of Colorado in *Carpenter v. Donohoe*[30] recognized implied warranties in the sale of a *completed* home. The case eliminated the incongruous and inequitable difference in application between complete and incomplete structures. There was little justification for denying implied warranties to a buyer who purchased a home the day of completion when they would have been implied had he purchased the home the day before. *Carpenter* has since been followed in many other jurisdictions.[31]

The major obstacle facing consumers attempting to recover losses under an implied warranty theory is that it has not received general acceptance throughout the United States. Out of 25 states that have

25. See text accompanying notes 41-47 *infra.*
26. [1931] 2 K.B. 113.
27. Perry v. Sharon Dev. Co., [1937] 4 All E.R. 390, 395-96 (C.A.).
28. McKeever v. Mercaldo, 3 Pa. D.&C.2d 188, 192 (Montgomery Co. Ct. 1954).
29. Mulhern v. Hederick, 163 Colo. 275, 430 P.2d 469 (1967); Glisan v. Smolenske, 153 Colo. 274, 387 P.2d 260 (1963); Weck v. A:M Sunrise Constr. Co., 36 Ill. App. 2d 383, 184 N.E.2d 728 (1962); Vanderschrier v. Aaron, 103 Ohio App. 340, 140 N.E.2d 819 (1957); Jones v. Gatewood, 381 P.2d 158 (Okla. 1963); Hoye v. Century Builders, Inc., 52 Wash. 2d 830, 329 P.2d 474 (1958).
30. 154 Colo. 78, 388 P.2d 399 (1964).
31. *See* Wawak v. Stewart, 247 Ark. 1093, 449 S.W.2d 922 (1970); Vernali v. Centrella, 28 Conn. 476, 266 A.2d 200 (1970); Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966); Crawley v. Terhune, 437 S.W.2d 743 (Ky. 1969); Weeks v. Slavick Builders, Inc., 24 Mich. App. 621, 180 N.W.2d 503 (1970); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965); Waggoner v. Midwestern Dev. Co., 83 S.D. 57, 154 N.W.2d 803 (1967); Rutledge v. Dodenhoff, 254 S.C. 407, 175 S.E.2d 792 (1970); Humber v. Morton, 426 S.W.2d 554 (Tex. 1968); Rothberg v. Olenik, — Vt. —, 262 A.2d 461 (1970); House v. Thorton, 76 Wash. 2d 428, 457 P.2d 199 (1969).

considered the question, 10 have denied any application of the rule[32] while the remainder either applied it to incomplete[33] or all structures.[34] The definite trend, however, is toward adoption of the principle for all structures.[35]

A potential impediment to the expansion of the warranty theory to other jurisdictions is a class of statutes prohibiting implied covenants in the transfer of real property.[36] Although the issue has been rarely litigated, the attitude until recently was that these statutes prohibited implied warranties.[37] Two recent cases have circumvented the statutes.[38]

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32. Druid Homes, Inc. v. Cooper, 272 Ala. 415, 131 So. 2d 884 (1961); Voight v. Ott, 86 Ariz. 128, 341 P.2d 923 (1959); Murphy v. Sheftel, 121 Cal. App. 533, 9 P.2d 568 (1932); Walton v. Petty, 107 Ga. App. 753, 131 S.E.2d 655 (1963); Tudor v. Heugel, 132 Ind. App. 579, 178 N.E.2d 442 (1961); Allen v. Wilkinson, 250 Md. 395, 243 A.2d 515 (1968); Whaler v. Milton Constr. & Supply Co., 241 S.W.2d 23 (Mo. App. 1951); Staff v. Lido Dunes, Inc., 47 Misc. 2d 322, 262 N.Y.S.2d 544 (1965); Mitchem v. Johnson, 7 Ohio St. 2d 66, 36 Ohio Ops. 2d 52, 218 N.E.2d 594 (1966); Steiber v. Palumbo, 219 Ore. 479, 347 P.2d 978 (1959).

33. Weck v. A:M Sunrise Constr. Co., 36 Ill. App. 2d 383, 184 N.E.2d 728 (1962); Jones v. Gatewood, 381 P.2d 158 (Okla. 1963); McKeever v. Mercaldo, 3 Pa. D.&C.2d 188 (Montgomery Co. Ct. 1954).

34. See cases cited note 31 *supra*.

35. The trend is illustrated by the following chart which also reflects (1) the present status of the law in those jurisdictions which have considered the issue of implied warranties in the sale of realty and (2) the date the present law was adopted.

APPLICATION OF DOCTRINE

Year	*None*	*To Incomplete Structures*	*To Complete Structures*
1932	Cal.		
1951	Mo.		
1954		Pa.	
1959	Ariz., Ore.		
1961	Ala., Ind.		
1962		Ill.	
1963	Ga.	Okla.	
1964			Colo.
1965	N.Y.		N.J.
1966	Ohio		Idaho
1967			S.D.
1968	Md.		Tex.
1969			Ky., Wash.
1970			Ark., Conn., Mich., S.C., Vt.

36. *See, e.g.*, CAL. CIV. CODE § 1113 (1954); MICH. REV. STAT. ANN. § 26.524 (1970); TEX. REV. CIV. STAT. ANN. art. 1297 (1962). ARIZ. REV. STAT. ANN. § 33-435(A) (1956) provides:

> A. If the word 'grant' or the word 'convey' is used in a conveyance by which an estate of inheritance or fee simple is to be passed, the following covenants and none other, on the part of the grantor for himself and his heirs, to the grantee and his heirs and assigns, are implied unless restrained by express terms contained in the conveyance:
>
> 1. That previous to the time of execution of the conveyance the grantor has not conveyed the same estate or any right, title or interest therein to any person other than the grantee.
>
> 2. That the estate is at the time of execution of conveyance free from encumbrances.

37. Gustafson v. Dunham, Inc., 204 Cal. App. 2d 10, 22 Cal. Rptr. 161 (Ct. App. 1962); Liberty Bldg. Co. v. Royal Indem. Co., 177 Cal. App. 2d 583,

To say that if a court may recognize an implied warranty in the sales agreement then it may also recognize it in the deed where it is prohibited by statute, however, either renders the statute meaningless or transforms warranty into a tort concept.[39] Thus Texas has announced that their warranties are in tort and not sale.[40]

Once a consumer finds a forum receptive to the implied warranty concept, he is then presented with the issue of privity. True implied warranties[41] are parasitic to a sale and as such are subject to the rules of sales.[42] Consequently, except for New Jersey,[43] all jurisdictions recognizing implied warranties in realty sales require privity between the builder and plaintiff. Although none of the cases implying warranties have expressly stated this requirement, it has been tacitly approved[44] and is apparent in the cases.[45]

A further element of the consumer's case is that of establishing that the type of defect involved is covered by the general warranties courts are willing to imply. Although courts have continuously applied only general warranties of habitability and good workmanship,[46] these warranties have been construed to include almost any type of defect.[47]

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2 Cal. Rptr. 329 (Ct. App. 1960); Steiber v. Palumbo, 219 Ore. 479, 347 P.2d 978 (1959); Polk Terrace, Inc. v. Curtis, 422 S.W.2d 603 (Tex. App. 1967).

38. Weeks v. Slavick Builders, Inc., 24 Mich. App. 621, 180 N.W.2d 503 (1970); Humber v. Morton, 426 S.W.2d 554 (Tex. 1968).

39. *See* Humber v. Morton, 426 S.W.2d 554 (Tex. 1968). For an attempt to rationalize the Texas decision to ignore the statutory prohibition, see Comment, *Builder-Vendor's Implied Warranty of Good Workmanship and Habitability*, 1 TEX. TECH. L. REV. 111, 120 (1969).

40. Humber v. Morton, 426 S.W.2d 554 (Tex. 1968). "[G]enerally in Texas, the notion of implied warranty arising from sales is considered to be a tort rather than a contract concept."

41. The phrase "true implied warranty" refers to warranty as it was known before courts began the questionable habit of attaching it as a label to what was actually strict liability. The former use of the term is now returning. *See* Shannon v. Butler Homes, Inc., 102 Ariz. 312, 315, 428 P.2d 990, 993 (1967).

42. The interrelation between sale and warranty was one of the major arguments for abrogating implied warranty in favor of strict liability in chattel law. *See* Prosser, *supra* note 23, at 1117-19.

43. Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965). Although *Schipper* is primarily known as a strict liability case, the court also held that the plaintiff, who was not in privity, could maintain his action upon an implied warranty theory. The elimination of privity was consistent with New Jersey's earlier elimination of privity in chattel cases. *See* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960). Since the advent of strict liability, implied warranties without privity are unnecessary and should become rare.

