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## When the Walls Come Tumbling Down--Theories of Recovery for Defective Housing

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## NOTE

### WHEN THE WALLS COME TUMBLING DOWN—THEORIES OF RECOVERY FOR DEFECTIVE HOUSING

This century has witnessed a dramatic increase in the number of potential avenues through which home buyers, who have suffered personal injury or property damage due to defective construction of their homes, may obtain judicial redress. In their eagerness to circumvent the strictures of the caveat emptor bar, judges have exercised considerable inventiveness in fashioning relief, employing such theories as fraud, negligence, or breach of warranty. The most recent addition to the homeowner's arsenal is a theory of strict liability, analogous to that imposed upon manufacturers of defective chattels. Consequently, the present state of the law regarding defective realty is an uncomfortable blend of tort, contract, and warranty precepts. It is impossible adequately to comprehend or to synthesize the decisions and the often contradictory underlying principles holding sway in this field, or to chart a suggested course for this body of law, without a thorough understanding of its jurisprudential sources.

Toward this end, the historical development of tort law initially will be discussed.<sup>1</sup> Thereafter, this Note will trace the evolution in sales of realty from the era of caveat emptor to the dawning of strict liability. Within the confines of real property law, the Note will examine the effect of the judicial impulse toward order on the formation of home buyers' remedies by juxtaposing this impulse against a growing recognition of the need for policy-based

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<sup>1</sup> The tort section of this Note draws much of its inspiration from the theories propounded by Professor G. E. White. See G.E. WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* (1980). For alternative perspectives on the emergence of 19th-century tort doctrine, see generally M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977); Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951); Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972); Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717 (1981).

consumer protection. The final section of the Note will focus on the particularly troublesome area of distinguishing the type of damages that are recoverable by first and subsequent purchasers of a house, and of delineating the components of the theory of relief under which they should bring their actions. It will be argued that the unique features which distinguish an action involving a defective house from one involving a defective product favor an idiosyncratic framework of home buyer relief. Under such a system, damages for any defect that threatens occupant safety should be recoverable by any occupant under a theory of strict tort liability. Defects which merely lower the value of the house, but do not give rise to the policy considerations of consumer protection that support an action in strict tort, should be recoverable only by parties in privity with the builder-vendor in a breach of implied warranty action.

#### THE CONCEPTUAL BASES OF TORT LAW

##### *From Law as Science to Law as Social Policy*

Historically, it was considered an inappropriate exercise of the judicial function for a court to indulge in considerations of public policy.<sup>2</sup> The 19th-century conception of American law was one of "legal science,"<sup>3</sup> a view characterized by an impulse toward order

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<sup>2</sup> Public policy, defined as "a principle of judicial legislation or interpretation founded on the current needs of the community," Winfield, *Public Policy in the English Common Law*, 42 HARV. L. REV. 76, 92 (1928), was considered a "last resort" in reaching a decision where precedent otherwise was available. *Id.* at 98. In the absence of settled precedent, a somewhat greater flexibility was possible at early common law, and harsh results were sometimes avoided by modification or extension of the rules. *Id.* at 77. The eventual hardening of rules of law into doctrines that were rigidly applied led, in the mid-14th century, to the growth of the Court of Chancery in England. S. WILLISTON, *SOME MODERN TENDENCIES IN THE LAW* 34 (1929). This forerunner of the equity courts, while not empowered to overturn rules of law, often declined to apply them when the result would be unjust. *Id.* at 34-35. The attempt to mold rules of law into "universal doctrines" took place in America in the 19th century under the banner of legal science. See notes 4-5 and accompanying text *infra*.

<sup>3</sup> The concept of legal science was imported from the physical sciences, where knowledge is gained empirically. Thus, the method of legal science in deducing a principle can be illustrated through comparison with the method of the physical sciences in deducing a physical law. If an apple is raised and dropped enough times, the law of gravity will be established, based upon the scientist's observations. A decision in a particular case gives rise to a rule; from numbers of decisions on similar facts the lawyer may establish a general principle. S. WILLISTON, *supra* note 2, at 122-23. Under this view of law, to argue against the application of the general principle to a similar state of facts because of its harsh result is tantamount to standing in the way of progress, and is decried as "an abnegation both of taking part in the development of the law and also of any considerable understanding of law

and systematization,<sup>4</sup> and by an emphasis upon the creation and utilization of comprehensive doctrines.<sup>5</sup> With the advent of an increasingly urban and industrialized society in the late nineteenth and early twentieth centuries, this static framework for the creation of remedies began to show signs of strain.<sup>6</sup> Cases arising in novel and unprecedented factual contexts were not easily disposed of by resort to established doctrines, and courts struggling to place the demands of a burgeoning society within the strictures of these doctrines were hampered by a "fundamental tension" between the methodology used and the goal sought to be achieved.<sup>7</sup>

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as a science." *Id.* at 124. Of course, empirical observation takes place, of necessity, under laboratory conditions. This aspect of legal science—its isolation from conditions in society—aroused severe criticism. *See* notes 18-20 and accompanying text *infra*.

<sup>4</sup> Fundamental to the concept of legal science is the method of studying law propounded by Christopher Columbus Langdell, appointed professor at Harvard Law School in 1869. S. WILLISTON, *supra* note 2, at 112. Students were to study cases in order to extract legal principles of universal application, and success in this endeavor was measured by the ability to apply such principles "with constant facility and certainty to the ever-tangled skein of human affairs." *Id.* at 113 (quoting C. LANGDELL, *CASES ON THE LAW OF CONTRACTS* (1st ed. 1871)). This technique makes the fashioning of a remedy a process of deduction from an already existing body of rights and liabilities—a closed system. Bloustein, *Logic and Legal Realism: The Realist as a Frustrated Idealist*, 50 CORNELL L.Q. 24, 24 (1964). One commentator has set forth a particularly isolationist view of legal science, characterizing it as the "pursuit of truth for its own sake," justified by the gratification of intellectual curiosity that attends it. H. CAIRNS, *THE THEORY OF LEGAL SCIENCE* 130 (1941). According to this view, it is merely incidental that the pursuit may yield benefits of practical value to society. *Id.* at 132-34.

<sup>5</sup> *See* G.E. WHITE, *supra* note 1, at 61. Two of Professor White's premises are particularly enlightening when applied to the subject at hand. First, the characterization of 19th-century tort law as primarily a system of comprehensive doctrines is contrasted with the movement in the 20th century to recognize it as an instrument of public policy. *Id.* at 60-62, 66-67, 72-73. Second, he speaks of the 19th-century creation of an "academic-judicial symbiosis," under which the writers of treatises and law review articles were relied upon to provide analytical guidance by organizing the cases in a comprehensive manner. *Id.* at 39-40. This relationship between legal scholars and the courts is set out as follows: (1) scholars sift out, from judicial opinions, principles which are articulated as guides to the area of law; (2) as new fact situations are presented, courts refer to these principles, which they revise and modify; (3) commentators note these modified principles and create new syntheses of them. *Id.* at 39. This relationship, which continues today, is particularly evident in the development of strict products liability. *See* Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1119 (1960). Prosser noted that many of the arguments advanced in favor of strict liability "appear[ed] to have been concocted in the heads of professors." *Id.*

<sup>6</sup> *See* G.E. WHITE, *supra* note 1, at 61-62.

<sup>7</sup> *Id.* at 55. The primary weakness of legal science in the late 19th century was its inability to reconcile its doctrinal acceptance of the notion that the law is in a state of flux with its endeavor to establish principles capable of comprehensive application to all factual contexts. *Id.*

This tension was particularly evident in the law of torts and it was there, in the origins of modern negligence theory, that the emerging recognition of law as an instrument of social, as opposed to scientific, order<sup>8</sup> manifested itself.<sup>9</sup> In the landmark case of *Brown v. Kendall*,<sup>10</sup> Chief Justice Shaw of the Supreme Judicial Court of Massachusetts eviscerated the concept that a man acts at his peril,<sup>11</sup> and clearly articulated fault as the preeminent principle of liability. Rendered at the midpoint of the century, the decision and its progeny, reflecting a transitional stage in judicial thought, served a dual purpose. On the one hand, a concept which imposed liability only upon proof of fault functioned in the traditionally valued manner of a comprehensive organizing system. It subsumed the relief of civil wrongs under what were deemed universal principles, applicable to any of a variety of private relationships. More significantly, however, it has been persuasively argued that the establishment of negligence as the cornerstone of liability served the purpose of limiting the expanding scope of industrial liability.<sup>12</sup> As industry and shipping grew, greater numbers of accidents occurred among parties who were essentially strangers, to whom no duty of

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<sup>8</sup> Bloustein, *supra* note 4, at 24.

<sup>9</sup> Recognition of a separate body of tort law dealing with remedies for unintentional harm is generally traced from the early to mid-19th century. R. RABIN, *PERSPECTIVES ON TORT LAW* 1 (1969); see W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 28, at 139 (4th ed. 1971). The theoretical origins of a fault-based theory of liability are subject to dispute. See generally R. KEETON, *VENTURING TO DO JUSTICE* 148-49 (1969). Keeton collects the following arguments: the law began under a moral system in which a man acts at his peril, and evolved to a theory of fault as the basis for liability; the maxim that a man acts at his peril has never been true, since even actions under strict liability were subject to justification and excuse; the process of law synthesizes guilt from a moral value to an objective standard, making actual guilt almost irrelevant; fault has always been a significant factor in imposing liability, but the emphasis placed upon it has fluctuated. *Id.*; see Malone, *Ruminations on the Role of Fault in the History of the Common Law of Torts*, 31 *LA. L. REV.* 1, 24-43 (1970). Regardless of the historical antecedents, the significant transition that occurred in the mid-19th century was from the view that held a person strictly liable for the consequences of his voluntary act, unless he could establish that the accident was "inevitable," to the view that liability should not be imposed absent wrongful intent or negligence. W. PROSSER, *supra*, § 29, at 141-42. *But see* R. EFSTEIN, *MODERN PRODUCTS LIABILITY LAW* 27 & nn. 8-10 (1980) (strict liability continued to be imposed for injury to real estate, defamation, and conversion of personal property).

<sup>10</sup> 60 Mass. (6 Cush.) 292 (1850).

<sup>11</sup> See Jenks, *On Negligence and Deceit in the Law of Torts*, 26 *LAW Q. REV.* 159, 160 (1910).

<sup>12</sup> W. SEAVEY, *COGITATIONS ON TORTS* 3, 24 (1954). The concept of negligence pre-dated the Industrial Revolution, but was not refined or accorded its preeminent role in tort law until the advent of the "machine age." *Id.*

care based on a specific relationship could be extended.<sup>13</sup> A generalized standard of legal duty was needed to order suits between such strangers.<sup>14</sup> The creation of a fault standard, however, went beyond a mere ordering principle, and functioned as a limitation of liability, since a plaintiff could recover only upon a showing that the conduct which injured him was blameworthy.<sup>15</sup> This limitation has been characterized as a "judicial subsid[y]" to the fledgling enterprises of the period, allowing industries engaged in risk-creating activity to grow unfettered by the capital-depleting lawsuits of injured employees.<sup>16</sup>

Tort law at the close of the nineteenth century reflected a laissez-faire attitude toward industry, a refusal to compensate an injured party absent blameworthy conduct by the defendant,<sup>17</sup> and a continuing attempt to articulate comprehensive doctrines. As the twentieth century began, social critics protested the conditions of urban living.<sup>18</sup> At the same time, legal commentators criticized the

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<sup>13</sup> G.E. WHITE, *PATTERNS OF AMERICAN LEGAL THOUGHT 182-83* (1978).

<sup>14</sup> *Id.*

<sup>15</sup> G.E. WHITE, *supra* note 1, at 61. Professor White has summarized the concurrently expanding and contracting effect of the fault principle on tort liability as follows: "[n]eglect was widened to become a generalized theory of legal carelessness; an objective fault standard emerged as a limiting principle of tort liability; modern negligence was born." G.E. WHITE, *supra* note 13, at 183.

<sup>16</sup> Gregory, *supra* note 1, at 368. It has been speculated that protection of industry is a fair interpretation of the motive underlying Chief Justice Shaw's opinion in *Brown v. Kendall*, see notes 10-16 and accompanying text *supra*, drawing support from Shaw's approval in other cases of the assumption of risk defense and fellow servant doctrine, both devices which protected industry at the expense of workers. Gregory, *supra* note 1, at 368. While such policies may seem "ruthless," they may be justified as having "helped to establish industry, which in turn was essential to the good society as Shaw envisaged it." *Id.* But see Posner, *supra* note 1, at 30 (connection between adoption of negligence standard and judicial subsidy to industry is "ambiguous"); Roberts, *Negligence: Blackstone to Shaw to ? An Intellectual Escapade in a Tory Vein*, 50 CORNELL L.Q. 191, 205 (1965) (rationale of *Brown v. Kendall* premised not on mere protection of industry but on desire to articulate "sound policy not only for business but for every man").