44. Wawak v. Stewart, 247 Ark. 1093, 449 S.W.2d 922 (1970).

45. *See, e.g.*, F.&S. Constr. Co. v. Berube, 322 F.2d 782 (10th Cir. 1963); Vernali v. Centrella, 28 Conn. Supp. 476, 266 A.2d 200 (Litchfield City Super. Ct. 1970); Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966); Weeks v. Slavick Builders, Inc., 24 Mich. App. 621, 180 N.W.2d 503 (1970). *Contra*, Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965).

46. *Accord*, New Home Constr. Corp. v. O'Neill, 373 S.W.2d 798 (Tex. Civ. App. 1964).

47. *See* Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1964) (warranty of compliance with local building codes); Vernali v. Centrella, 28 Conn. Supp. 476, 266 A.2d 200 (Litchfield City Super. Ct. 1970) (warranty of work in accordance with good usage and accepted practices); Moore v. Werner, 418 S.W.2d 918 (Tex. Civ. App. 1967) (warranty to furnish adequate materials); House v. Thorton, 76 Wash. 2d 428, 457 P.2d 199 (1969) (warranty of firm foundation).

Hence, the scope of implied warranties is usually not a limitation upon the consumer's action.

The concept of implied warranties has expanded rapidly to provide another broad remedy to the consumer of real property. In an increasing number of jurisdictions, a purchaser may expect to recover any loss shown to be proximately caused by a breach of the liberally interpreted warranties of good workmanship and habitability.[48] Hopefully, courts will continue to recognize warranty as a contract remedy and leave those cases which do not fit within contract rules to tort remedies.

Strict Liability

Strict liability as applied to the sale of defective realty is a relatively new concept. Its origins are traceable to the development of strict liability in chattel law.

It appeared initially that the adoption of strict liability in the realty area would engender an era of confusion between the concepts of implied warranty and strict liability similar to the one which occurred in the chattel area. The court in *Schipper v. Levitt & Sons, Inc.*[49] referred to the theories concurrently and failed to enumerate what they believed to be the basic distinctions. Their decision was followed by *Humber v. Morton*[50] in which the court introduced the hybrid concept of tort warranties.

Fortunately, *Schipper* also introduced an analogy between strict liability in the chattel and realty areas and presented a method of avoiding the confusion between warranty and strict liability. Of primary importance to the analogy is the continually expanding definition of "product" to which the chattel theory applies. At its inception in the chattel area, "product" included food and drink. That was the definition adopted in the first draft of section 402A of the *Restatement (Second) of Torts*.[51] A second draft was immediately proposed to include products for intimate body use.[52] Finally, on the strength of *Greenman v. Yuba Power Products, Inc.*,[53] which applied strict liability to the seller of a power tool, a third draft was drawn to include "any product."[54]

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48. See note 35 *supra*.
49. 44 N.J. 70, 207 A.2d 314 (1965).
50. 426 S.W.2d 554 (Tex. 1968).
51. RESTATEMENT (SECOND) OF TORTS § 402A (Tent. Draft No. 6, 1961).
52. RESTATEMENT (SECOND) OF TORTS § 402A (Tent. Draft No. 7, 1962).
53. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).
54. RESTATEMENT (SECOND) OF TORTS § 402A (1965) provides:
(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
(a) the seller is engaged in the business of selling such a product, and
(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

The broad scope of "any product" under section 402A encouraged an analogy between the manufacture and distribution of chattels and realty products, and *Schipper* was a perfect vehicle for that analogy. Levitt in mass production fashion had designed, constructed and sold the Schipper residence without installing a mixing valve in the hot water system. When the 16-month-old son of the lessee of the original purchaser climbed into the bathroom sink and turned on the water, he was severely injured by its scalding temperature. The Supreme Court of New Jersey thought the circumstances were sufficient to hold the builder strictly liable. The court concluded that there were no meaningful distinctions between the mass production of automobiles and the mass production of homes.

State Stove Manufacturing Co. v. Hodges[55] moved far beyond the basic analogy. There, a hot water heater exploded due to a builder's failure to install a pressure relief valve and destroyed a house and its contents while the occupants of the home were away. Although the case was presented to the court entirely upon a negligence theory,[56] the

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(2) The rule stated in Subsection (1) applies although
(a) the seller has exercised all possible care in the preparation and sale of his product, and
(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Although section 402A has been criticized as an overly broad restatement of the status of strict liability at the time the section was adopted, Titus, *Restatement (Second) of Torts Section 402A and the Uniform Commercial Code,* 22 STAN. L. REV. 713, 714-15 (1970), its widespread and uncritical acceptance by the courts makes it accurate at this time. O.S. Stapley Co. v. Miller, 103 Ariz. 556, 447 P.2d 248 (1968); Garthwait v. Burgio, 153 Conn. 284, 216 A.2d 189 (1965); Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965); Dealers Transp. Co. v. Battery Distrib. Co., 402 S.W.2d 441 (Ky. App. 1965); Meche v. Farmers Drier & Storage Co., 193 So. 2d 807 (La. App. 1967); McCormack v. Hankscraft Co., 278 Minn. 322, 154 N.W.2d 488 (1967); State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966); Williams v. Ford Motor Co., 411 S.W.2d 443 (Mo. App. 1966); Heaton v. Ford Motor Co., 248 Ore. 467, 435 P.2d 806 (1967); Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966); Ford Motor Co. v. Lonon, 217 Tenn. 400, 398 S.W.2d 240 (1966) (dictum); McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787 (Tex. 1967); Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

Any present criticism might be that section 402A is too restrictive in some respects. *See, e.g.,* Caruth v. Mariani, 11 Ariz. App. 188, 463 P.2d 83 (1970); Price v. Shell Oil Co., 2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970); Cova v. Harley Davidson Motor Co., 26 Mich. App. 602, 182 N.W.2d 800 (1970). Those extensions of the restatement which have been made, however, remain peculiar to individual jurisdictions and do not constitute general rules.

55. 189 So. 2d 113 (Miss. 1966).

56. The cause of action at trial was plead and argued on a negligence theory. No attorney for any party mentioned strict liability in the trial court, nor did the trial judge in rendering his decision. On appeal to the Supreme Court of Mississippi, strict liability was neither discussed in the briefs nor mentioned in the oral arguments. The supreme court did not call for briefs on the issue. Thus, strict liability was applied to realty for the first time in Mississippi without the benefits of the advocacy process. Counsel for each party in *State Stove* have affirmed that no argument was ever presented regarding the applicability of strict liability to defective realty. Letter from Junior O'Mara, Aug. 3, 1971; Letter from Taylor B. Smith, Nov. 16, 1971; Letter from W. H. Jolly, Sr., Nov. 18, 1971. [All letters are on file in the offices of ARIZONA LAW REVIEW.] This is undoubtedly the type of case of which Professor Titus spoke when he noted the " 'overanxiousness' of

Supreme Court of Mississippi found that the home was a product "in a defective condition and was not reasonably safe for its intended purpose,"[57] thereby recognizing that realty qualifies as "any product" under section 402A.

The extension of strict liability to realty by California has shown how quickly courts will move toward the outer limits once strict liability is accepted. In *Kriegler v. Eichler Homes, Inc.*[58] a mass builder-vendor had constructed the home with a radiant heating system which failed to function after several years. While ostensibly adhering to the rule that there must be property damage before strict tort liability is applicable,[59] the court of appeals applied strict liability to cover a diminution in value of the house, an economic loss.[60] The same court announced a second extension of strict liability in *Avner v. Longridge Estates*[61] where it recognized that a manufacturer of a defective lot could be held strictly liable for damages resulting from the manufacturing process. Thus, in California strict liability now encompasses defective lots and economic loss.

Although these realty cases reveal a substantial similarity to the concepts of section 402A, they present novel problems which distinguish them from chattel cases. The decision of the Supreme Court of Mississippi to apply section 402A to defective realty without expressing its reasons and without argument from the parties is unfortunate.[62] That decision's lack of precedential value is evident from the fact that it was not mentioned in either *Kriegler* or *Avner,* although the *Avner* court was aware of the lack of precedent and of the Mississippi decision.[63]

Whether section 402A is applied to realty or a concept of strict liability tailored specifically for realty is developed, the essence of application will be the same: The plaintiff must prove that he has suffered a loss caused by a defect in the realty and that the defect existed when the product left the defendant's control.[64]

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courts to take part in the 'dramatic fall of the citadel.'" Titus, *supra* note 54, at 715.

57. State Stove Mfg. Co. v. Hodges, 189 So. 2d 113, 123 (Miss. 1966).

58. 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (Ct. App. 1969).

59. Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

60. *See* note 167 *infra.*

61. 272 Cal. App. 2d 607, 77 Cal. Rptr. 633 (Ct. App. 1969). The facts of the case do not indicate that Longridge Estates was a mass builder-vendor. Rather, that fact is drawn from Price v. Shell Oil Co., 2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970), wherein the Supreme Court of California cited both *Kriegler* and *Avner* as cases applying strict liability to mass producers.

62. State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966). The opinion of the court does not indicate why the court believed strict liability was applicable to real property sales or why it believed realty cases should be subject to the same strict liability concepts as chattels.

63. Brief for Appellant at 26, Avner v. Longridge Estates, 272 Cal. App. 2d 607, 77 Cal. Rptr. 633 (Ct. App. 1969).

64. *See* State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965).

Impact of Strict Liability

The applicability of strict liability in the chattel area has reduced the use of implied warranties primarily due to the fact that strict liability eliminates the requirements of privity and notice of the defect to the seller.[65] By contrast, the emergence of the strict liability theory in the realty area is not likely to have a similar retarding effect upon implied warranty theory because the notice requirement does not apply in the sale of realty and the plaintiff is frequently in privity.[66] Hence, the use of the implied warranty theory should not significantly decline.

The application of strict liability theory in the chattel area has not decreased the utility of negligence theory because strict liability does not offer the plaintiff a significant advantage over negligence theory. It is true that under strict liability the plaintiff is not required to prove negligence. He is required to prove, however, that a defect existed in the product at the time it left the defendant's control. Proving the latter may be as difficult as proving the former, especially if negligence actually is the simplest element of proof in a negligence case.[67] If courts begin to apply *res ipsa loquitur* to strict liability situations, however, strict liability will offer a significant advantage over negligence. A plaintiff could establish a prima facie case by proving only that he was injured by a defective product and the burden of proving that the defect did not occur from the design or manufacture would shift to the defendant.[68]

If strict liability is as burdensome to prove as the other theories[69] and if it rarely changes the outcome of the case,[70] then it is difficult to understand the bitter contest over its adoption in the chattel area and why a similar contest is likely in the realty area. The "third chance" concept may be the heart of the dispute. As the three theories have developed, each has become a nonexclusive alternative basis of liability which the plaintiff may allege and prove in a single case.[71] Accordingly, potential defendants vehemently oppose the recognition of an additional theory against which they must defend. If the three jurisdictions which have recognized strict tort liability with regard to realty are indicative of the future, it seems that these potential defendants will lose the battle. Hence, it is necessary to ascertain whether this new application of strict tort liability is a justifiable addition to the existing remedies in the realty area.

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65. UNIFORM COMMERCIAL CODE § 2-607(3) (1962).
66. The frequency of privity in realty law is much higher than in chattel law because the purchaser usually buys directly from the builder.
67. Prosser, *supra* note 23, at 1114.
68. *See* Caruth v. Mariani, 10 Ariz. App. 277, 283, 458 P.2d 371, 377 (1969), *modified on other grounds*, 11 Ariz. App. 192, 463 P.2d 87 (1970).
69. Prosser, *supra* note 23, at 1114.
70. *Id.*
71. *See* Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965).

UNDERLYING RATIONALES OF STRICT LIABILITY

Various reasons have been advanced for the adoption of strict liability in regard to chattels, but only four have been convincing to the courts: reduction of litigation, induced reliance, social pressure and enterprise liability.[72] In the chattel cases, no single factor has emerged as controlling nor has there been any indication that any combination of factors is required to justify an adoption of strict tort liability. Instead, the presence of any one of the factors is only some support for an adoption of strict liability. The proponents of strict liability now appear prepared to advance these arguments in realty cases.[73]

Reduction of Litigation

As noted previously,[74] the manufacture and distribution of movable goods present special problems, one of which is illustrated in *Kasler & Cohen v. Slavouski.*[75] The manufacturer produced dyed furs which were resold until they reached the consumer on the fifth sale. The consumer promptly developed "fur dermatitis" and sued the retailer for breach of warranty. Each party then passed the cost up the line until the producer eventually absorbed the loss. Because of the protracted litigation, there was a considerable loss of time, and the producer's ultimate cost was over 200 percent greater than the consumer's recovery. This type of case precipitated the argument that if manufacturers were held strictly liable to consumers, then the waste of time and money could be eliminated. The risk that some procedural point might break the chain between the two would also be eliminated. This avoidance of circuitous litigation with its accompanying savings was justifiable since implied warranty and strict liability are substantively very similar.

There are two reasons that this approach cannot be applied to the construction and sale of real property. First, the majority of states will not imply warranties in the sale of realty either because the states have found the reasons for doing so unconvincing[76] or because warranties are prohibited by statute.[77] In those states, the recovery must be based upon a negligence action which is substantively too dissimilar to strict liability to allow the transformation on the ground of expediency.

Second, there would not be a noticeable reduction in litigation because the builder usually sells directly to the consumer. Therefore, the suit will be initiated directly against the builder without an intermediate chain of suits. It is evident that the reduction of litigation is not an im-

72. *See generally* Prosser, *supra* note 23, at 1120-24.
73. Brief for Appellant at 18-27, Avner v. Longridge Estates, 272 Cal. App. 2d 607, 77 Cal. Rptr. 633 (Ct. App. 1969); Brief for Appellant at 22-30, Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965).
74. See text following note 20 *supra.*
75. [1928] 1 K.B. 78 (1927).
76. See cases cited note 32 *supra.*
77. See text accompanying notes 36-40 *supra.*

portant factor in deciding whether strict liability should be applied to the sale of realty. Courts must rest their decisions upon other factors.

Reliance

A second basis for strict liability, induced reliance, appears to raise similar questions whether applied to chattels or realty. The manufacturer possesses superior skills and by marketing his product he represents that it is safe, thereby inducing the reliance of the consumer. When that process led to injuries or losses, it was thought that the manufacturer should not escape responsibility.[78] This concept is the foundation of the warranty theories,[79] but it is insufficient to support broad applications of strict liability.

Comment *m* accompanying section 402A is the best indication that the reliance theory is now recognized as being more restrictive than strict liability. The American Law Institute stated that the consumer is not required to rely upon the reputation, skill or judgment of the seller who may be held strictly liable. Consequently, a seller may be held strictly liable even though he might have been unknown at the time of injury. The cases involving bystanders, who often recover, provide an excellent illustration.[80] The first rationale for allowing bystanders to recover is that manufacturers are liable for all foreseeable harm.[81] Second, bystanders, unlike consumers, have not had a chance to protect themselves and are therefore in a better position than consumers to assert strict liability.[82] A further illustration of the erosion of the reliance approach is the use of strict liability to protect infants who could hot have relied upon the seller or builder.[83]

It appears reasonably certain that induced reliance is superfluous to strict liability. Consumers have stronger cases when they have relied upon the builder, but the same result is reached in the absence of reliance. Under these circumstances, induced reliance cannot be an extensive justification for strict liability.

Social Pressure

The importance of public pressure should not be overlooked when contemplating an adoption of strict liability. If the public convinces the

78. W. PROSSER, *supra* note 8, § 97 at 651.
79. *Id.*
80. *See, e.g.*, Caruth v. Mariani, 11 Ariz. App. 188, 463 P.2d 83 (1970); Elmore v. American Motors Corp., 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969); Toombs v. Fort Pierce Gas Co., 208 So. 2d 615 (Fla. 1968); Piercefield v. Remington Arms Co., 375 Mich. 85, 133 N.W.2d 129 (1965); Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966).
81. Elmore v. American Motors Corp., 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969).
82. Caruth v. Mariani, 11 Ariz. App. 188, 463 P.2d 83 (1970).
83. *See* Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 91, 207 A.2d 314, 325-26 (1965). While the court paid lip service to the reliance reasoning, it failed to relate the reasoning to the infant's basis for recovery.

courts or legislatures that the change would provide substantially improved public protection, the battle is won.[84] Such a public outcry has occurred previously.[85]

The prognosis is that a convincing public movement for the protection of the homebuyer is not likely. Although homes are being built at a record rate to accommodate the expanding population,[86] the proportion of the national population moving into new homes each year remains low.[87] The added fact that most purchasers do not experience significant defects[88] with a new home combines to produce a small core for the base of any movement.

Finally, the central concern of other movements was human health.[89] There have been only one strict liability or implied warranty

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84. As to the goal of improving public protection, one author seems correct in stating that reduction of accidents by applying strict liability to manufacturers is a figment of the imagination of law professors. *See* Prosser, *supra* note 23, at 1119.