<sup>17</sup> Posner, *supra* note 1, at 29. The origins of the judicial refusal to shift the burden of loss from the injured party absent a showing of blameworthiness can be traced in part to the exigencies of the Industrial Revolution and in part to the "individualistic" philosophy which pervaded American society. See *id.* The general principle was succinctly articulated by Justice Oliver Wendell Holmes as requiring that "loss from accident must lie where it falls, and this principle is not affected by the fact that a human being is the instrument of misfortune." O.W. HOLMES, *THE COMMON LAW* 94 (1923).

<sup>18</sup> G.E. WHITE, *supra* note 1, at 103-04. In the political sphere, the progressive movement criticized the poverty and hardship created by unchecked growth and industrialization, and demanded a more paternalistic attitude by government and the courts to promote general social welfare. *Id.* In the literary sphere, journalist-photographer Jacob Riis chronicled the squalid living conditions in New York's lower east side, where industrialization

courts' obsession with universal principles as "mechanical jurisprudence,"<sup>19</sup> impotent in the face of social needs. A call was made for a flexible "sociological jurisprudence"<sup>20</sup> which would be more responsive to these rapidly changing demands.

The movement toward an overt recognition of societal interests was begun in the first half of the twentieth century,<sup>21</sup> as courts, working within the fault framework, began to balance competing interests.<sup>22</sup> The balancing process, however, necessarily detracted from the efficacy of negligence as a universal ordering principle, since courts employing the inherently subjective "reasonable man" standard were less likely to arrive at uniform, predictable results.<sup>23</sup>

Similarly, the utility of the doctrine of privity as an ordering principle upon negligence suits involving defective products was severely undercut by the seminal decision of the New York Court of Appeals in *MacPherson v. Buick Motor Co.*<sup>24</sup> Judge Cardozo, writing for the *MacPherson* court, rejected the traditional rule that a duty of care arises only between parties in a contractual relationship,<sup>25</sup> and concluded that liability could be imposed upon a manufacturer whenever a "known danger [was] attendant upon a known use."<sup>26</sup> The *MacPherson* case exemplifies the period's judicial trend toward a recognition of the needs of various segments of society and a willingness actively to reassess the appropriate allocation of risks among these segments.<sup>27</sup> This trend persisted after

combined with overcrowding and continued European immigration to produce a permanent underprivileged class. See generally Cordasco, *Preface to JACOB RIIS REVISITED: POVERTY AND THE SLUM IN ANOTHER ERA xv-xxii* (F. Cordasco ed. 1968).

<sup>19</sup> Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 606 (1908).

<sup>20</sup> Pound, *Liberty of Contract*, 18 YALE L.J. 454, 464 (1909). Sociological jurisprudence has been defined as "the movement for the adjustment of principles and doctrines to the human conditions they are to govern rather than to assumed first principles . . ." *Id.*

<sup>21</sup> See McNiece & Thornton, *Is the Law of Negligence Obsolete?*, 26 ST. JOHN'S L. REV. 255, 258-59 (1952).

<sup>22</sup> See W. SEAVEY, *supra* note 12, at 27-28. The formulation for interest-balancing may be stated generally as the interests of the parties evaluated with respect to the welfare of the community. *Id.* at 27. An attempt to articulate this formula in mathematical terms suggested that when the probability of an accident (P) multiplied by the projected loss (L) of the accident exceeds the burden (B) of its prevention, or  $PL > B$ , the conduct is negligent. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (Hand, L., J.).

<sup>23</sup> G.E. WHITE, *supra* note 1, at 107.

<sup>24</sup> 217 N.Y. 382, 111 N.E. 1050 (1916).

<sup>25</sup> *Id.* at 392-93, 111 N.E. at 1054.

<sup>26</sup> *Id.* at 390, 111 N.E. at 1053.

<sup>27</sup> See G.E. WHITE, *supra* note 13, at 95.

World War II, when courts began to balance interests without regard to fault, and culminated in the development of strict liability, "a pure matter of social engineering."<sup>28</sup>

### *Strict Liability: A Judicial Refocusing*

The twentieth century movement from a liability-limiting, fault-based conception of tort law to a theory of liability without fault for certain classes of defendants was the product of a correlative change in the intellectual climate and social conditions.<sup>29</sup> The nascent industries of the mid-nineteenth century were well entrenched and thriving, but the disadvantaged groups created by industrialization and urbanization were beginning to be perceived in a different light. The notion that an injury to one member of society might be, in a conceptual sense, an injury to society as a whole, implicated society at large in the redress of that injury.<sup>30</sup> Thus, the social policies effectuated by tort remedies were accepted as being of far greater importance than any type of categorical doctrine underlying these remedies.<sup>31</sup>

The growing sense of social responsibility intertwined with the desire to protect those unable adequately to fend for themselves led to the application of strict liability initially to sales of food and drink,<sup>32</sup> then to products for "intimate bodily use,"<sup>33</sup> and eventually to a wide range of consumer products.<sup>34</sup> The theoretical under-

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<sup>28</sup> F. HARPER, A TREATISE ON THE LAW OF TORTS 334 (1933); see Roberts, *supra* note 16, at 191.

<sup>29</sup> For a striking example of the initial judicial aversion to liability without fault, see *Ives v. South Buffalo Ry.*, 201 N.Y. 271, 285, 94 N.E. 431, 436 (1911). In *Ives*, the New York Court of Appeals struck down the state's first workmen's compensation statute, a narrowly drawn departure from fault-based liability, as not only unconstitutional but, "judged by . . . common law standards[,] . . . plainly revolutionary." *Id.* Echoing Justice Holmes, see note 17 *supra*, the court declared that "in everything within the sphere of human activity the risks which are inherent and unavoidable must fall upon those who are exposed to them." 201 N.Y. at 305, 94 N.E. at 444. An amendment to the New York State Constitution and, ultimately, approval by the United States Supreme Court was required before workmen's compensation laws took effect in New York. See *New York Central R.R. v. White*, 243 U.S. 188, 195-96, 208 (1917).

<sup>30</sup> G.E. WHITE, *supra* note 1, at 148. The conception of a tort suit was changing from that of a "two-party affair" to that of a "three-party affair," in which the third party was society at large." *Id.*

<sup>31</sup> *Id.* at 150.

<sup>32</sup> W. PROSSER, *supra* note 9, § 97, at 653.

<sup>33</sup> *Id.* at 654 & n.34.

<sup>34</sup> *Id.* at 655 & n.37.



pinnings for these cases were far from uniform,<sup>35</sup> as the judicial response to the perceived need for remedies outstripped the formulation of a comprehensive doctrine to justify granting them.<sup>36</sup> The remedy used with the greatest consistency, however, was that of an implied warranty of fitness.<sup>37</sup>

The use of warranty as a vehicle for imposing liability without fault created confusion from the outset as to whether the remedy sounded in contract or tort.<sup>38</sup> The leading case granting relief with-

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<sup>35</sup> Cases circumventing the privity bar provide a striking illustration of the lack of uniformity in the underlying theoretical bases of early strict liability cases. See R. EPSTEIN, *supra* note 9, at 32-34. Courts resorted to a variety of legal fictions to accord an out-of-privity plaintiff a remedy, including characterizing the plaintiff as the real party in interest regardless of who had bought the product; analogizing warranties of fitness "running" with the product to covenants running with the land; finding an assignment of the cause of action to the plaintiff; or finding a third-party beneficiary contract with the plaintiff as the beneficiary. *Id.* at 33.

<sup>36</sup> An examination of the early period of inconsistent theories of recovery without fault reveals an intermediate step in the transition from negligence to strict liability. See R. EPSTEIN, *supra* note 9, at 30. First, a more stringent standard of care was imposed upon manufacturers of consumer goods, particularly food, so that proof of the food's purity was required, rather than a mere showing that reasonable care was taken to make it pure. *Id.* at 30-31. It has been suggested that there is no significant difference between proving a defect, defined under strict liability theory as a reasonably foreseeable, "harm-causing characteristic," and proving the manufacturer to be negligent under this standard. R. KEETON, *supra* note 9, at 109. The evidence required and its effect on the jury would be the same. *Id.* Second, liberal use of *res ipsa loquitur* shifted the burden of proving freedom from negligence, once the defect was established, to the manufacturer. R. EPSTEIN, *supra* note 9, at 31. See also Epstein, *Products Liability: The Search for the Middle Ground*, 56 N.C.L. REV. 643, 647 (1978).

The plaintiff in a negligence case must prove: (1) his injury was caused by a defect; (2) the defect existed when the product left the manufacturer; and (3) the defect was caused by the manufacturer's negligence. The point has been made that strict liability theory is of no help to the plaintiff in establishing the first two requirements. Prosser, *supra* note 5, at 1114. The link between the defect and the manufacturer's negligence is the easiest element to prove, and a plaintiff aided by *res ipsa loquitur* invariably gets his case before the jury. *Id.* Once the cause of the injury is "laid at [the manufacturer's] doorstep," a jury verdict for the defendant manufacturer is "virtually unknown." *Id.* at 1115.

<sup>37</sup> Three distinct bases have been identified for the implied warranty of fitness: (1) a tort theory of misrepresentation upon which the buyer relies; (2) an implied in fact contract term agreed upon by the parties in the contract of sale; or (3) a term read into the contract as a matter of law by virtue of the sale, whether the parties intended it or not. Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 122-24 (1943). Dean Prosser found no significant difference among the various theories, noting that "courts have flitted cheerfully from one to another as the facts may demand, always tending to an increasing extent to favor the buyer and find the warranty." *Id.* at 124-25 (citations omitted).

<sup>38</sup> See W. PROSSER, *supra* note 9, § 97, at 655. Warranty was historically a tort concept, but the word itself was so closely identified with the existence of a contract of sale that it was always attended by rules of sales law. *Id.*; see Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 801 (1966).

out requiring proof of fault and without invoking privity was *Henningsen v. Bloomfield Motors, Inc.*<sup>39</sup> Decided under the Uniform Sales Act,<sup>40</sup> *Henningsen* is notable for its handling of the privity issue and the seller's attempts to disclaim liability.

The court had no difficulty finding an implied warranty of safety running from the manufacturer and dealer of the defective automobile to the purchaser.<sup>41</sup> Notably, the injured plaintiff was the wife of the purchaser and not a party to the contract of sale. By "parity of reasoning," the policy considerations which would allow a buyer to maintain an action against a manufacturer, even though he had dealt only with the dealer, were invoked to permit Mrs. Henningsen to bring suit, despite the lack of privity.<sup>42</sup>

The court next examined the clauses in both the manufacturer's and dealer's contracts which disclaimed all liability for personal injury and found them to be unfairly obtained, given the relative bargaining positions of the parties.<sup>43</sup> Relying on "[a]n instinctively felt sense of justice," the court struck down the exculpatory clauses and upheld recovery under the implied warranty theory.<sup>44</sup>

Although the *Henningsen* decision was immediately acclaimed as a landmark in consumer protection, it has since been assessed as "clearly flawed in all its essentials."<sup>45</sup> Nowhere in the opinion is the theory of strict tort liability mentioned. Rather, the case osten-

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<sup>39</sup> 32 N.J. 358, 161 A.2d 69 (1960). The *Henningsen* decision has been characterized as "the date of the fall of the citadel of privity." Prosser, *The Fall of the Citadel*, *supra* note 38, at 791.

<sup>40</sup> 32 N.J. at 370-74, 161 A.2d at 76-78. The court also referred to the Uniform Commercial Code (UCC), which had not yet been enacted in New Jersey. *Id.* at 415, 161 A.2d at 100-01.

<sup>41</sup> *Id.* at 384, 161 A.2d at 84. Despite the absence of privity between the purchaser, who dealt only with the car dealer, and the manufacturer, the court found an implied warranty running from the manufacturer to the ultimate purchaser based on "modern marketing conditions" in which the manufacturer actively promotes sales of his product to consumers. *Id.*

<sup>42</sup> *Id.* at 412-16, 161 A.2d at 99-101. In granting relief absent privity, the court evidenced an awareness that it was going beyond the current state of the law, noting that "[i]t is important to express the right of Mrs. Henningsen to maintain her action in terms of a general principle." *Id.* at 414, 161 A.2d at 100. The court did not reach the question of how far the privity requirement should be relaxed, stopping at the "general principle" that with respect to a car, the purchaser, his family, and others occupying or using it with his consent should be included in the seller's warranties. *Id.*

<sup>43</sup> *Id.* at 385-404, 161 A.2d at 84-95. The court's analysis of the circumstances and terms of the parties' contract owes much to the UCC's provision on unconscionability. *Id.* at 403-04, 161 A.2d at 95; see U.C.C. § 2-302.

<sup>44</sup> 32 N.J. at 388, 161 A.2d at 85.