The safety argument might bear more validity if the builder used more mechanized procedures. A chattel manufacturer can improve his product by replacing human error with high tolerance machinery. The builder, however, is forced to continue building in almost the same manner as he did early in this century. *See generally* B. KELLY & ASSOCIATES, DESIGN AND THE PRODUCTION OF HOUSES (1959); STAFF OF THE JOINT ECONOMIC COMM., 91ST CONG., 1ST SESS., INDUSTRIALIZED HOUSING (Comm. Print 1969). Even today when nine-tenths of the builders construct more than five houses a year and the craft builder is rapidly vanishing, a high percentage of the work is still done locally by workmen organized along old craft lines. B. KELLY, *supra*, at 349. The builder has not become industrialized but simply employs more workers and consequently produces more hand-crafted homes. STAFF OF THE JOINT ECONOMIC COMM., *supra*, at 41. Technological advance in housing has been limited mainly to making minor improvements within the conventional framework. *Id.* at 42.

Reliable predictions about the potential advantages of future construction technology are difficult to make. Major technological breakthroughs have been "just around the corner" for forty years. While much has been done to industrialize both the product and process, the revolutionary transformation of construction has not, in fact, occurred. *Id.* at 60.

85. One movement was the struggle for workmen's compensation. It grew from an industrial expansion and a dispute as to the most effective means of compensating injuries and redistributing the loss. *See* Bohlen, *A Problem in the Drafting of Workmen's Compensation Acts*, 25 HARV. L. REV. 328, 330 (1911). Today's workmen's compensation laws represent a legislative compromise which accomplished the goals of each philosophy. Another public drive for change occurred later in the campaign to police the food and drug industry. Regier, *The Struggle for Federal Food and Drugs Legislation*, 1 LAW & CONTEMP. PROB. 3 (1933). *See also* Comment, *Streenz v. Streenz: The End of an Era of Parental Tort Immunity*, *infra* p. 720.

86. The monetary expenditure per year for residential construction more than tripled between 1946 and 1970. There were 14 million housing starts in the 1960's and 26 million are expected in the 1970's. *Building*, 1 STANDARD & POOR'S INDUSTRIAL SURVEYS B65, B67-68 (1971).

87. In 1970, the United States population was 203,285,000. U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, POCKET DATA BOOK USA 1971, at 37 (1971) (Table 1). The average household contained 3.17 persons. *Id.* at 53 (Table 22). In the same year, there were 1,434,000 housing units completed. U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, CONSTRUCTION REPORTS: HOUSING COMPLETIONS 3 (PUB. NO. C22-71-1, 1971). Accordingly, there was a supply of new housing for only 2.2 percent of the total population in 1970.

88. What constitutes a significant defect, of course, varies with the position of the parties. *See* text accompanying note 92 *infra*.

89. See note 85 *supra*.

case[90] and very few negligence cases[91] involving personal injuries as a result of defective realty. The overwhelming majority of loss has been property damage. The frequency of property damage, however, is disputable since statistics of this nature are unavailable. Certainly, the frequency of defects or damage cannot be ascertained from the interested parties. Situations like *New Home Construction Corp. v. O'Neill*[92] where the owner alleged 108 defects, the builder denied them all, and an independent party found 11 justified, are common.

With or without a movement, there is and will continue to be controversy as to public priorities. Already there is a sector voicing concern for the unfortunate homebuyer who suffers a loss and has no recourse when either there has been no negligence or he cannot prove negligence. The opposition these persons face is a present national concern for producing sufficient standard housing. Congress has provided incentives and financing to accomplish that national goal, especially in regard to the urban poor.[93] The present concern seems to be with the predicament of the homebuilder in his struggle to produce sufficient standard housing while being faced with problems attributable to inflation, unions, and regulatory agencies[94] rather than with the problems of the buyer. Reducing the friction between the two goals in order to meet them both is not an impossibility, as the workmen's compensation laws exemplified. The friction which is created by this type of public pressure is most efficiently relieved by well-studied legislative programs which are designed to accomplish both goals, comprehensively and uniformly.

Indications that public pressure is unlikely to materialize in the housing industry provide scant refuge for the builders as it is already evident that public movements are unnecessary for the adoption of strict liability. If the homebuyer's position at present is truly inequitable, the courts may adopt an expanded doctrine of strict liability on a basis of social awareness rather than await legislative action. When strict liability was extended from food products to all products, increased social awareness replaced the public movement.[95] If the decided cases[96]

90. Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 307 A.2d 314 (1965).

91. Moran v. Pittsburgh-Des Moines Steel Co., 166 F.2d 908 (3d Cir.), *cert. denied*, 334 U.S. 846 (1948); Hale v. Depaoli, 33 Cal. 2d 228, 201 P.2d 1 (1948); Kapalczynski v. Globe Constr. Co., 19 Mich. App. 396, 172 N.W.2d 852 (1969); Rogers v. Scyphers, 251 S.C. 128, 161 S.E.2d 81 (1968); Gasteiger v. Gillenwater, 57 Tenn. App. 206, 417 S.W.2d 568 (1966).

92. 373 S.W.2d 798 (Tex. Civ. App. 1964).

93. *See* Housing & Urban Development Act of 1965, Pub. Law No. 89-117, tit. I, 79 Stat. 451 (codified in scattered sections of Titles 12, 38 & 42 U.S.C.).

94. *See, e.g.*, Symposium, *Housing*, 32 LAW & CONTEMP. PROBS. 189 (1967); *Id.* at 371; Seligman, *Wanted—A New Foundation for Housing*, THE MAG. OF WALL ST. & BUS. ANALYST, Oct. 11, 1969, at 32; Williams, *Low-cost Housing is a Homeless Waif*, IRON AGE, Sept. 11, 1969, at 63; *Industry Eyes Housing Field Warily*, AV. WORLD & SPACE TECH., Sept. 15, 1969, at 113; *Housing Officials Score Prime Rate Hike*, ENG. NEWS-RECORD, Jul. 3, 1969, at 47; *Housing Slumps Again*, FIN. WORLD, Jan. 7, 1970, at 3.

95. *See generally* Titus, *supra* note 54, at 313-15. For a discussion of a similar

are indicative of the future course in regard to realty, the procedure will be the same and the extension will require only an analogy between a house and an automobile.

Enterprise Liability

The fourth traditional basis for strict liability is enterprise liability. The philosiophy is not new[97] and is sometimes labeled the "superior risk bearer"[98] or "risk spreading"[99] theory. Under any title, it appears to be gaining momentum in the products liability field—specifically in the realty area.[100] Before examining its elements, however, the dichotomous nature of the concept should be noted. Enterprise liability may be viewed as a separate remedy similar to absolute liability which does not require a defective product. The other use of enterprise liability is as a justification for applying a strict liability theory which requires a defective product.

Justice Traynor constructed a rough framework for enterprise liability in his *Escola* dissent.[101] In his opinion, if the consumer is exposed to a constant and general risk of injury by products, there is a need for constant general protection, and the manufacturer is in the best position to provide that protection.[102] The point of departure for the development of the rationale was articulated by Professor James:

> Strict liability is to be preferred over a system of liability based on fault whenever you have an enterprise or activity, beneficial to many, which takes a more or less inevitable accident toll of human life and limb. This is true at least where the accident victims are as a class economically ill-equipped to carry the burden of serious accident losses.[103]

The major goal of this ideology is a distribution of losses in a manner which minimizes the losses to the individual and society.[104] Implicitly, the most important factor in realizing this goal, as stated by Professor James, is the application of the theory to builders sufficiently sol-

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phenomenon in the abrogation of tort immunities, see Comment, *Streenz v. Streenz: The End of an Era of Parental Tort Immunity*, 13 ARIZ. L. REV. 720 (1971).

96. *See generally* Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (Ct. App. 1969); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965).

97. *See generally* Bohlen, *supra* note 85.

98. Note, *Real Property: Builder-Vendors: Liability for Negligence and for Breach of Implied Warranty of Habitability*, 51 CORNELL L. REV. 389, 395 (1966).

99. *See* Prosser, *supra* note 23, at 1120.

100. *See generally* Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (Ct. App. 1969); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965).

101. Escola v. Coca Cola Bottling Co., 24 Cal. 2d 543, 461, 150 P.2d 436, 440 (1944).

102. *Id.* at 462, 150 P.2d at 441.

103. James, *General Products—Should Manufacturers be Liable Without Negligence?*, 24 TENN. L. REV. 923 (1957).

104. *Id.*

vent to absorb the losses and to later redistribute them to other buyers. Whether builders appear able to accomplish this task is a function of the vantage point. If the builders are considered as an industry, their class ability to sustain the loss appears better than the class ability of the buyers. An analysis of individual builders in the industry, however, indicates that the ability to perform the risk-spreading role varies greatly among them.

Presumably Levitt Corporation,[105] a subsidiary of International Telephone and Telegraph, could spread large losses. Levitt-sized corporations, however, are few. The 1967 census of the construction industry provides enlightening facts on this subject. Of the 13,237 builder-vendors[106] surveyed, 12 percent of the builders earned over 45 percent of the group's net income, while the other 88 percent earned less than 55 percent of the total. At the extremes of the classifications, those who employed four or fewer persons made up over 70 percent of those surveyed and earned only 35 percent of the total net income while those employing 250 persons or more were less than 0.5 percent of the group with almost 2.5 percent of the earnings. The conclusion drawn from these statistics is that there is a small group of builders producing a large volume of homes who presumably would be capable of withstanding the added burden under a strict liability theory. Conversely, there is a large group of small builders who might be incapable of operating under strict liability.[107] Those falling between the two extremes could be categorized in either group depending upon individual circumstances.

To the layman, notwithstanding those percentages, it would appear that even the average small builder still holds the edge in the ability to absorb the loss. The traditional financial structure of construction firms, however, is composed of a low capital base with construction on borrowed funds.[108] Typically, a builder will construct a structure worth far more than the net worth of the construction firm.[109] Under these circumstances, even if a builder who produces five homes per year is able to withstand a loss occasioned by the application of strict tort liability, he will probably price himself out of the market by trying to spread the loss. In this situation the balance sought by Professor James between losses to individuals and society would not be achieved.

The court in *Schipper* did not consider the individual builder's abil-

105. Formerly, Levitt & Sons, Inc., the defendant in the *Schipper* case.

106. 1 U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, 1967 CENSUS OF THE CONSTRUCTION INDUSTRIES 24, at 24-5 (1971) (Table 3). The reader should note that the survey was of builder-vendors and not contractors who traditionally build on a smaller scale.

107. If Dean Prosser is correct in stating that the adoption of strict liability would only change the result of one case in one hundred, Prosser, *supra* note 23, at 1114, then the added burden to the builder as a class might be insignificant.

108. *See* Poulton, *Property Damage Liability for Completed Work of Contractors,* 22 CHART. PROP. & CAS. UND. ANNALS 19 (1969).

109. *Id.*

ity to absorb the risk. It presumed the availability of adequate extended insurance coverage to such modern entrepreneurs.[110] Not only are builders rarely covered for casualties after the sale, but obtaining post-completion insurance is a practical impossibility.[111] The standard insurance forms exempt the insurance companies from damage caused by either defective work or products[112] or from damage after completion.[113] Most liability underwriters refuse to amend these exclusions because they are not willing to assume such risks even with additional premium.[114] Unless and until post-completion insurance becomes generally available to builders, the assumption in *Schipper* should not be repeated.

Summary

While the various reasons advanced for applying strict liability to the production of realty cannot be weighed and balanced to derive a general rule for the applicability of strict liability in specific fact situations, several points are clear. The reduction-of-litigation and induced-reliance arguments provide insufficient support for the contemplated extension. It is the social conscience of the courts and enterprise liability which most accurately explain this new application of strict liability. Perhaps these two bases will be sufficient to sustain Dean Prosser's prediction[115]

110. Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 87, 207 A.2d 314, 323 (1965).
111. Poulton, *supra* note 108.
112. Lloyd's Form *B* of 1960 excludes:

> Claims for repairing or replacing any defective product or products manufactured, sold or supplied by the Assured or any defective part or parts thereof or for damage to that particular part of any property upon which the Assured is or has been working caused by the faulty manner in which the work has been performed.

Poulton, *supra* note 108, at 22. Eichler Homes was insured under Form *B*. The sub-floor heating system in 21 homes built by Eichler malfunctioned and Eichler presented its claims to the underwriters, who subsequently denied liability on the grounds that the houses were defective products of the assured and that the tubing was of defective workmanship. Eichler then sued the underwriters. The court held that the insurance company had a duty to defend Eichler, but did not decide whether the underswriters were liable. Eichler Homes, Inc. v. Underwriters at Lloyd's, London, 238 Cal. App. 2d 532, 47 Cal. Rptr. 843 (Ct. App. 1965). The cases against Eichler were then settled out of court, except the subsequent case of Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (Ct. App. 1969).
113. The October, 1966, Comprehensive General Liability Policy form excludes the following as to *completed work*:

> Property damage (1) to premises alienated by the named insured arising out of such premises or any part thereof or (2) to work performed by or on behalf of the named insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith.

Poulton, *supra* note 108, at 23.
114. Poulton, *supra* note 108, at 23.
115. It appears that Dean Prosser is ready to carry his campaign for strict liability into the realty area. *See* W. PROSSER, *supra* note 8, § 104 at 682. A reading of the cases cited by Dean Prosser, however, indicates that his predictions are premature. For example, Calvera v. Green Spring, Inc., 220 So. 2d 414 (Fla. App. 1969), is cited for an application of strict liability to the builder when in fact the court said no more than it had in Slavin v. Kay, 108 So. 2d 462 (Fla. 1959): that to hold a homeowner liable for injuries caused by defects which the owner had no reason to discover and which were created by the builder's negligence would

that strict liability will become the majority rule in the realty area. Therefore, an analysis of special problems likely to be encountered in such an extension seems appropriate.

SPECIAL PROBLEMS OF APPLYING STRICT LIABILITY TO REALTY

Because the theory of strict liability in real property law is strongly related to strict liability in personal property law, it follows that many of their principles of application are identical. The following discussion is concerned only with those problems peculiar to real property. These areas include the parties to the litigation, defects to be encountered and the determination of damages.

Identity of Parties

The initial problem arising in such an extension of strict liability relates to the determination of which builders are potentially strictly liable. Of the two tests which have been proposed for making that determination, one would hold any builder in the business of selling realty liable while the other would hold only mass producers liable.

The first test was adopted in *Hodges v. State Stove Manufacturing Co.*[116] where section 402A was applied to a contractor. In principle, the test is inclusionary. All builders are potentially liable unless they are specifically exempted. Comment *f* following section 402A provides insight as to which builders might be exempted. If the builder is not in the "business of selling" realty, strict liability will be inappropriate. Criteria for determining who is in the "business of selling" have not been delineated in chattel cases since they usually concern mass-produced products which obviously place the manufacturer in the business. The comment states that a single transaction does not qualify a person as being in the business. By analogy, it appears that a laborer who on one occasion contracts to build a home would not be in the business. The analogy is not conclusive, however, since a contract to build a house is more substantial than the sale of a jar of jam by a housewife and might place the laborer in the business.

It is significant that the two leading jurisdictions in the products liability area, California and New Jersey, have adopted the narrower application of strict liability. The court in *Schipper* emphasized that the defendant was a mass producer with a superior risk-bearing capability.[117] *Kriegler* relied heavily upon the same factor[118] and the Supreme Court

be tantamount to holding the *owner* strictly liable while allowing the negligent party to escape liability. Therefore, it held that a builder can be held liable for his *negligence.*

116. State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966).

117. Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 90, 207 A.2d 314, 325 (1965).

118. Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 227, 74 Cal. Rptr. 749, 752 (Ct. App. 1969).

of California later cited both *Kriegler* and *Avner* as applications of strict liability to mass producers.[119] Contrary to the first test, this one is exclusionary and only builders who come within the definition of mass producer will be strictly liable.

Although the inclusive test is broadly favored in the chattel area of strict liability, it is significant that the jurisdictions which pioneered the strict liability movement in that area are applying the exclusive test in the threshold realty cases. Hence, it seems predictable that the exclusive test is likely to previal at least during the early stages of development in the realty area, and it is appropriate to analyze the problems that are engendered by such a test.

The central problem is that of defining mass producer. None of the decisions are explicative, but they have exposed the strong interrelation of that class with enterprise liability.[120] Moreover, since the primary justification for the extension of strict liability into the realty area is enterprise liability,[121] it should be decisive in determining the parties to whom the doctrine applies. That is, if a builder falls within the purview of enterprise liability by virtue of being both responsible for creating a constant and general risk and capable of absorbing and spreading losses,[122] he is a member of the mass producer class.

Accordingly, one requisite of the mas producer definition is that the defendant must be in a position to absorb and spread the loss. Because of the lack of insurance,[123] the best general indicator of this ability is the builder's size. Determining size is, however, a difficult problem since there are several means of making the evaluation. Among them are unit output, gross income, net income and net worth.

Although mass production is traditionally suggestive of unit output, the fallacy of using it as an indicator is that there is no standard benefit returned for each unit produced. A builder who produces 50 low income units might receive the same return as a builder who constructs five exclusive homes. The second scale, gross income, contains a similar fallacy. As the Supreme Court has indicated, gross income is not a measure of ability to pay[124] unless all members of the class have the same costs of production.[125] There are various factors, such as geographic location and union contracts, which produce diversified production costs for builders.