<sup>45</sup> R. EPSTEIN, *supra* note 9, at 53.

sibly was decided under codifications of sales law which regulated transactions between buyers and sellers. Moreover, in light of the increasing judicial activism in affording relief to consumers of all types of products under a strict liability theory, the *Henningsen* court's invalidation of the seller's attempts to limit its liability in effect "neutralized the possibility that private contracts could check judicial excesses."<sup>46</sup> One of the leading academic commentators of the time, however, was urging even greater judicial activism.<sup>47</sup> Dean Prosser contended that the impediments to increased relief, inherent in warranty law,<sup>48</sup> demanded that courts cease to employ the language of warranty and openly embrace a theory of strict tort liability that was not dependent on any contractual relationship, but rather, was imposed by law as a matter of public policy.<sup>49</sup>

Shortly thereafter, in *Greenman v. Yuba Power Products*,

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<sup>46</sup> *Id.* at 56. The *Henningsen* court's handling of the contract provision limiting the seller's liability has been criticized as too extreme on a practical level. *Id.* at 52. Rather than refusing to give effect to such clauses, it has been argued that the court should have required only that they be printed in a size and type conspicuous enough to alert the consumer, who is free to accept or reject their terms. *Id.* Moreover, it has been suggested that the court failed clearly to establish why, absent fraud or duress, the contract was the result of overreaching or an unequal bargaining position, since automobile manufacturers do not "conscript unwilling persons as their customers." *Id.* at 53. On a conceptual level, the court overlooked the possibility that the limited warranty was a benefit to both buyer and seller, *id.*, with the buyer's benefit being reflected in a reduced sale price. *Id.* at 53-54. The lower price is thus the quid pro quo of the limited warranty. *Id.* Finally, *Henningsen*, by its excesses, has been read as an indictment of modern manufacturing and marketing practices, thus providing implicit encouragement of an even more consumer-protective, remedy-oriented attitude by the judiciary. *Id.* at 56.

<sup>47</sup> See Prosser, *supra* note 5, at 1134. In much quoted language, Prosser articulated what amounted to a rallying cry for strict liability in tort:

No one doubts that, unless there is privity, liability to the consumer must be in tort and not in contract. There is no need to borrow a concept from the contract law of sales; and it is 'only by some violent pounding and twisting' that 'warranty' can be made to serve the purpose at all. Why talk of it? If there is to be strict liability in tort, let there be strict liability in tort, declared outright, without an illusory contract mask.

*Id.* (citation omitted). Prosser's metaphorical title (*The Assault Upon the Citadel*), borrowed from Judge Cardozo's opinion in *Ultramares Corp. v. Touche*, 255 N.Y. 170, 180, 174 N.E. 441, 445 (1931), is significant. Imagery of storming the gates, of bringing to the ground an "edifice" (precedent) both formidable and faintly sinister may have appealed, albeit subconsciously, to the growing judicial impulse to shape remedies to right social wrongs. Cf. Shanker, *A Case of Judicial Chutzpah (The Judicial Adoption of Strict Tort Products Liability Theory)*, 11 AKRON L. REV. 697, 697 (1978) (development of strict tort liability likened to pursuit of the Holy Grail).

<sup>48</sup> W. PROSSER, *supra* note 9, § 98, at 656-58.

<sup>49</sup> *Id.*

*Inc.*,<sup>50</sup> a leading torts jurist distinguished the nature and purpose of warranties in sales law from the theory of strict tort.<sup>51</sup> Sales law, held Judge Traynor, regulates the relationship between buyer and seller which necessarily grows out of a contract. In contradistinction, strict tort was held to operate outside of the contract, fulfilling the public policy of allocating the costs of injuries resulting from defective products among society at large.<sup>52</sup>

Ultimately, in 1965, the theory of strict liability for defective products was articulated, entirely without reference to the language of warranty, by the American Law Institute in section 402A of the Second Restatement of Torts.<sup>53</sup> With the exception of section 402A, strict products liability theory is an entirely judge-made system of allocating the costs of injuries.<sup>54</sup>

<sup>50</sup> 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962) (Traynor, J.) (en banc).

<sup>51</sup> *Id.* at 63-64, 377 P.2d at 901, 27 Cal. Rptr. at 701. The facts on which *Greenman* arose necessitated distinguishing the warranty remedy from that of strict tort liability in order to grant relief. Under California's version of the Uniform Sales Act, in effect at the time, a purchaser who did not give notice of the breach within a reasonable time was precluded from relief. The plaintiff in *Greenman* had not notified the retailer and manufacturer of the claimed breaches of warranty until 10½ months after he was injured. *Id.* at 59, 377 P.2d at 898-99, 27 Cal. Rptr. at 698-99.

<sup>52</sup> *See id.* at 63-64, 377 P.2d at 901, 27 Cal. Rptr. at 701. Central to Judge Traynor's conclusion that warranty law governing commercial transactions is not applicable to the manufacturer's liability to an injured purchaser is his formulation of the purpose that strict tort liability is to serve: "The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." *Id.*

<sup>53</sup> RESTATEMENT (SECOND) OF TORTS § 402A (1965). The Restatement 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.
- (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.

*Id.*

<sup>54</sup> *See Gregory, supra* note 1, at 384-85. The degree of judicial activism involved in the development of strict products liability, and the lack of clarity in the articulation of its principles, was noted with disapproval:

But see what has been going on in this country under the name of implied warranties, to protect consumers at the cost of manufacturers not in privity of contract with them, when some of our courts get impatient over the fact that there is no evidence of negligence on which to allow recovery. This perversion of good old legal doctrine is bewildering; it is all right, perhaps, as far as the social result is

Significantly, during the same period in which *Greenman*<sup>55</sup> and section 402A articulated the theory of strict liability for defective products, the Uniform Commercial Code was beginning to be adopted throughout the states.<sup>56</sup> The question which immediately arose, and still has not been fully resolved, was the extent to which the two bodies of law that purport to offer protection to the consumer are coextensive or preemptive.<sup>57</sup> To the extent that the provisions of the Uniform Commercial Code have been perceived to be inconsistent with or restrictive of the consumer's remedy, the Code largely has been disregarded.<sup>58</sup> This evidences a drastic change in judicial thought with respect to the judiciary's perception of the nature of its role. The resultant trend toward increased judicial autonomy in fashioning remedies based on public policy has undergone severe criticism.<sup>59</sup>

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concerned, but it is a type of judicial legislation which is defensible only if the courts call it by its right name of absolute liability without fault, or, if I may suggest a new term, enterprise liability.

*Id.*

<sup>55</sup> See notes 50-52 and accompanying text *supra*.

<sup>56</sup> See Shanker, *Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Jurisprudential Eclipses, Pigeonholes and Communication Barriers*, 17 W. RES. L. REV. 5, 5-6 (1965).

<sup>57</sup> See RESTATEMENT (SECOND) OF TORTS § 402A comment m (1965). The comment to section 402A of the Restatement emphasizes the independence of strict tort from the UCC, stating that "[t]he rule stated in this Section is not governed by the provisions of the Uniform Sales Act, or those of the Uniform Commercial Code." *Id.* With respect to the more extreme positions on the relationship between strict tort liability and the UCC, the notion that the two fields have "distinct orbits in the jurisprudential heavens wherein each shines without interfering with the other" has been generally discounted. Shanker, *supra* note 56, at 10. It has also been noted that, though increased consumer protection may have been one of the aims of the drafters of the UCC, the Code when enacted clashed with the recent liberalized case law on defective products. The result was that the UCC, with its provisions dealing with notice, privity, and disclaimer, had an inhibiting effect on manufacturer liability. R. KEETON, *supra* note 9, at 115-16. If one takes the position that the two bodies of law are coextensive, one might argue for a judicial formulation of strict products liability that would incorporate the statutory restrictions of notice, privity, and disclaimer. *Id.* at 115. Viewing the two as "parallel but competing," and accepting strict tort as independent from the UCC results in strict tort "displac[ing] and eclips[ing]" the parallel UCC provisions. Shanker, *supra* note 56, at 10-11.

<sup>58</sup> See note 57 *supra*.

<sup>59</sup> For a particularly apoplectic response to judicial neglect of the UCC in favor of strict tort, see Shanker, *supra* note 47, at 705, in which the author asks "since when does a court get the power to ignore a validly enacted statute, just because the court does not like what the statute says and wishes that it had said something else?" *Id.*; see Shanker, *supra* note 56, at 11 n.20. Even the leading proponent of strict tort, noting the rapidity with which it had been adopted as the all but exclusive remedy in defective products cases, wondered "[w]hether, given enough time—say another decade—the sales law of warranties might have worked out a method of dealing effectively with these problems . . ." Prosser, *supra* note

It was, of course, inevitable that the consumer-oriented tort remedies fashioned by the courts to deal with defective products would filter into the area of housing, another consumer "product," but one traditionally subject to the particularly rigid doctrines of real property law.<sup>60</sup> Having examined the judicial dismissal of "analytical jurisprudence" in favor of a more flexible system of redress in tort, a similar process, proceeding at a slower pace, will be examined in the area of real property. This examination leads inevitably to the question of whether the "complex developments indigenous to the law of products liability"<sup>61</sup> will be extended to the sale of housing and, if so, how and with what effect.

## REAL PROPERTY LAW: FROM CAVEAT EMPTOR TO CAVEAT VENDITOR

### *Caveat Emptor and Merger: Decline and Fall*

Property law historically has been hidebound with rigid doctrines.<sup>62</sup> One of the most rigid and significant of these was the doctrine of caveat emptor. Originally applicable to all types of commercial transactions between vendor and purchaser,<sup>63</sup> this

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38, at 801.

<sup>60</sup> See D. WHALEY, *WARRANTIES AND THE PRACTITIONER* 230 (1981). Courts recognized that the reliance a consumer placed on the representations of a seller, or at least on the assumption that the purchased good would meet minimum standards of merchantability, was an interest worthy of protection. This change in judicial attitude made the need for changes in real property law to protect a purchaser's interest more compelling. *Id.* The process by which the courts constructed a body of remedies for home buyers has been described as the "utilization of dynamic and flexible legal concepts when the more archaic and immutable ones failed them." Bearman, *Caveat Emptor in Sales of Realty—Recent Assaults Upon the Rule*, 14 *VAND. L. REV.* 541, 543 (1961).

<sup>61</sup> Recommendation of the Law Revision Commission to the Legislature Relating to the Liability of Housing Merchants for Personal Injuries and Breach of Warranty, [1967] *N.Y. LAW REV. COMM'N REP.* 30.

<sup>62</sup> See generally W. LEACH, *PROPERTY LAW INDICTED: OR THE PEOPLE VS. BLACKSTONE, KENT, GRAY, AND STARE DECISIS* 7-12 (1967). Blackstone characterized the static framework of rules governing the law of real property in England as "a fine artificial system, full of unseen connections and nice dependencies." *Id.* at 2. The major flaw of such a system is its inherent fragility when confronted with modern conditions. This concept is implicit in Blackstone's warning that "he who breaks one link of the chain endangers the dissolution of the whole." *Id.* (quoting *Perrin v. Blake*, reported in HARGRAVE, *TRACTS RELATIVE TO THE LAW OF ENGLAND* 489 (1787)).

The idiosyncratic system of rules applicable to real property has been explained as growing out of the fixed and permanent nature of land. In contrast, the "expanding and transient market for goods" demanded "commercial fluidity" and a law of sales responsive to change. 1 S. WILLISTON, *SALES* § 6-6, at 170 (4th ed. A. Squillante & J. Fonseca 1973).

<sup>63</sup> See Hamilton, *The Ancient Maxim Caveat Emptor*, 40 *YALE L.J.* 1133, 1136-56, 1158-78 (1931). For a comprehensive discussion of the historical foundations of caveat

inflexible rule continued to influence land sales long after its scope had been curtailed in the area of personal property.<sup>64</sup> As a general principle arising from land sale disputes, caveat emptor constituted a simple and effective judicial incantation to the unwary purchaser: absent an express agreement to the contrary, the seller of real estate was not liable to the purchaser for the defective condition of the premises.<sup>65</sup> The doctrine was grounded in the notion that if the purchaser had an adequate opportunity to inspect the

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emptor, applied in the area of personal property, see *id.* at 1136 n.11. Linking the development of a doctrine that the buyer must be aware of the risks of a commercial transaction to the moral values of the time, Hamilton finds no place for caveat emptor in the Middle Ages. *Id.* at 1136. The religious spirit of the age excoriated trade as an indulgence in avarice, one of the seven deadly sins. *Id.* at 1137, 1139. The merchant, who was perceived in such an unfavorable light, was still held responsible for the quality of his wares pursuant to the prevailing system of Christian ethics. *Id.* at 1141. A doctrine which placed the risk of unscrupulous practices upon the buyer was inconsistent with such a system. *Id.* It was not until trade developed and was to a degree legitimized, in the 17th and 18th centuries, that the concept of caveat emptor became firmly entrenched. *Id.* at 1162-63.

In the United States, the "triumph" of caveat emptor is linked not to morality but to the economy, specifically the growing industrial society. *Id.* at 1178. In 1870, the United States Supreme Court placed its imprimatur upon the doctrine, declaring it to be of "universal acceptance" in every state save one. *Barnard v. Kellogg*, 77 U.S. (10 Wall.) 383, 388-89 (1870).

<sup>64</sup> See, e.g., M. FRIEDMAN, *CONTRACTS AND CONVEYANCES OF REAL PROPERTY* § 1.2(n), at 30-32 (3d ed. 1975) (doctrine "flourishes" in sales of realty); Bearman, *supra* note 60, at 542 (doctrine "still clings tenaciously" to sales of realty); Seavey, *Caveat Emptor as of 1960*, 38 TEX. L. REV. 439, 445 (1960) ("courts have been very slow" to demand that seller reveal defects in realty). One explanation for the divergence between the law of personalty and that of realty with respect to caveat emptor is the timing of the emergence of mass production techniques. Bearman, *supra* note 60, at 542. Mass-produced chattels were one result of the Industrial Revolution, and concerns about quality control may have hastened the demise of caveat emptor. *Id.* at 542-43. With the enactment of the Uniform Sales Act and later the UCC, the doctrine was divested of its remaining power with respect to personal property. *Id.* It was not until 1945 that similar techniques were employed in the building industry to meet the post-World War II demand for housing. *Id.*; Roberts, *The Case of the Unwary Home Buyer: The Housing Merchant Did It*, 52 CORNELL L.Q. 835, 837 (1967).

<sup>65</sup> See 8A G. THOMPSON, *COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY* § 4470, at 393 (1963); Bearman, *supra* note 60, at 542; Note, *Phasing Out Caveat Emptor: Implied Warranties in Builder-Vendor Contracts*, 2 CAP. U.L. REV. 199, 200-01 (1973). Until approximately 20 years ago, courts were still invoking the doctrine of caveat emptor as a bar to implied warranties in the sale of realty. See, e.g., *Steiber v. Palumbo*, 219 Or. 479, 490, 347 P.2d 978, 983 (1959) (en banc) (court precluded by statute from "summoning . . . implied warranties"), *overruled*, *Yepsen v. Burgess*, 269 Or. 635, 525 P.2d 1019 (1974); *Levy v. C. Young Constr. Co.*, 46 N.J. Super. 293, 296, 134 A.2d 717, 719 (Super. Ct. App. Div. 1957) (recognition of implied warranties would render real estate transactions "chaotic"), *aff'd*, 26 N.J. 330, 139 A.2d 738 (1958), *overruled*, *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965); *Dennison v. Harden*, 29 Wash. 2d 243, 250, 186 P.2d 908, 912 (1947) (court found no cases recognizing "such a thing as an implied warranty in the sale of real estate").

premises,<sup>66</sup> he would be bound by whatever knowledge of defects his inspection should have revealed.<sup>67</sup> If he was hesitant to rely upon his own perceptions, the proper course was to exact an express warranty of fitness from the vendor.<sup>68</sup> The other principal means by which a purchaser could have avoided the remedial bar posed by caveat emptor was by establishing fraud on the part of the vendor.<sup>69</sup>

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<sup>66</sup> See Dunham, *Vendor's Obligation as to Fitness of Land for a Particular Purpose*, 37 MINN. L. REV. 108, 110 (1953). The belief that a vendee's inspection adequately will protect him from defects dates back to a society in which the parties to the transaction were of the same community and were familiar with each other's land. *Id.* To place the risk of inspection upon the vendee was not inequitable, since the bifurcated process by which land and a house were purchased during that time afforded the vendee other remedies for subsequently discovered defects. *Id.* at 111. It was customary for the 19th-century purchaser to carry out two distinct transactions, first, the purchase of the land, and second, the hiring of an architect and builder to construct the house. If defects subsequently developed in the house, the architect could be sued in negligence, Roberts, *supra* note 64, at 837, or the builder could be sued on the promise implied in the construction contract that the house would be built in a workmanlike manner. Dunham, *supra*, at 111. The implied warranty of workmanlike quality growing out of the construction contract, as distinguished from the contract of sale, has always been recognized. *Id.* Modern developments in the field of real estate whereby houses began to be mass produced, and the builder and seller became the same entity, cast the purchaser back upon the no-liability rule of caveat emptor, since the contract was viewed as one for sale of a completed house and land. Roberts, *supra* note 64, at 837.

<sup>67</sup> See, e.g., *Kordig v. Northern Constr. Co.*, 18 Ill. App. 2d 48, 53-55, 151 N.E.2d 470, 472-74 (App. Ct. 1958) (vendor not liable if defect patent); *Tudor v. Heugel*, 132 Ind. App. 579, 583-84, 178 N.E.2d 442, 444-45 (App. Ct. 1961) (vendor who made no false representations not liable to purchaser who inspected house prior to purchase); *Crum v. McCoy*, 41 Ohio Misc. 34, 38, 322 N.E.2d 161, 164 (Mun. Ct. Franklin County 1974) (caveat emptor applies when conditions are open to observation and purchaser freely investigates); cf. *Hughes v. Stusser*, 68 Wash. 2d 707, 711, 415 P.2d 89, 92 (1966) (caveat emptor will not excuse "moral and legal obligation to disclose" defects not discoverable on reasonable inspection).

<sup>68</sup> See 6A R. POWELL & P. ROHAN, REAL PROPERTY ¶ 938.2[1], at 370.29 (1981). If the purchaser exacted an express warranty from his vendor in oral form, the Statute of Frauds and the parol evidence rule would operate to preclude enforcement of the warranty. D. WHALEY, *supra* note 60, at 228. It has been argued that to demand that the home buyer obtain an express warranty from the vendor assumes a greater level of sophistication on the buyer's part than is ordinarily the case. See Haskell, *The Case for an Implied Warranty of Quality in Sales of Real Property*, 53 GEO. L.J. 633, 642 (1965).

<sup>69</sup> See 3 AMERICAN LAW OF PROPERTY § 11.20, at 53-56 (A.J. Casner ed. 1952). Originally, nondisclosure was not deemed to be fraud because no duty to speak arose in the vendor-purchaser relation. *Swinton v. Whitinsville Sav. Bank*, 311 Mass. 677, 678, 42 N.E.2d 808, 808 (1942). The genesis of the imposition upon the vendor of a duty to disclose nondiscoverable defects has been traced to 1945, Bearman, *supra* note 60, at 561, a period in which the growth of home building and sales prompted recognition of the consumer's need for protection. See note 64 and accompanying text *supra*. The vendor, as the party with superior knowledge, had a duty to disclose, and failure to do so was actionable fraud. *Elder v. Clawson*, 14 Utah 2d 379, 382, 384 P.2d 802, 804 (1963). Protection of the home buyer was broadened even further by cases which allowed recovery when an innocent misrepresenta-



Inextricably intertwined with the doctrine of caveat emptor was the merger doctrine. Arising from the peculiar two-step format that characterizes a land transaction, whereby the parties first enter into a contract of sale defining their rights and obligations, and, at some later date, tender and accept the deed,<sup>70</sup> the merger doctrine served as a rationale for the application of caveat emptor.<sup>71</sup> Merger rested on the theory that since the home buyer theoretically had an opportunity to inspect the premises between contract and closing, any contract warranties of fitness and quality not specifically recited in the deed would be extinguished.<sup>72</sup> The law would imply no warranties from the deed, which was deemed to represent completion of the contract and all of its terms.<sup>73</sup>

Both caveat emptor and merger, functioning as general principles ordering land sale transactions, attracted criticism because of the often harsh consequences of their application.<sup>74</sup> Courts seeking to offer home buyers greater protection relied initially upon the

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tion was made, *Spargnapani v. Wright*, 110 A.2d 82, 83 (D.C. 1954), and even when the true facts of the matter being represented could easily have been ascertained by the vendee. *Suraci v. Ball*, 160 Pa. Super. 349, 351-52, 51 A.2d 404, 405-06 (Super. Ct. 1947). *But see Sokolosky v. Tulsa Orthopaedic Assocs. Pension Trust*, 566 P.2d 429, 431 (Okla. 1977).

<sup>70</sup> See *Roberts*, *supra* note 64, at 857.

<sup>71</sup> See Note, *Commercial Law—Implied Warranties in Sales of Real Estate—The Trend to Abolish Caveat Emptor*, 22 DE PAUL L. REV. 510, 512 (1972).

<sup>72</sup> 6 A. CORBIN, *CONTRACTS* § 1319, at 310 (1962); 7 S. WILLISTON, *TREATISE ON THE LAW OF CONTRACTS* § 926, at 797-99 (3d ed. W. Jaeger 1963); 2 *RESTATEMENT OF CONTRACTS* § 413, at 778 (1932); 3 *AMERICAN LAW OF PROPERTY*, *supra* note 69, § 11.65, at 165-66. See generally Comment, *Merger of Land Contract in Deed*, 25 ALB. L. REV. 122, 122 (1961).

<sup>73</sup> D. WHALEY, *supra* note 60, at 228-29. Merger of contract terms into the deed as a matter of course ensured a predictable result in land sale transactions, and thus fulfilled the ordering function of a comprehensive principle. The policy behind it was "to resolve all real property problems by looking to only one recorded document and to make that document carry all of the limitations of the transaction so that the whole world can know the complete contours of the deal." *Id.* at 229; see *Bennett v. Behring Corp.*, 466 F. Supp. 689, 701 (S.D. Fla. 1979); *Knudson v. Weeks*, 394 F. Supp. 963, 976 (W.D. Okla. 1975); *Palos Verdes Corp. v. Housing Auth.*, 202 Cal. App. 2d 827, 836, 21 Cal. Rptr. 225, 231 (Dist. Ct. App. 1962); *Pybus v. Grasso*, 317 Mass. 716, 718, 59 N.E.2d 289, 291 (1945); *Dieckman v. Walser*, 114 N.J. Eq. 382, 385, 168 A. 582, 583 (Eq. Ct. 1933); *Cathedral Court Co. v. Sun Constr. Co.*, 72 Misc. 408, 410, 130 N.Y.S. 154, 155 (Sup. Ct. App. T., 1st Dep't 1911); *Smith v. Vehrs*, 194 Or. 492, 504, 242 P.2d 586, 591 (1952); *Miles v. Mackle Bros.*, 73 Wis. 2d 84, 87-88, 242 N.W.2d 247, 249-50 (1976).

<sup>74</sup> See *Hamilton*, *supra* note 63, at 1135. Caveat emptor has been characterized generally as "[t]he refusal of public authority, through legislature and judiciary, to accord effective protection to the purchaser . . ." *Id.* The soundness of the theoretical basis for the merger doctrine has been attacked, and it has been labeled "merely a 'handy' phrase, of convenient uncertainty and obscurity, that is used so as to avoid the necessity of clear thinking and accurate analysis." 6 A. CORBIN, *supra* note 72, § 1319, at 310.

traditional exceptions to the doctrines.<sup>75</sup> Thus, cases of fraud or mistake,<sup>76</sup> or purchases of property involving latent defects,<sup>77</sup> were spared the harshness of its application. Another very useful method of circumventing the "impediment of the deed"<sup>78</sup> was the collateral covenants exception, which invoked a distinction between those provisions of the contract which the parties intended to merge into the deed,<sup>79</sup> and those deemed independent, or collat-

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<sup>75</sup> *But see* *Lutz v. Bayberry Huntington, Inc.*, 148 N.Y.S.2d 762, 767-68 (Sup. Ct. Nassau County 1956). In *Lutz*, the court, rather than relying on exceptions to the doctrines of merger and caveat emptor, fashioned an implied warranty of workmanlike quality out of two other basic principles: (1) every contract implies good faith and fair dealing between the parties, and (2) implied in every contract is a covenant that neither party will prevent the other from receiving the fruits of the contract. *Id.*

The Uniform Land Transactions Act (the ULTA), a model for state legislation which has not yet been adopted by any state, would eliminate the merger doctrine entirely. UNIF. LAND TRANSACTIONS ACT § 1-309, commissioner's comment (1975), *reprinted in* 13 U.L.A. 539, 572 (1980). Section 1-309 of the ULTA provides:

Acceptance by a buyer or a secured party of a deed or other instrument of conveyance is not of itself a waiver or renunciation of any of his rights under the contract under which the deed or other instrument of conveyance is given and does not of itself relieve any party of the duty to perform all his obligations under the contract.

*Id.* The section abolishes the doctrine of merger but permits terms of the deed, if agreed to by the purchaser, to operate as modifications of the contract. *Id.* § 1-309, commissioner's comment. The parties may also agree that acceptance of the deed waives the purchaser's rights to claim damages for breach. *Id.* Such a limitation of remedy would be subject to section 2-517 of the ULTA. *Id.* This section is patterned after section 2-719 of the Uniform Commercial Code, which provides for acceptable and unconscionable contractual modification or limitation of remedies. *Id.*; *see* U.C.C. § 2-719.