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119. Price v. Shell Oil Co., 2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970).
120. *See* Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (Ct. App. 1969); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965).
121. *Id.*
122. *See* text accompanying notes 101-104 *supra.*
123. *See* text accompanying notes 109-114 *supra.*
124. Stewart Dry Goods Co. v. Lewis, 294 U.S. 550 (1935).
125. Pacific American Fisheries v. Alaska, 269 U.S. 269 (1925).

A combination of net income and net worth provides the most accurate indicator, and should be used in determining the ability to absorb and spread losses. Even this, however, may be misleading. The net income which is to be examined might be the net income from realty products or from all business activities. It is typical in our present economy to find builders who are only a division of a larger, more diversified firm. Additionally, there is the problem that income is computed on a periodic basis and there must be a determination of the most representative time span. Although there is a pool of assets to compare the loss to, and from which the ability to recapture the loss might be calculated, the pitfall is that the capital base of a construction firm does not accurately reflect its earning power. Moreover, this evaluation through a combined analysis of financial factors cannot be reduced to formulas since each case presents a unique financial structure.

A further element in the mass producer definition is that the builder must have created a constant and general risk to the public.[126] If a builder has met the first requirement of risk spreading ability, it seems likely that he will have created the defined risk since large builders invariably generate extensive public contact. Thus, the size of the builder, as discussed previously,[127] will determine the applicability of strict liability under the exclusive test. Only the builders with "deep pockets" will be held strictly liable.

An actual evaluation of risk creation should involve at least three factors. The type of structure, the number of structures, and the type of risk being considered would each be examined. Evaluating and balancing these factors, however, is so difficult that if the courts were required to make the determination in every case, they would soon begin using the inclusive test.

To this point the discussion has at least implied that only builders may be mass producers. This is not the case since strict liability is applicable to parties other than manufacturers. Although Justice Traynor's dissent in *Escola*[128] seemed to limit it to manufacturers, Professor James would include any enterprise or activity which meets the two enterprise liability requirements.[129] This expanded application has occurred in the chattel area.[130] To date, the cases which have applied strict liability to defective realty have all involved builders[131] or builder-vendors.[132]

126. See text accompanying notes 101-104 *supra.*
127. See text accompanying notes 123-125 *supra.*
128. *See* Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944) (Traynor, J., dissenting).
129. See text accompanying notes 101-104 *supra.*
130. *See* RESTATEMENT (SECOND) OF TORTS § 402A (1965).
131. Avner v. Longridge Estates, 272 Cal. App. 2d 607, 77 Cal. Rptr. 633 (Ct. App. 1969).
132. Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 649 (Ct. App. 1969); State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965).

Whether the courts will apply strict liability to architects, engineers, subcontractors, manufacturers of component parts, suppliers, vendors and financiers is undetermined.

Parties, other than primary builders, who contribute to the production of realty may be divided into two categories by the function they perform, either pre-completion or post-completion. Those performing the post-completion function of bringing the consumer into contact with the product are strictly liable under section 402A. Since there are no real distinctions between sellers of chattels and sellers of realty, if vendors meet the other two mass production requirements, they should expect to be held strictly liable just as are builders and builder-vendors.

The liability of parties contributing to the pre-completion or manufacturing process is not as well defined. There has been a split of authority in regard to chattels with both views lacking extensive reasoning.[133] More significant reasons appear, however, for holding component parts manufacturers strictly liable in realty cases.[134] If a person purchased a furnace and installed it in his home, there is no doubt that the furnace manufacturer could be held strictly liable under section 402A for losses resulting from a defect. The result would be the same where the owner hired a contractor or repairman to replace the furnace in his home. It would be incongruous to deny the use of strict liability simply because the furnace was installed before the home was sold. Further, comment *g* to section 402A states that where a component part is incorporated into a larger structure without change, strict liability will carry through to the ultimate consumer.

The liability of persons employed by the builder is likely to follow the common law of agency. If the tradesmen are employed and controlled by the builder, they are his agents and he will be held liable as the principal.[135] If the work is performed by an independent subcontractor who has contracted to perform special tasks, such as installing the plumbing or electrical wiring, he will usually be placed in the position of a component part manufacturer.[136] Professional persons, such as architects and engineers, might be immune from strict liability regardless of

133. Contrast Goldberg v. Kollsman Instrument Co., 12 N.Y. 432, 191 N.E.2d 81 (1963), where the court refused to hold the component part manufacturer liable on the ground that the primary manufacturer was a sufficient risk bearer, with Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965), which extended liability since there were "no reasons why [the component part manufacturer] should not come within the rule of strict liability." *Id.* at 623, 210 N.E.2d 188.

134. For attempts to hold component parts manufacturers liable see Kriegler v. Eichler, 269 Cal. App. 2d 224, 74 Cal. Rptr. 649 (1969) (manufacturer of metal tubing); State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966) (manufacturer of water heater); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965) (manufacturer of boiler).

135. In State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966), an agent installed the water heater and thermostat and the principal was held liable.

136. *Id.* Of course the general contractor is not relieved of all types of liability. *See* RESTATEMENT (SECOND) OF TORTS § 302A (1965).

agency principles.[137]

At this time, there appears to be little authority for finding any duty running from a construction financier to the purchaser or consumer. One case has held, however, that a financier may be held liable to the consumer for negligence by failing to adequately supervise the construction process.[138] Whether that case will be followed or even extended to a duty of financing a nondefective product will only be seen in future cases.

Because of the myriad of potential defendants to whom an attempt may be made to apply strict liability, the foregoing discussion is not intended to be exhaustive. Rather, it is presented as an illustration of the most basic and complicated problems involved in selecting defendants under the mass producer test. No single factor which has been discussed is likely to be determinative. Rather, an aggregate consideration of all the factors must be made.

On the surface, California and New Jersey appear to be acting inconsistently between chattels and realty by applying the inclusive test to chattels and the exclusive test to realty. Their tenure as the respected leaders in the products liability field precludes dismissal of this apparent inconsistency as inadvertent. It seems more probable that the courts have deliberately recognized that the manufacture and distribution processes in the two areas dictate the distinction. Generally, chattel production is sufficiently industrialized to allow a presumption of mass production while the building process is still struggling to reach that classic industrialized status. The courts are aware that there is a class of individual builders who are sufficiently industrialized to be considered mass producers, but until the industry as a whole reaches that general status, California and New Jersey are likely to remain selective when applying strict liability to builders.

Proving a Defect

Once the preliminary determination of parties is made, the necessary elements of proof and the position of the burden of proof in each case must be ascertained. Because strict liability approaches but does not encompass absolute liability, the plaintiff is only relieved of proving negligence on the part of the defendant. Thus, the plaintiff must prove that he has suffered a loss caused by a defect in the realty and that the realty was defective when it left the control of the defendant.[139]

Since it has replaced the negligence element, the defect requirement

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

138. Connor v. Great W. Sav. & Loan Ass'n, 69 Cal. 2d 850, 447 P.2d 609, 73 Cal. Rptr. 369 (1968); *see* Pfeiler, *Construction Lending and Products Liability*, 25 BUS. LAW. 1309 (1970).

139. Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 92, 207 A.2d 314, 326 (1965).

is the most important and elusive point in the entire application of strict liability.[140] The problem is one of defining "defect" because without a defect, there is no basis for liability.[141] If a defect is no more than a condition which causes the loss, then it becomes meaningless[142] and the producer becomes an insurer, a status the courts have refused to impose upon him.[143] Alleged defects have been measured by a standard of reasonableness rather than one of perfection.[144]

If Justice Traynor is correct in assessing a defect as a condition which fails to meet the standards of like products,[145] then a defect in realty may accurately be described as a substandard quality in the product. The reasonableness of the substandard condition is measured by the expectations of a reasonable consumer and not by the state of the manufacturer's art.[146] Under this view, a defect is a substandard condition which would not be expected by a reasonable man.

The *Restatement* takes a similar position in defining the qualities of a defect which would invoke strict liability, but it includes one substantially different quality. It requires that the defect be capable of causing and that it actually cause personal injury or property damage.[147] That requirement is too restrictive for defining a realty defect.[148] *Kriegler* illustrates the difference in the two conceptions. There the heating system became defective and caused the home to diminish in value. There was no actual damage to the property under section 402A since the only element in need of repair was the defect itself. Yet, the homeowner had suffered a large loss as a result of the defect.

The second element of the defect requirement is showing that the product was defective at the time it left the defendant's control.[149] This is not always a simple task. Cases such as *Schipper,* in which a necessary element of the product was omitted because of a design defect, or *State Stove,* in which the builder failed to install a necessary part, leave little doubt that the defect existed at the time of the sale. Often, however, the problem is in the nature of *Kriegler,* in which the system became defective and caused the loss eight years after installation. In these cases, a product which develops defects before a reasonable time elapses is con-

140. Keeton, *Products Liability—Liability Without Fault and the Requirement of a Defect,* 41 TEXAS L. REV. 855, 858 (1963).
141. Traynor, *The Ways and Meanings of Defective Products and Strict Liability,* 32 TENN. L. REV. 363, 366 (1965).
142. *Id.* at 372.
143. Avener v. Longridge Estates, 272 Cal. App. 2d 607, 611, 77 Cal. Rptr. 633, 636 (Ct. App. 1969); Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 228, 74 Cal. Rptr. 749, 751 (Ct. App. 1969); State Stove Mfg. Co. v. Hodges, 189 So. 2d 113, 120 (Miss. 1966); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 92, 207 A.2d 314, 326 (1965).
144. Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 92, 207 A.2d 314, 326 (1965).
145. Traynor, *supra* note 141, at 367.
146. *Id.* at 370-74.
147. RESTATEMENT (SECOND) OF TORTS § 402A, comment *d* (1965).
148. See text accompanying notes 156-175 *infra.*
149. Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 92, 207 A.2d 314, 326 (1965).

sidered defective at the time of sale. Comment *g* of section 402A provides a good analogy. A seller of chattels is not liable when he delivers goods in a safe condition. Safe condition means, however, that the necessary precautions required to permit the product to remain safe for a reasonable time must have been taken.

Once it has been determined that the product is defective, the only permissible question for determining if the defect was caused by the builder is whether reasonable time has lapsed since the home was built.[150] The period of reasonable time must be established by expert testimony as to the life expectancy of similar products rather than by allowing the plaintiff or defendant to prove the inadequacy or adequacy of the precautions taken. Allowance of the latter type of proof would be improper because it would effectively transform strict liability into a negligence theory in all cases except those in which the actual defect existed when it left the defendant's control.

According to *Kriegler*, another requirement for recovery is that the plaintiff prove he was using the instrumentality in a way it was intended to be used.[151] Although this requirement is consistent with comment *h* of section 402A, which states that a product is not in a defective condition if it is safe for normal handling, the comment takes no position as to burden of proof.[152]

This normal use element has been described as a carryover from negligence cases.[153] Attached to that transplant is the rule that there are certain abnormal uses which the manufacturer or seller might be required to anticipate and guard or warn against.[154] In fact, sellers of chattels have been held strictly liable for not doing so.[155] Hence, it would seem reasonable that a court might require a builder to foresee that persons slide down banisters, overload electrical outlets or stand on shelves.

Measurement of Damages

Any theory of strict liability extended to realty would provide for compensation of losses from either property damage or personal injury.[156] Since the overwhelming majority of losses are property oriented, the pri-

150. *See* Avner v. Longridge Estates, 272 Cal. App. 2d 607, 77 Cal. Rptr. 749 (Ct. App. 1969); Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (Ct. App. 1969).

151. Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 227, 74 Cal. Rptr. 749, 752 (Ct. App. 1969).

152. For a case interpreting misuse as a defense under section 402A, see McDevitt v. Standard Oil Co. of Texas, 391 F.2d 364 (5th Cir. 1968).

153. Prosser, *supra* note 1, at 825.

154. *Id.*

155. Canifax v. Hercules Powder Co., 237 Cal. App. 2d 44, 46 Cal. Rptr. 552 (Ct. App. 1965); Hardman v. Helene Curtis Indus., Inc., 48 Ill. App. 2d 42, 198 N.E.2d 681 (1964). In *Canifax* the court stated that it might be foreseeable that a workman would mishandle a dynamite fuse and that the manufacturer could be held strictly liable for failure to warn against the misuse.

156. *See* Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (Ct. App. 1969); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965).

mary reason for making the extension would be to compensate for non-injury situations. In addition to these losses, however, there are strong arguments for a theory which would cover economic losses.

Since the basic elements required for recovery under strict liability and implied warranties are similar, it is helpful to briefly compare their allowable damages. The traditional implied warranty cases in the realty area have been devoted exclusively to compensation for non-injury losses. Thus, where a leaking roof damages a ceiling,[157] a faulty fireplace burns the walls,[158] swelling soil causes uneven settling[159] or a defective sewer causes damage to furnishings,[160] the plaintiff is allowed to recover money damages. Other cases have allowed damages where the plaintiff was not seeking compensation for property damages but for economic loss.[161] This has been so whether it was incomplete work,[162] defective conditions,[163] or uninhabitable conditions.[164] In addition to money damages, rescission of contract has been awarded where the economic loss arises from uninhabitability.[165]

Against this background, it appears that the court in *Kriegler* was justified in tacitly rejecting the edict of its supreme court[166] and adopting the New Jersey rule[167] allowing recovery for economic loss under strict liability.[168] *Kriegler* situations emphasize two important ideas of

157. Weeks v. Slavick Builders, Inc., 24 Mich. App. 621, 180 N.W.2d 503 (1970).
158. Vernali v. Centrella, 28 Conn. Supp. 476, 266 A.2d 200 (Litchfield City Super. Ct. 1970).
159. F.&S. Constr. Co. v. Berube, 322 F.2d 782 (10th Cir. 1963).
160. Vanderschrier v. Aaron, 103 Ohio App. 340, 140 N.E.2d 819 (1957).
161. Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1964); Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966); Weck v. A:M Constr. Co., 36 Ill. App. 383, 184 N.E.2d 728 (1962); House v. Thorton, 76 Wash. 2d 428, 457 P.2d 199 (1969).
162. Weck v. A:M Sunrise Constr. Co., 36 Ill. App. 383, 184 N.E.2d 728 (1962).
163. Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1964); Weck v. A:M Sunrise Constr. Co., 36 Ill. App. 383, 184 N.E.2d 728 (1962).
164. Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966); House v. Thorton, 76 Wash. 2d 428, 457 P.2d 199 (1969).
165. Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966); House v. Thorton, 76 Wash. 2d 428, 457 P.2d 199 (1969).
166. Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).
167. Santor v. A&M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965). *Cf.* Smith v. Platt Motors, Inc., 137 So. 2d 239 (Fla. App. 1962); Continental Copper & Steel Indus., Inc. v. E.C. "Red" Cornelius, Inc., 104 So. 2d 40 (Fla. App. 1958). Dean Prosser has suggested that the proper route in the chattel area would be to deny compensation for loss of bargain. Prosser, *supra* note 1, at 821-23.
168. The Kriegler court assumed that the failure of the heating system to function properly and its subsequent replacement constituted property damage. This assumption could have been based upon Eichler Homes, Inc. v. Underwriters at Lloyd's of London, 238 Cal. App. 2d 532, 47 Cal. Rptr. 843 (Ct. App. 1965), which held this type of defect to be property damage, but a survey of decided cases shows that the loss was economic.

The Supreme Court of California held in Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965), that the doctrine of strict liability does not include compensation for economic loss. The plaintiff had purchased a truck which failed to function properly and on which attempted repairs were made over a period of 11 months. Finally, because of the defect the truck was involved in an accident. Besides bringing an action for recovery of damages to the truck, the

compensation in the realty area. First, Kriegler was not in privity with the builder and would have been denied a recovery under an implied warranty of sale. Second, if courts do not allow damages for economic loss under strict liability, the result would be an imbalance of remedies among consumers. For example, if *A* purchased a home and eight years later suffered an economic loss, he would have the possibility of recovering the loss under an implied warranty theory. Suppose *A* owned the home for only two weeks and then sold it to *B*, and *B* owned the house one month before suffering the same loss. *B* would have no possibility of recovering the loss under a warranty theory since he is not in privity[169] with the builder and he would not be able to recover the loss under strict liability because it was an economic loss.

The most frequent objection to bringing economic loss within the strict liability theory in the chattel area is that the loss is often the result of a bad bargain on the part of the purchaser.[170] Admittedly, some losses result from bad bargains and the purchaser should not be reimbursed for his own improvidence. These situations should not prohibit compensation, however, when the loss of bargain results from a failure of the product to meet reasonable consumer expectations. When a reasonable man purchases a $25,000 home, he exepects that it will contain certain unspecified substandard conditions. The buyer, however, also expects those defects to be reflected in the purchase price since higher quality work demands a greater price. The problems arise when the substandard conditions are those whch would not be expected by a reasonable man or those which would be expected but because of their number are not accurately reflected in the purchase price as could reasonably be expected. These are the two types of economic loss that should be compensated. Under this objective limitation, the courts would not be open to contest every obscure defect, nor would the determination of loss be impossible.

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plaintiff, under a strict liability doctrine, asked for damages unrelated to the accident for money he had paid on the purchase price and loss (of profits) because of the *inability to make normal use* of the truck.

The loss for which compensation was sought in Kriegler is the same as in Seely. The plaintiffs brought an action to recover their losses (moving expenses and replacement costs) which resulted from the failure of the heating system to function properly. There was no allegation of personal injury or physical property damage beyond the defect itself.