<sup>76</sup> *See, e.g.*, *Richard v. A. Waldman & Sons, Inc.*, 155 Conn. 343, 346, 232 A.2d 307, 309-10 (1967) (misrepresentation as to compliance with zoning ordinance); *Pryor v. Aviola*, 301 A.2d 306, 308-09 (Del. Super. Ct. 1973) (representation, with intent to deceive, that trees could be cut down); *Zander v. Blumenthal*, 1 Ohio App. 2d 244, 245-47, 198 N.E.2d 93, 95-96 (Ct. App. 1964) (false representation that two-family house was three-family house); *Jensen v. Miller*, 280 Or. 225, 230-32, 570 P.2d 375, 377-79 (1977) (conveyance based on mistaken survey).

<sup>77</sup> As with caveat emptor, *see* notes 66-67 and accompanying text *supra*, the nature and extent of the vendee's inspection is relevant in determining whether contract provisions have merged into the deed. Where defects are known or should have been discovered, acceptance of the deed without complaint within a reasonable period extinguishes the right to damages. *Barrie v. Abate*, 209 Md. 578, 583, 121 A.2d 862, 864 (1956). No merger and waiver of remedy is implied when the vendee has no means of knowing of the defect. *Galvin v. Keen*, 100 Ohio App. 100, 104-05, 135 N.E.2d 769, 772-73 (Ct. App. 1954).

<sup>78</sup> *Snyder v. Roberts*, 45 Wash. 2d 865, 872, 278 P.2d 348, 353 (1955) (quoting *Howes v. Barker*, 3 Johns. Cas. 506, 509 (N.Y. Sup. Ct. 1808)).

<sup>79</sup> *Knudson v. Weeks*, 394 F. Supp. 963, 976 (W.D. Okla. 1975) (merger determined by intention of parties, based on instruments and circumstances). *See also* *Disbrow v. Harris*, 122 N.Y. 362, 365, 25 N.E. 356, 357 (1890). In *Disbrow*, the court specifically rejected the existence of a presumption of surrender of stipulations in an executory contract by acceptance of the deed. *Id.* A party's intent not to give up contractual provisions is established

eral, which survived merger.<sup>80</sup> This exception has been used, perhaps most effectively, to distinguish as collateral the contractual agreement to construct the dwelling house from the agreement to convey the land.<sup>81</sup> Having preserved this agreement, an implied warranty of workmanlike construction could then be imposed, based upon accepted construction-contract precedent.<sup>82</sup>

### *From Implied Warranty to Strict Liability*

The modern implied warranty of fitness had its origins in the

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when conveyance of the deed is deemed to constitute only part performance of the contract. Provisions of the unperformed portion of the contract then survive merger. *Cox v. Bowman*, 213 Or. 154, 161, 323 P.2d 60, 63 (1958). For example, when a contract provides for transfer of title, among other provisions, transfer of title alone cannot be construed as full performance of all the contractual obligations, nor as substituted performance for them. *Rapp v. Murray*, 112 Ohio App. 344, 348, 171 N.E.2d 374, 377 (Ct. App. 1960). Similarly, when a deed was tendered to a vendee in possession under an installment contract so that she could obtain a tax exemption, the deed, which conveyed less land than described in the contract, did not trigger application of merger. The deed "was neither offered . . . nor accepted . . . as a performance of the contract, but for a purpose entirely foreign thereto." *Thompson v. Reising*, 114 Ind. App. 456, 464, 51 N.E.2d 488, 492 (Ct. App. 1943) (en banc).

<sup>80</sup> Collateral covenants were defined in an early case as those unrelated to "title, possession, quantity or emblements of the land." *Bull v. Willard*, 9 Barb. 641, 645 (N.Y. Sup. Ct. Monroe County 1850). The concept has been interpreted to embrace a wide variety of contractual provisions. See, e.g., *Stevens v. Milestone*, 190 Md. 61, 66, 57 A.2d 292, 294 (1948) (agreement to furnish insulation and windows); *Lipson v. Southgate Park Corp.*, 345 Mass. 621, 625, 189 N.E.2d 191, 194 (1963) (covenant to build house according to specifications); *Witbeck v. Waine*, 16 N.Y. 532, 541-42 (1858) (provision to adjust balance of purchase price after survey made); *Liang v. Malawista*, 70 App. Div. 2d 415, 419, 421 N.Y.S.2d 594, 596-97 (2d Dep't 1979) (per curiam) (agreement to remodel existing house).

<sup>81</sup> *Weinberg v. Wilensky*, 26 N.J. Super. 301, 304-05, 97 A.2d 707, 709-10 (Super. Ct. App. Div. 1953). In *Weinberg*, acceptance of the deed was held to perform the agreement to convey; the agreement to build, however, was deemed "so far collateral to the conveyance as not to be merged in the deed." *Id.* at 305, 97 A.2d at 710 (citing *Brownback v. Spangler*, 101 N.J. Eq. 388, 139 A. 524 (Ch. 1927)); *accord*, *Kuniansky v. D.H. Overmeyer Warehouse Co.*, 406 F.2d 818, 820 (5th Cir. 1968); *Holihan v. Rabenius Builders, Inc.*, 355 Mass. 639, 642-43, 246 N.E.2d 638, 640 (1969); *cf.* *Cullens v. Woodruff*, 137 Ga. App. 262, 263-64, 223 S.E.2d 293, 294-95 (Ct. App. 1976) (construction work to be performed after closing not affected by doctrine of caveat emptor). This characterization of the transaction of sale, which was resorted to in the interest of expanding the home buyer's protection, appears to be a relic of the peculiar format of the 19th-century real estate transaction, whereby separate contracts were executed with a seller for the sale of the land and with a builder for the construction of the house. See note 66 *supra*. It is suggested that such a characterization is inapposite to contemporary real estate transactions, where the vendor of land and the builder of the dwelling is oftentimes the same person.

<sup>82</sup> Builders traditionally have been held to warrant that their buildings will be erected in a workmanlike manner. *E.g.*, *Jose-Balz Co. v. De Witt*, 93 Ind. App. 672, 675, 176 N.E. 864, 865 (Ct. App. 1931) (en banc); *Robertson Lumber Co. v. Stephen Farmers Coop. Elevator Co.*, 274 Minn. 17, 21, 143 N.W.2d 622, 625-26 (1966); *Mann v. Clowser*, 190 Va. 887, 901, 59 S.E.2d 78, 84-85 (1950).

construction-contract warranty, which was extended by courts seeking to afford the home buyer relief in situations in which the house was unfinished when purchased.<sup>83</sup> The implied warranty that the house, when finished, would be fit for habitation thus rested on the contract to build, not the contract to sell, and consequently was premised on the defendant's status as a builder rather than a vendor.

Once the unfinished home exception was isolated, it was adopted and functioned as a legitimate sub-doctrine within the array of rules ordering land sale transactions.<sup>84</sup> The next step for consumer-oriented courts was the abolition of the distinction between finished and unfinished houses, and the invocation of an implied warranty of fitness arising from the contract of sale for a completed house.<sup>85</sup> This step was prompted by the unavoidable

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<sup>83</sup> Two English decisions of the 1930's first recognized an implied warranty running to the purchaser of an unfinished home. *Miller v. Cannon Hill Estates, Ltd.*, [1931] 2 K.B. 113, 120-21 (dictum); *Perry v. Sharon Dev. Co.*, [1937] 4 All E.R. 390, 392-93 (C.A.). The rationale given for distinguishing an unfinished house encompassed both construction contract law and the buyer's inability to inspect, a concept crucial to the invocation of caveat emptor:

In the first place, the maxim caveat emptor cannot apply, and the buyer, insofar as the house is not yet completed, cannot inspect it, either by himself or by his surveyor, and, in the second place, from the point of view of the vendor, the contract is not merely a contract to sell, but also a contract to do building work, and, insofar as it is a contract to do building work, it is only natural and proper that there should be an implied undertaking that the building work should be done properly.

*Id.* at 395-96 (MacKinnon, L.J., concurring).

<sup>84</sup> The American cases upholding an implied warranty in the sale of an unfinished house begin with *Vanderschrier v. Aaron*, 103 Ohio App. 340, 342, 140 N.E.2d 819, 821 (Ct. App. 1957), in which the court relied on the English precedent, *see* note 83 *supra*, to grant relief to a purchaser whose basement was flooded due to defective sewer construction. *Id.* at 341-42, 140 N.E.2d at 820. The following year, the Supreme Court of Washington held that a contract to construct a new dwelling was not merely a contract of sale, but one for work, labor, and materials, in which there vested an implied warranty that the finished house would be fit for human habitation. *Hoye v. Century Builders, Inc.*, 52 Wash. 2d 830, 832-33, 329 P.2d 474, 476 (1958). In another seminal case, *Weck v. A:M Sunrise Constr. Co.*, 36 Ill. App. 2d 383, 390-96, 184 N.E.2d 728, 731-34 (App. Ct. 1962), the court relied both on *Miller v. Cannon Hill Estates, Ltd.*, [1931] 2 K.B. 113, and on the traditional collateral covenants exception to defeat the operation of the merger doctrine and afford the plaintiff the benefit of an implied warranty.

The early cases formed a nucleus of precedent and, as the number of jurisdictions recognizing an implied warranty of fitness in sales of unfinished housing grew, so did the string of citations legitimizing the new doctrine. *See, e.g.*, *Jones v. Gatewood*, 381 P.2d 158, 159-60 (Okla. 1963); *Glisan v. Smolenske*, 153 Colo. 274, 279, 387 P.2d 260, 263 (1963).

<sup>85</sup> *See* *Carpenter v. Donohoe*, 154 Colo. 78, 83-84, 388 P.2d 399, 402 (1964). In *Carpenter*, the implied warranty was extended to cover the sale of a newly constructed home that was complete at the time of contract. *Id.*

recognition that the exception for unfinished houses so carefully carved out by the English courts<sup>86</sup> was "a distinction without a reasonable basis."<sup>87</sup> Courts were willing to label houses lacking only minor items of decoration "unfinished" in order to invoke the warranty.<sup>88</sup> This led to the patently "incongruous"<sup>89</sup> result whereby a purchaser signing a contract of sale one day before completion of the house could successfully raise the warranty, while one who signed the following day received no protection.<sup>90</sup> In addition, the underlying rationale that the purchaser of a completed house was protected by his ability to inspect was criticized as "blithely oblivious to the realities of the situation," given the home buyer's probable lack of sophistication with respect to housing construction, and the cost of hiring a professional.<sup>91</sup>

Thus, a certain momentum was building in the early cases toward an overt judicial recognition of an implied warranty of fitness accompanying the sale of a house, whether completed or under construction. Accordingly, in 1968, a court was able to point to the "rapid sickening" of caveat emptor in sales of realty.<sup>92</sup> A second line of cases which served to hasten the doctrine's demise premised the liability of the builder-vendor upon his failure to disclose defects in the premises.

Initially, the English cases and the early American decisions refused to find a vendor of real estate liable to his purchaser for dangerous conditions which existed at the time the vendee took possession.<sup>93</sup> One rationale for this rule was that unlike the land-

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<sup>86</sup> See note 83 *supra*.

<sup>87</sup> *Carpenter v. Donohoe*, 154 Colo. 78, 83, 388 P.2d 399, 402 (1964); see Bearman, *supra* note 60, at 546.

<sup>88</sup> See *Carpenter v. Donohoe*, 154 Colo. 78, 83, 388 P.2d 399, 402 (1964); Bearman, *supra* note 60, at 546 n.16.

<sup>89</sup> 154 Colo. at 83, 388 P.2d at 402.

<sup>90</sup> Bearman, *supra* note 60, at 546.

<sup>91</sup> *Id.* at 545 & n.15.

<sup>92</sup> *Humber v. Morton*, 426 S.W.2d 554, 558 (Tex. 1968). As documentation for the decline of caveat emptor in sales of realty, the court was able to refer to the "Miller-Perry-Howe-Weck-Jones-Glisan-Carpenter syndrome," *id.* at 558 & n.5, before going on to reject unequivocally the notion that the caveat emptor rule had any contemporary relevance with respect to the sale of a new house by a builder-vendor, *id.* at 561.

<sup>93</sup> See *Smith v. Tucker*, 151 Tenn. 347, 359-60, 270 S.W. 66, 69-70 (1925); *Bottomley v. Bannister*, [1932] 1 K.B. 458, 468 (C.A.). In *Bottomley*, the court dismissed a wrongful death claim for the death of the purchaser of a new home and his wife, caused by the builder's failure to hook up a flue to the gas boiler. 1 K.B. at 468. The Tennessee court, in *Tucker*, denied recovery to a vendee whose infant son was killed by a defective mantelpiece, noting that upon delivering the deed the vendor relinquished control over the property and hence

lord-tenant relationship, which continues after the signing of the lease, the vendor-vendee relationship terminates upon delivery of the deed.<sup>94</sup> Thus, absent control or supervision over the property, the vendor should not be deemed liable.<sup>95</sup>

An early exception to the rule held that the vendor's immunity did not extend to situations where he knew of a defect or where he actively concealed a defect with the knowledge that the purchaser was unlikely to discover it.<sup>96</sup> An injured plaintiff, however, was still confronted with the heavy burden of demonstrating the vendor's knowledge of the defect. Motivated by a desire to relieve plaintiffs of this burden, an increasing number of courts were

was insulated from liability for defects which subsequently caused injury. 151 Tenn. at 359-60, 270 S.W. at 69-70.

<sup>94</sup> 151 Tenn. at 362, 270 S.W. at 70.

<sup>95</sup> *Id.* The *Tucker* court distinguished the "quasi confidential relation of landlord and tenant," which would raise a duty to warn. *Id.* at 373, 270 S.W. at 73. *But see* *Belote v. Memphis Dev. Co.*, 208 Tenn. 434, 440-41, 346 S.W.2d 441, 443-44 (1961), *aff'd*, 51 Tenn. App. 423, 369 S.W.2d 97 (1962). In *Belote*, the court, holding for the injured daughter of the purchaser, explicitly rejected the notion that protection should be based on the status or relationship of the parties, invoking instead a generalized duty of care. 208 Tenn. at 440-41, 346 S.W.2d at 443-44.

<sup>96</sup> *See* *Belote v. Memphis Dev. Co.*, 208 Tenn. at 438, 346 S.W.2d at 442-43. The *Belote* court based the liability of a builder-vendor, who covered up an opening left in the attic floor, on "something like fraud." The scope of and limitations upon the exception for concealment or failure to disclose were set out by the American Law Institute in section 353 of the Restatement of Torts, which provides:

A vendor of land who conceals or fails to disclose to his vendee any condition whether natural or artificial involving unreasonable risk to persons upon the land, is subject to liability for bodily harm caused thereby to the vendee and others upon the land with the consent of the vendee or his subvendee, after the vendee has taken possession, if

- (a) the vendee does not know of the condition or the risk involved therein, and
- (b) the vendor knows of the condition and the risk involved therein and has reason to believe that the vendee will not discover the condition or realize the risk.

RESTATEMENT OF TORTS § 353 (1934).

The Restatement, Second, of Torts is essentially the same, with the substitution of the phrase "physical harm" for "bodily harm" in the first clause. A second section is added, however, which provides:

- (2) If the vendor actively conceals the condition, the liability stated in subsection (1) continues until the vendee discovers it and has reasonable opportunity to take effective precautions against it. Otherwise the liability continues only until the vendee has had reasonable opportunity to discover the condition and to take such precautions.

RESTATEMENT (SECOND) OF TORTS § 353(2) (1965). The comment to subsection 2 emphasizes that "[t]he liability of the vendor . . . does not continue for an indefinite period throughout the subsequent history of the land sold. Where there is no active concealment . . . it continues only until the vendee, or his successors have had adequate time . . . to discover the . . . condition." *Id.* § 353(2) comment g.

willing to imply a constructive knowledge of the defect<sup>97</sup> on the part of a builder-vendor,<sup>98</sup> predicated at least in part upon his status as a builder.<sup>99</sup>

Despite the growing number of exceptions to the caveat emptor rule, the privity doctrine continued to function in many cases as a shield which barred an injured plaintiff's cause of action against his builder-vendor.<sup>100</sup> More progressive courts, finding no rational distinction between a defective house and a defective product, invoked the rule of *MacPherson v. Buick Motor Co.*<sup>101</sup> in cases where privity was lacking to grant foreseeable plaintiffs recovery against builder-vendors.<sup>102</sup> Having overcome the privity problem,<sup>103</sup> courts began to speak in terms of interest balancing,<sup>104</sup> a development earlier identified in the analogous context of defective products.<sup>105</sup>

<sup>97</sup> See, e.g., *Caporaletti v. A-F Corp.*, 137 F. Supp. 14, 19 (D.D.C. 1956), *rev'd on other grounds*, 240 F.2d 53 (D.C. Cir. 1957) (builder who defectively constructs house charged with knowledge of his own negligence); *Lowe v. Francis Constr. Co.*, 373 P.2d 51, 54-55 (Okla. 1962) (knowledge of builder's agent imputed to builder); *Rogers v. Scyphers*, 251 S.C. 128, 134, 161 S.E.2d 81, 84 (1968) (builders have duty to disclose dangerous conditions about which they know or should have known).

<sup>98</sup> See *Roberts*, *supra* note 64, at 844-45.

<sup>99</sup> See notes 82 & 83 and accompanying text *supra*.

<sup>100</sup> See W. PROSSER, *supra* note 9, § 104, at 680. With respect to the rule of privity in the law of real property, it has been noted that "the ghost of *Winterbottom v. Wright* died very hard." *Id.*

<sup>101</sup> 217 N.Y. 382, 111 N.E. 1050 (1916); see text accompanying notes 24-27 *supra*.

<sup>102</sup> In *Dow v. Holly Mfg. Co.*, 49 Cal. 2d 720, 321 P.2d 736 (1958) (en banc), the court relied on a close analogy between builders of houses and manufacturers of defective products, expressly acknowledging the application of *MacPherson*, to hold a general contractor liable for negligent installation of a defective gas heater by his subcontractor. *Id.* at 725-27, 321 P.2d at 739-40. The New York Court of Appeals approved the extension of the *MacPherson* rule to structures erected on real property in *Inman v. Binghamton Hous. Auth.*, 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957), noting "no logical basis for . . . a distinction" between such structures and chattels. *Id.* at 144, 143 N.E.2d at 899, 164 N.Y.S.2d at 703-04; *accord*, *Leigh v. Wadsworth*, 361 P.2d 849, 851-52 (Okla. 1961).

<sup>103</sup> See *Steinberg v. Coda Robertson Constr. Co.*, 79 N.M. 123, 124, 440 P.2d 798, 799 (1968). The *Steinberg* court dismissed privity as no longer a factor in determining negligence liability. *Id.*

<sup>104</sup> See *Stewart v. Cox*, 55 Cal. 2d 857, 863, 362 P.2d 345, 348, 13 Cal. Rptr. 521, 524 (1961) (en banc). In *Stewart*, the court clarified the question to be asked in determining liability for negligence in a particular case as not one of privity, but of policy,

involv[ing] the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that he suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, and the policy of preventing future harm.

*Id.*

<sup>105</sup> See note 22 and accompanying text *supra*.

With the end of World War II, a new era of mass-produced and frequently poorly built housing had dawned in response to the surge in demand of a greatly expanded class of home-seeking consumers.<sup>106</sup> The same concern for safety which had been an impetus in the law of defective products<sup>107</sup> impelled the judiciary to acknowledge the unique problems posed by mass-produced housing<sup>108</sup> and, ultimately, to fashion consumer-oriented relief.

While the laudability of the goal of increased consumer protection was undeniable, an undercurrent of uneasiness was nonetheless perceptible in the face of growing numbers of policy-grounded decisions, rendered on a *sui generis* basis.<sup>109</sup> Since the

<sup>106</sup> See 7 S. WILLISTON, *supra* note 72, § 926A, at 818. The implied warranty of habitability was cited with approval, in light of conditions existing in the housing industry, in the hope that it would "discourage much of the sloppy work and jerry-building that has become perceptible over the years." *Id.*

<sup>107</sup> See note 64 *supra*.

<sup>108</sup> See *Caporaletti v. A-F Corp.*, 137 F. Supp. 14, 16 (D.D.C. 1956), *rev'd on other grounds*, 240 F.2d 53 (D.C. Cir. 1957). In *Caporaletti*, the court noted the inherent flexibility of the common law, which enables it to respond to changes in social and economic conditions. The court expressly recognized the changes that had occurred in the housing industry:

Homes are being constructed on a large scale by persons engaged in the building business for the purpose of selling them to individual owners. The ordinary purchaser is not in a position to discover a latent defect by inspection, no matter how thorough his scrutiny may be, because usually he lacks sufficient familiarity with the complexities of building construction and the intricacies of applicable regulations. He should be able to rely on the skill of the builder who sells the house to him. Otherwise he would be at the vendor's mercy. The realities of modern life necessarily lead to the conclusion that the builder should be liable for injuries caused by his negligence under such circumstances, either to the purchaser or to an invitee.

*Id.*

<sup>109</sup> See *Dow v. Holly Mfg. Co.*, 49 Cal. 2d 720, 725, 321 P.2d 736, 739 (1958) (en banc). In *Dow*, the California Supreme Court surveyed the present state of the law with respect to home buyers' remedies and found it unclear, observing that the many judicially created exceptions to caveat emptor "afford[ed] an opportunity to hold the defendant liable without stating any general rule." *Id.* Similarly, the court's approval, in *Bethlahmy v. Bechtel*, 91 Idaho 55, 67-68, 415 P.2d 698, 710-11 (1966), of the remedy of implied warranty in home sales has been characterized as "manifest[ing] a compulsion to reach a socially desirable result with little attention being devoted to the means used to reach the desired end." Young & Harper, *Quaere: Caveat Emptor or Caveat Venditor?*, 24 ARK. L. REV. 245, 256 (1970); see Roberts, *supra* note 64, at 862. Roberts, who was not adverse to applying the remedy of implied warranty to housing sales, nonetheless was moved to note that "[t]he results under the doctrine of caveat emptor, though outrageous, were at least predictable." *Id.* Such comments are symptomatic of a form of intellectual backlash in legal thought. While courts have been criticized for a too rigid adherence to doctrine at the expense of policy considerations, see notes 19-20 and accompanying text *supra*, a school of thought which places the recognition and redress of social conditions in a position superior to order



old rules of *caveat emptor* and merger had no place in the modern housing market,<sup>110</sup> the task confronting the courts was to identify the new rules that would govern in their stead. Having conceptually linked the builder of a house with the manufacturer of a product,<sup>111</sup> and having applied *MacPherson* to soften the privity bar,<sup>112</sup> the logical progression was to extend some type of liability without fault to the builder-vendor of a defective house, analogous to that imposed upon a manufacturer in the area of defective products.

### HOMEOWNERS' REMEDIES FOR DEFECTIVE HOUSING: TORT OR CONTRACT?

The movement away from *caveat emptor* and toward expanded relief in the area of defective realty had as its impetus the policy of protecting the consumer from personal injury—the same policy that launched products liability as a separate branch of tort law.<sup>113</sup> As was true in the early products liability cases, the social policy of compensating the injured consumer has been advanced, in the housing context, at a rate which has outstripped the formulation of a supporting theoretical base.<sup>114</sup> For example, the leading case in the field of home buyer remedies, *Schipper v. Levitt & Sons, Inc.*,<sup>115</sup> articulated in broad language a remedy for an occupant of a home who suffered personal injury from a dangerous water heating system, but rested its holding on an all but indistinguishable mixture of tort and contract theory.

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and predictability in the law has, in turn, been criticized as precluding any type of meaningful precedent or "intellectual system-building." G.E. WHITE, *supra* note 1, at 73, 118. In the area of defective realty, the impulse toward rational systematization has received its most recent expression in the tendency to analogize the essentially ad hoc home sales remedies to more established systems of relief. The implied warranty of habitability in new home sales is analogized to the UCC warranty of merchantability, *see* note 154 and accompanying text *infra*, and strict liability for defective housing is likened to strict products liability. *See* note 133 and accompanying text *infra*.

<sup>110</sup> *See* *Humber v. Morton*, 426 S.W.2d 554, 562 (Tex. 1968). The *Humber* court characterized the rule of *caveat emptor* as "an anachronism patently out of harmony with modern home buying practices," *id.* at 562, and compared the usefulness of the merger theory under modern conditions to that of a "unicorn hunting bow," *id.* at 556.

<sup>111</sup> *See* note 102 *supra*.

<sup>112</sup> *See* *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 390-93, 111 N.E. 1050, 1053-54 (1916); text accompanying notes 24-27 *supra*.

<sup>113</sup> *See* note 52 and accompanying text *supra*.

<sup>114</sup> *See* notes 35-36 and accompanying text *supra*.

<sup>115</sup> 44 N.J. 70, 207 A.2d 314 (1965).

The plaintiff in *Schipper*, who was not in privity with the builder-vendor, sued to recover damages in counts of negligence and breach of warranty.<sup>116</sup> In upholding a cause of action in negligence, the court was merely applying the *MacPherson* rule of liability absent privity with respect to a plaintiff who could foreseeably be injured by a defendant's negligence.<sup>117</sup> It is the court's repeated characterization of the plaintiff's second theory of liability as "implied warranty or strict liability"<sup>118</sup> that creates confusion as to the nature and extent of the remedy being fashioned. It is clear that the court wanted to reach the result of strict liability in order to grant relief to the seriously injured plaintiff.<sup>119</sup> To reach this result, it relied on concepts borrowed from sales law, such as the home buyer's reliance on the builder's skill, and the inequality of his bargaining position, to support the "implied warranty" part of its formulation,<sup>120</sup> while at the same time making

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<sup>116</sup> *Id.* at 80, 88, 207 A.2d at 320, 324.