The case which emphasizes the economic character of the loss in Kriegler is Santor v. A&M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965). There the carpeting became unsuitable for its normal use. The court declared that in the absence of personal injury and physical damage the loss was economic. They then held that such losses are recoverable under strict liability.

The same loss has been given two labels. Unless the defect has caused personal injury or some physical damage beyond the defect, economic loss is more accurate. Further, it would be ludicrous to allow a recovery for the defect under the term "property damage" if the defective heating system damaged a chair and to deny the recovery under the term economic loss where the same defect caused no physical damage.

169. See text accompanying notes 41-45 *supra.*

170. *See* Prosser, *supra* note 1 at 822-23.

There is a split of authority in the chattel area regarding economic loss. California[171] and Texas[172] have denied recovery while New Jersey[173] and Michigan[174] have allowed it. The central issue has been whether strict liability is to prevent or to compensate loss.[175] This chattel law split is minimized, however, by the *Uniform Commercial Code*[176] which has been universally adopted for the sale of goods. In almost all states a consumer may recover his economic loss under the Code's provisions. Although implied warranty theory allows recovery for economic loss, its limited acceptance for realty renders it an inadequate counterpart of the *Uniform Commercial Code* and suggests that recovery for economic loss in the realty area should be allowed under a strict liability theory. Hence, any theory of strict liability which is extended to cover the sale of defective realty should not only provide compensation for personal injuries and property damage but economic loss as well.

LIABILITY UNDER ARIZONA LAW

A review of the issue of the liability of a builder or seller of defective realty in Arizona reveals that despite the present limited liability of builders and vendors, the outlook is promising for the consumer. Sellers of defective realty may be confronted in the near future with a shift from limited liability to strict liability.

The Supreme Court of Arizona initially held that upon completion and acceptance of the builder's work by the owner, the builder is dismissed from any future liability to third parties for his tortious conduct.[177] A further consideration of the issue by the court engendered an exception to that broad proscription of liability. In *Shannon v. Butler Homes, Inc.*[178] it stated that the exception to the rule occurs where the "work is inherently, intrinsically or abnormally dangerous or *so manifestly defective as to be imminently dangerous* to third persons."[179] This statement, supported by citing several *negligence* cases,[180] preceded a holding that

171. Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).
172. Melody Home Mfg. Co. v. Morrison, 455 S.W.2d 825 (Tex. Civ. App. 1970) (mobile home).
173. Santor v. A&M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965).
174. Cova v. Harley Davidson Motor Co., 26 Mich. App. 602, 182 N.W.2d 800 (1970).
175. Compare the majority opinion with the dissent in Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).
176. UNIFORM COMMERCIAL CODE § 2-314.
177. Kennecott Copper Corp. v. McDowell, 100 Ariz. 276, 413 P.2d 749 (1966) (dictum); Roman Catholic Church v. Keenan, 74 Ariz. 20, 243 P.2d 455 (1952).
178. 102 Ariz. 312, 428 P.2d 990 (1967), *noted*, 10 ARIZ. L. REV. 223 (1968).
179. *Id.*, at 315, 428 P.2d at 993 (emphasis added).
180. E.I. Du Pont de Nemours & Co. v. Kissinger, 259 F.2d 411 (5th Cir. 1958), *cert. denied*, 359 U.S. 950 (1959); Hale v. Depaoli, 33 Cal. 2d 228, 201 P.2d 1 (1948); Sohifano v. Security Bldg. Co., 133 Cal. App. 2d 70, 283 P.2d 306 (1955); Del Gaudio v. Ingerson, 142 Conn. 564, 115 A.2d 665 (1955); Paul Harris Furniture Co. v. Morse, 10 Ill. 2d 28, 139 N.E.2d 275 (1956); Andrews v. Del Guzzi, 56 Wash. 2d 381, 353 P.2d 422 (1960).

the installation of a plate-glass door was not a type of danger which could be embraced within the exception.[181] As a result, Arizona builders may be held liable at least for that degree of negligence described in *Shannon*.[182]

The law of implied warranty in Arizona fails to provide even the slight protection for the consumer which is provided under the negligence theory by *Shannon*. Before the concept of implied warranty is operative in Arizona, privity must exist between the plaintiff and defendant.[183] Further, the court has clearly refused to imply warranties in either the sale[184] or construction[185] of defective realty. If a plaintiff would manage to somehow move past these problems, he still would face the open issue of whether the Arizona statute[186] prohibiting implied covenants in the conveyance of real property also prohibits implied warranties in realty sales.[187]

This review of the state of the law in regard to negligence and implied warranties in Arizona raises the question of how it could be thought that the Supreme Court of Arizona could possibly consider applying strict liability to the sale of defective realty. Several developments, however, may make the conclusion reasonable.

The Arizona court has been especially receptive to the strict liability concept in regard to the sale of personal property. Its unequivocal adoption of section 402A in *O.S. Stapley Co. v. Miller*[188] places Arizona squarely in the stream of consumer protection. In fact, its holding that contributory negligence is no defense to strict liability[189] and a later decision that the doctrine is applicable to bystanders[190] are indicative of the court's receptiveness to strict liability. Adoption of the theory for the sale of chattels, however, is not conclusive proof of an inclination to adopt it for the sale of realty, and more positive evidence must be sought.

In originally contemplating whether the supreme court would be receptive to strict liability, the court of appeals said, "We find no Arizona Supreme Court case specifically holding that strict tort liability applies in Arizona, but language in the recent case of *Shannon v. Butler Homes,*

181. Shannon v. Butler Homes, Inc., 102 Ariz. 312, 315, 428 P.2d 990, 993 (1967).
182. *See* "Torts," 10 ARIZ. L. REV. 148, 223 (1968).
183. Bailey v. Montgomery Ward Co., 6 Ariz. App. 213, 431 P.2d 108 (1967). *See* Epstein, *Personal Injuries from Defective Products—Some "Dots and Dashes,"* 9 ARIZ. L. REV. 163 (1967); 5 ARIZ. L. REV. 306 (1964); *cf.* "Products Liability," 11 ARIZ. L. REV. 61, 173 (1969).
184. Allen v. Reichert, 73 Ariz. 91, 237 P.2d 818 (1951).
185. Voight v. Ott, 86 Ariz. 128, 341 P.2d 923 (1959).
186. ARIZ. REV. STAT. ANN. § 33-435 (1956). See note 42 *supra*, for the text of the statute.
187. See text accompanying notes 36-40, *supra*.
188. 103 Ariz. 556, 447 P.2d 248 (1968), *noted*, "Products Liability," 11 ARIZ. L. REV. 61, 173 (1969).
189. *Id.* at 561, 447 P.2d at 253.
190. Caruth v. Mariani, 11 Ariz. App. 188, 463 P.2d 83 (1970).

Inc. indicates that the Supreme Court approves of this doctrine."[191] In the view of the court of appeals, the supreme court had strict liability in sight when it decided *Shannon*, a realty case. When *Stapley* was decided, the supreme court also cited the language of *Shannon* as a previous approval of strict liability.[192] As a result, the way is paved for the Supreme Court of Arizona to adopt summarily strict liability for realty sales in Arizona.

Hopefully, the court will recognize two important points. First, if *Shannon* actually was an approval of strict liability, it was an early approval in which the language is hopelessly enmeshed between negligence and strict liability. Second, there is no evidence within the case that the court was aware of any differences between strict liability in the chattel and realty areas. When the appellate courts of Arizona next consider the strict liability issue in regard to realty, they should place minimal emphasis on *Shannon* and scrutinize the merits and limitations of an extension of strict liability.

CONCLUSION

Although negligence actions provide a broad avenue to relief for persons suffering a loss as a result of defectively constructed realty and the implied warranty theory is growing rapidly in the realty area, it appears that the expansion of strict liability into the field of defective realty is a certainty. The movement is not based upon the lack of sufficient alternatives for protection of the consumer, but upon an analogy to the development of strict liability in the chattel area.

The analogy, however, is not exact. The sole justifiable support for extending strict liability to the realty area is enterprise liability. From that basis, it appears that the theory will be applied only to large builders in the immediate future. In addition, if strict liability is to produce any real benefits for consumers in the realty area, the theory must be expanded beyond the narrow confines of chattel law and given broader application in relation to the defects actionable and the damages recoverable.

191. Bailey v. Montgomery Ward & Co., 6 Ariz. App. 213, 217, 432 P.2d 108, 112 (1967) (citation omitted).

192. O.S. Stapley Co. v. Miller, 103 Ariz. 556, 447 P.2d 248 (1968), *noted*, 11 ARIZ. L. REV. 173 (1969).