<sup>117</sup> *Id.* at 82, 207 A.2d at 321. The court viewed the "impelling policy considerations" underlying the *MacPherson* decision as applying with equal strength in the area of defective housing. *Id.*; see notes 24-27 and accompanying text *supra*. The defendant contended that tap water which issued from the faucet at essentially the same high temperature as it was in the water heater was not a latent defect. In support, the defendant cited *Inman v. Binghamton Hous. Auth.*, 3 N.Y.2d 137, 145, 143 N.E.2d 895, 899, 164 N.Y.S.2d 699, 704 (1957), in which the New York Court of Appeals reversed a finding of a cause of action in negligence against a builder because the defect, an unrailed porch, was neither latent nor concealed. 44 N.J. at 84, 207 A.2d at 322. In rejecting the argument that, with respect to children, tap water was no more a latent danger than a stove or a second floor window, *id.* at 87, 207 A.2d at 323, the *Schipper* court identified the latter type of potential dangers as "incident to normal living," *id.*, 207 A.2d at 324. While a builder has no obligation to produce a house that presents no dangers, reasoned the court, liability would be imposed where, as here, the nature of the danger was concealed, and extended far beyond what would normally be expected. *Id.* The argument that a danger likely to be underestimated is a latent danger was secondary to the court's basic position that "'the bottom does not logically drop out'" of a negligence suit against a builder upon a showing that a purchaser was aware of the dangerous condition. *Id.* at 81, 207 A.2d at 320 (quoting F. HARPER & F. JAMES, TORTS § 28.5, at 1543 (1956)). A jury may still find unreasonable risk and negligence. 44 N.J. at 87, 207 A.2d at 323.

<sup>118</sup> 44 N.J. at 82, 90, 91, 96, 207 A.2d at 321, 325, 326, 328.

<sup>119</sup> See *id.* at 89-90, 207 A.2d at 324-25. The New Jersey court began by identifying its decision in *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), as a leading illustration of "[l]aw as an instrument for justice," with an "infinite capacity for growth to meet changing needs and mores." 44 N.J. at 89, 207 A.2d at 324. The extension of strict liability into the housing area was then presented as accomplishing a goal similar to that of *Henningsen* in "keeping . . . common law principles abreast of the times." *Id.* at 90, 207 A.2d at 325.

<sup>120</sup> 44 N.J. at 91-92, 207 A.2d at 325-26. The court's sales-based rationales, incident to a contractual relationship, had no relevance to the plaintiff before the court, who was a lessee of the original purchaser. *Id.* at 75, 207 A.2d at 317.

reference to a traditional policy ground for "strict liability" in tort—the builder-vendor's greater economic resources and hence superior risk-bearing capacity.<sup>121</sup>

The general tenor of the opinion in *Schipper* is an attempt by the court to subsume the law of defective housing under the current state of products liability law.<sup>122</sup> Indeed, the court cited, as part of the line of cases into which *Schipper* was purportedly being fit, *Santor v. A & M Karagheusian, Inc.*,<sup>123</sup> a decision embodying one of the furthest extensions of products liability law. In *Santor*, the New Jersey Supreme Court held that a remote purchaser could recover in strict liability from a manufacturer for mere loss in value of a defective product, absent injury to himself or other property.<sup>124</sup>

The lack of focus in the *Schipper* decision, and the lack of guidance as to the manner in which the liability of home builders was to be shaped and narrowed in the future,<sup>125</sup> stems from this

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<sup>121</sup> *Id.* at 87, 91, 207 A.2d at 323, 326. The defendant in *Schipper*, a mass developer of homes, *id.* at 74, 207 A.2d at 316, was unquestionably a superior risk-bearer. The court considered the argument that continued builder liability, after sale of the house, might not be equitable because the builder would ordinarily discontinue his insurance coverage at that juncture. *Id.* at 86-87, 207 A.2d at 323 (citing *Sarnicandro v. Lake Dev., Inc.*, 55 N.J. Super. 475, 484, 151 A.2d 48, 53 (Super. Ct. App. Div. 1959)). The court distinguished that circumstance, however, suggesting that while it might be a factor in ascertaining the liability of a "solitary" vendor, it was not an appropriate consideration with respect to an entrepreneurial mass builder-vendor, who presumably would have adequate insurance in existence. 44 N.J. at 86-87, 207 A.2d at 323.

Subsequent decisions by the New Jersey courts have not afforded differential liability treatment to large and small builder-vendors. *See McDonald v. Miannecki*, 79 N.J. 275, 293-94, 398 A.2d 1283, 1292 (1979) (warranty principles of *Schipper* extended to any builder, regardless of status as mass producer); *Totten v. Gruzen*, 52 N.J. 202, 210, 245 A.2d 1, 5 (1968) (negligence principles articulated in *Schipper* held applicable to all builders and contractors); *Pattitucci v. Drelich*, 153 N.J. Super. 177, 179-80, 379 A.2d 297, 298 (Super. Ct. Law Div. 1977) (strict liability applied to a small builder); *cf. Hodgson v. Chin*, 168 N.J. Super. 549, 553-55, 403 A.2d 942, 944-45 (Super. Ct. App. Div. 1979) (intimations that builder-vendor liability may extend to commercial premises).

<sup>122</sup> 44 N.J. at 90, 207 A.2d at 325. As a preface to its holding, the court traced the genesis of strict liability in food and drug cases, *see* notes 32-34 and accompanying text *supra*, and its extension, in *Henningsen*, to defective automobiles, with the accompanying rationale that while defective food or drugs could harm the user, a defective car could injure persons other than the user. *Id.* These principles were then expressly held to be applicable to the area of realty, *id.*, and the extension of strict liability into this area was deemed to be in keeping with the court's "step by step" approach. *Id.*

<sup>123</sup> 44 N.J. 52, 207 A.2d 305 (1965) (cited in *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 82, 88, 207 A.2d 314, 321, 324 (1965)).

<sup>124</sup> 44 N.J. at 63, 207 A.2d at 310-11.

<sup>125</sup> 44 N.J. at 95, 207 A.2d at 328. Although it articulated a sweeping new theory of recovery for home buyers, the *Schipper* court furnished little guidance for future decisions.

attempt to fit defective housing cases within the established system of products liability law.<sup>126</sup> Indeed, in addition to finding no meaningful distinctions between mass-produced homes and mass-produced goods,<sup>127</sup> the court left questions such as notice<sup>128</sup> and

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Indeed, the court noted that "we need not at this stage concern ourselves with [notice, statute of limitations, measure of proof]," since the plaintiffs in the instant case had specifically established these elements. *Id.*; see Note, *Expansion of Consumer Protection in the Purchase of New Homes*, 3 W. ST. U.L. REV. 106, 112 (1975). One commentator characterized the *Schipper* rationale as unclear and "leading to confusion as to what theory of recovery the court was instituting." *Id.* at 111. Indeed, subsequent cases have cited *Schipper* as support for both strict liability, *Bearman v. Watergate W. Inc.*, 391 A.2d 1351, 1357 (D.C. 1978), and contract-based implied warranty, *Bethlahmy v. Bechtel*, 91 Idaho 55, 65-66, 415 P.2d 698, 708-09 (1966).

<sup>126</sup> Cf. G.E. WHITE, *supra* note 1, at 168 (strict liability has been acknowledged as the theoretical underpinning of liability for defective products). No longer a renegade, strict liability has become respectable. One commentator, charting the change in judicial attitude from 19th-century adherence to negligence to 20th-century acceptance of tort law as a system of compensation, observed:

When the idea gets around that industry not only has no further need of subsidization but also should be made to assume the burden of paying for all damage ensuing from its normal operations, then the climate is right for judges to begin making an honest woman of the theory of absolute liability without fault. They can then safely acknowledge her when they see her coming and, indeed, even declare that they had always thought highly of her.

Gregory, *supra* note 1, at 382-83.

<sup>127</sup> The validity of the *Schipper* court's finding that no meaningful difference exists between a chattel and a house has been questioned, on the ground that there is a greater complexity and number of component parts involved in a house, as opposed to even a complex chattel such as a car. See 6A R. POWELL & P. ROHAN, *supra* note 68, ¶ 938.4, at 370.49-.50; 28 OHIO ST. L.J. 343, 349 (1967). Moreover, even if one accepts the validity of the analogy between a house and a chattel, the developer in *Schipper* argued that the imposition of strict liability upon builders would throw the housing industry into the same "uncertainty and chaos" that afflicts the products liability field. 44 N.J. at 92, 207 A.2d at 326. The *Schipper* court not only declined to address this consideration, but flatly declared that no such confusion existed in the products liability field. *Id.* at 92, 207 A.2d at 326. But see Roberts, *supra* note 64, at 866. Roberts noted just 2 years after *Schipper* was decided that "the housing scene seems ripe for almost any rational solution before it falls victim to the same confusion now affecting products liability in general." Roberts, *supra* note 64, at 866.

<sup>128</sup> The requirement of notice has affected the outcome of subsequent cases. See *Major v. Rozell*, 618 S.W.2d 293, 296 (Mo. App. 1981). The *Major* court held that a builder should be given notice of a defect and an opportunity to remedy it. *Id.* Where a builder acts subsequent to notice but fails to correct the defect, his action should be taken into account in the calculation of damages. *Id.* The *Major* court suggested that a theory of implied warranty could be applied by analogy to U.C.C. § 2-607(3), which provides that "[w]here a tender has been accepted (a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy . . ." *Id.* Two questions which immediately arise in the peculiar context of housing sales are: (1) the extent to which a consumer-oriented court would, in analogizing to the commercially oriented UCC remedies and limitations, give effect to the annihilation of "any remedy" for failure to give notice, and (2) the duration of the "reasonable time" in which defects should be discovered. With respect to products cases specifically decided under the UCC, it has

statute of limitations<sup>129</sup> to be answered in conformity with "the developing case law" of products liability.<sup>130</sup> Moreover, the *Schipper* court's purported merger of housing and products law ignores the fact that the same confusion over contract versus tort principles continues to plague products liability theory, in such areas as notice, statute of limitations, and the ability to disclaim liability,<sup>131</sup>

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been noted that "a reasonable time . . . has as many meanings as there are fact patterns in the cases." J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 11-9, at 343 (1972). It is suggested that similar diverse results would obtain in the area of realty, with the rationale of a house necessitating the adoption of extended periods of time in which defects will be deemed discoverable. See *Pollard v. Saxe & Yolles Dev. Co.*, 12 Cal. 3d 374, 380, 525 P.2d 88, 91-92, 115 Cal. Rptr. 648, 651-52 (1974). In *Pollard*, vendees who waited nearly 4 years to give notice of breach of the implied warranty of habitability were barred from recovery. *Id.* The court deemed it appropriate to apply statutory standards to common-law warranties, invoking the notice requirement of the California Commercial Code to bar recovery. *Id.*; CAL. COM. CODE § 2607(3) (Deering 1970). In applying this "sound commercial rule" to a consumer transaction, the court considered the following: "allow[ing] the defendant opportunity for repairing the defective item, reducing damages, avoiding defective products in the future, and negotiating settlements." 12 Cal. 3d at 380, 525 P.2d at 91-92, 115 Cal. Rptr. at 651-52.

With respect to the policy reasons behind U.C.C. § 2-607(3), the reasoning of the *Major* court was in accord with the rationale of that section's notice requirement as enabling the seller to adjust, replace, or otherwise cure in order to mitigate the buyer's loss and limit his own liability. See U.C.C. § 2-607(3) comment 4. Of course, the notice requirement of U.C.C. § 2-607(3) would not be at all applicable to cases decided under strict tort theory. J. WHITE & R. SUMMERS, *supra*, § 11-9, at 343.

<sup>129</sup> Whether an action brought against a builder-vendor for defects in realty is characterized as a tort or contract claim has been crucial to subsequent determinations of the applicable statute of limitations. In *Richman v. Watel*, 565 S.W.2d 101 (Tex. Civ. App. 1978), breach of the implied warranty of fitness was deemed a tort concept, with the 4-year statute of limitations commencing when the buyer discovers or should have discovered the injury. *Id.* at 102. Dictum in *Sims v. Lewis*, 374 So. 2d 298 (Ala. 1979), indicated that in no event would the statute of limitations for implied warranty actions exceed the 6-year period allowed for suits on an express warranty. *Id.* at 305. A Colorado statute limiting actions against architects, contractors, engineers and inspectors for injury to person or property to 2 years after the claim arises, COLO. REV. STAT. § 13-80-110 (1973), was held inapplicable in *Duncan v. Schuster-Graham Homes, Inc.*, 194 Colo. 441, 446, 578 P.2d 637, 640 (1978) (en banc). The claim for structural deficiencies causing injury to the house itself was deemed a contract action covered by the normal 6-year statute of limitations. *Id.* at 447, 578 P.2d at 641. The same result obtained under the Colorado statute in *Tamblyn v. Mickey & Fox, Inc.*, 195 Colo. 354, 357-58, 578 P.2d 641, 644 (1978) (en banc), notwithstanding the fact that the claim sounded in negligence rather than breach of contract or warranty.

Statutes of repose, such as the Colorado 2-year statute, are a common legislative response to expanded builder liability. See note 142 *infra*. Several such statutes, however, have not survived constitutional challenge. *E.g.*, *Phillips v. ABC Builders, Inc.*, 611 P.2d 821, 831 (Wyo. 1980). In *Phillips*, a 10-year limitation on actions in tort or contract based on improvements to real property was held to embody an unconstitutional grant of immunity from suit rather than a statute of limitations. *Id.*

<sup>130</sup> 44 N.J. at 95, 207 A.2d at 328.

<sup>131</sup> The problem of defining the scope of a builder-vendor's ability to disclaim liability

while the underlying policies themselves, such as the "risk-spread-

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arises when the implied warranty of habitability is analogized to the UCC implied warranty of merchantability. The question then becomes whether UCC provisions permitting disclaimer and exclusion of warranties will apply. See U.C.C. §§ 2-316(2), 2-713(3). A disclaimer clause inserted in the contract of sale would attempt to limit the factual contexts in which the vendor would be deemed to be in breach. J. WHITE & R. SUMMERS, *supra* note 128, § 12-11, at 383-84. The requirements of a valid disclaimer clause are set out in U.C.C. § 2-316(2): "[T]o exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in the case of a writing must be conspicuous." *Id.* Courts which have decided defective housing suits under contract doctrines have had to deal with contract defenses. For example, courts have not construed express warranties as limiting implied warranties. *E.g.*, Hoagland v. Celebrity Homes, Inc., 40 Colo. App. 215, 216, 572 P.2d 493, 494 (Ct. App. 1977) (letter of express warranty insufficient to indicate builder's intent to limit common law implied warranties); Herlihy v. Dunbar Builders Corp., 92 Ill. App. 3d 310, 316, 415 N.E.2d 1224, 1228 (App. Ct. 1980) (express warranty does not preclude or limit implied warranty, which is separate covenant growing out of dependent vendor-vendee relationship). It has been held, however, that disclaimer of the implied warranty violates no public policy, Conyers v. Molloy, 50 Ill. App. 3d 17, 22, 364 N.E.2d 986, 990 (App. Ct. 1977), and is within the parties' contractual power to accomplish. Griffin v. Wheeler-Leonard & Co., 290 N.C. 185, 202, 225 S.E.2d 557, 567 (1976). Courts have required disclaimers to be in writing and conspicuous, see MacDonald v. Mobley, 555 S.W.2d 916, 919 (Tex. Civ. App. 1977), and have refused to give effect to clauses that did not meet these requirements. In Herlihy v. Dunbar Builders Corp., 92 Ill. App. 3d 310, 415 N.E.2d 1224 (App. Ct. 1980), the purported disclaimer clause provided: "[n]o representations, warranties, undertakings or promises other than those expressed herein whether oral, implied or otherwise shall be considered a part of this transaction." *Id.* at 312, 415 N.E.2d at 1225. In reversing summary judgment for the defendant builder, the court held that it could not be stated as a matter of law that the clause, which appeared near the end of a standard form contract in the same print size and typeface, was sufficient to disclaim the implied warranty. *Id.* at 317, 415 N.E.2d at 1229. The clause did not specifically mention "habitability." *Id.*; cf. U.C.C. § 2-316(2) (disclaimer must mention merchantability). In addition, the clause failed in its purpose by not explaining the consequences of disclaimer. 92 Ill. App. 3d at 317, 415 N.E.2d at 1229.

An exclusionary clause, as distinguished from a disclaimer clause, restricts the remedies available to the parties after a breach has occurred. J. WHITE & R. SUMMERS, *supra* note 128, § 12-11, at 384. Under U.C.C. § 2-719(3), "[c]onsequential damages may be limited or excluded unless the limitation or exclusion is unconscionable." *Id.* In Colsant v. Goldschmidt, 97 Ill. App. 3d 53, 421 N.E.2d 1073 (App. Ct. 1981), a defendant builder who had expressly warranted his house against defects for 1 year claimed he had effected a limitation of remedies under U.C.C. § 2-719(3) through the following clause: "[b]uilder does not assume responsibility for any secondary or consequential damages caused by any defects." 97 Ill. App. 3d at 54, 421 N.E.2d at 1075. The court held that the clause, which was buried within a 14-page typed contract of 515 lines, and neither mentioned habitability nor delineated the consequences of disclaimer, was insufficient to function as a limitation of remedies. *Id.* at 57, 421 N.E.2d at 1077. Although U.C.C. § 2-719(3) explicitly sanctions the contractual exclusion of consequential damages, *Colsant* suggests that in a consumer transaction such as the sale of a house, a rigid application of the section will be foreclosed by a liberal interpretation of "unconscionable."

The foregoing discussion focuses on suits for property damage, since the limitation of consequential damages for personal injury is *prima facie* unconscionable with respect to consumer goods under U.C.C. § 2-719(3). Under a theory of strict tort liability, the UCC provi-

ing" theory of strict liability, have been criticized.<sup>132</sup> Clearly, therefore, the importation of products liability law does not, of itself, create a universal and generalized system of ordering the field of defective housing.<sup>133</sup>

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sions regarding disclaimer are inapplicable, see RESTATEMENT (SECOND) OF TORTS § 402A comment m, at 356 (1965), and it has been held impermissible for a seller to disclaim strict tort liability. *J. WHITE & R. SUMMERS*, *supra* note 128, § 12-1, at 351 & n.10 (citing *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964) (en banc)).

<sup>132</sup> See 44 N.J. at 90, 207 A.2d at 325. The *Schipper* court articulated the theory of enterprise liability as the basic policy reason underlying strict products liability. *Id.* This theory, which was posited by Justice Traynor in *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962) (en banc), places the onus of liability upon the manufacturer who launches his product into the marketplace rather than upon the consumer, who is deemed "powerless" to safeguard himself from defective products. *Id.*; see notes 50-52 and accompanying text *supra*. Other policy reasons that have been advanced are the desire to provide incentives to manufacturers to make safe products, and the attempt to spread the cost of compensating accident victims throughout society. Epstein, *supra* note 36, at 658-59.

All of the policy reasons for strict products liability have been challenged. Subsequent interpretations of the *Greenman* rule have been criticized for failing to take into account postsale product misuse against which the manufacturer is "powerless" to safeguard. Epstein, *supra* note 36, at 658. The incentive argument ignores the lack of control that a manufacturer has over the conduct of employees and others in the distributive chain, *id.* at 659, and does not give sufficient weight to the desire of most manufacturers, independent of the fear of liability, to avoid a reputation for unsafe products. Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products—An Opposing View*, 24 TENN. L. REV. 938, 945 (1957). The validity of the risk-spreading argument also has come under heavy criticism. See, e.g., Epstein, *supra* note 36, at 659 (risk-spreading argument so powerful it can explain away all of tort law); Lang, *Compensation of Victims—A Pious and Misleading Platititude*, 54 CALIF. L. REV. 1559, 1559 (1966) (criticizing perceived attitude that continual shifting of losses will somehow cause losses to disappear); Plant, *supra*, at 945-48 (unsound assumption that manufacturers in general are in a position to distribute risk through pricing).

<sup>133</sup> Some of the products liability rationales are weakened in light of peculiarities characteristic of the home sale transaction. Considerations such as the consumer's inability to identify the manufacturer responsible for his injury, and his lack of awareness of the process by which the product reached him, while crucial to a policy of enterprise liability, see G.E. WHITE, *supra* note 1, at 171, 203-04, are less meaningful in the context of a home buyer's relationship with his builder-vendor. See *Halliday v. Greene*, 244 Cal. App. 2d 482, 486-87, 53 Cal. Rptr. 267, 271 (Ct. App. 1966). Similarly, the theory that the risk of injury from a defective product should be borne by the manufacturer, who can pass on the increased costs to his customers, functions well in an anticompetitive industry in which price can be dictated by a small number of members, and adjusted to absorb increased costs. See Plant, *supra* note 132, at 946-47. For vulnerable industries in which price is determined by many external factors, however, such a price adjustment may be foreclosed by the danger that a seller will price himself out of the market. *Id.*; accord, W. HIRSCH, *LAW AND ECONOMICS: AN INTRODUCTORY ANALYSIS* 172 (1979). The home building industry would fall within the latter category, since it embraces a multiplicity of small builders who do not do the requisite volume of business to absorb successfully a large judgment. See 6A R. POWELL & P. ROHAN, *supra* note 68, ¶ 938.4, at 370.52.

In contradistinction to the expansive approach adopted by the *Schipper* court is the decision of the Colorado Court of Appeals in *Wright v. Creative Corp.*<sup>134</sup> In *Wright*, the infant child of a second purchaser of a home was injured when he ran through a sliding glass door.<sup>135</sup> Asserting failure to install safety glass, the child's parents sued the builder under theories of negligence, breach of implied warranty, and strict liability.<sup>136</sup> The court's brief opinion distinguished the three counts on both policy and theory grounds. The negligence claim was held to state a cause of action under *MacPherson*, because a builder's duty of care does not rest on any contractual basis.<sup>137</sup> No cause of action was deemed established under breach of implied warranty of habitability, a contract-based theory which requires privity.<sup>138</sup> Finally, the count in strict liability was disallowed on the ground that the policy goal of placing the costs of injuries upon manufacturers is less compelling in the context of defective housing, given the legitimate distinctions between a defective house and a defective chattel.<sup>139</sup>

*Schipper* and *Wright* arguably may be explained as decisions which turn upon their respective facts.<sup>140</sup> On a more fundamental level, however, these cases illustrate contrasting approaches to the extension of liability into a heretofore unprotected area. *Schipper*, in emphasizing the strong policy reasons for granting relief to a home buyer whose safety is threatened by a defect, does little to sort out the morass of legal theories upon which such relief is to be

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<sup>134</sup> 30 Colo. App. 575, 498 P.2d 1179 (Ct. App. 1972).

<sup>135</sup> *Id.* at 576, 498 P.2d at 1180.

<sup>136</sup> *Id.* at 577, 581, 498 P.2d at 1180, 1182.

<sup>137</sup> *Id.* at 579-81, 498 P.2d at 1181-82.

<sup>138</sup> *Id.* at 581, 498 P.2d at 1182. The court stated, without elaboration, that the implied warranty of habitability applies only to the first purchaser of a home. *Id.* (citing *H.B. Bolas Enters., Inc. v. Zarlengo*, 156 Colo. 530, 400 P.2d 447, 450 (1965) (en banc)).

<sup>139</sup> 30 Colo. App. at 582-83, 498 P.2d at 1182-83. The *Wright* court distinguished the imposition of strict liability for defective products and for defective housing in practical terms, noting that "[a] builder cannot easily limit his liability by express warranties and disclaimers, and it is easier to trace a defect to a builder than to a manufacturer as there is more opportunity to make a meaningful inspection of a structure on real property." *Id.* The *Wright* court implicitly declined to follow *Schipper*. *Id.* at 581-82, 498 P.2d at 1182.

<sup>140</sup> *Schipper* presented the situation of a horribly burned child, 44 N.J. at 76, 207 A.2d at 317, and a developer with considerable financial resources, *id.* at 74, 207 A.2d at 316. *Wright* involved a less seriously injured child, 30 Colo. App. at 576, 498 P.2d at 1180, and a building corporation of unspecified but assumedly smaller size, *id.* at 582, 498 P.2d at 1182. The facts of *Schipper*, particularly the developer's pecuniary reasons for not installing the safety device, 44 N.J. at 78-79, 207 A.2d at 319, may have militated toward a more sweeping articulation of builder-vendor liability, and, to a certain extent, excused what might be deemed judicial excesses.



premised, and creates, through the broadness of its language, a climate in which builder-vendor liability may be extended beyond the unquestionably justified limit of dangerous defects. The *Wright* court, on the other hand, engaged in the type of balancing of interests that is associated with a flexible system of jurisprudence,<sup>141</sup> while at the same time adhering to the traditional parameters of tort and contract doctrine in defining the reach of strict liability and implied warranty. The court's refusal to extend strict liability, premised upon its view that the relevant policy considerations were not at issue, is palatable under the particular facts of the case, since the out-of-privity plaintiff was deemed to have established a cause of action in negligence.<sup>142</sup> Under different facts,

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<sup>141</sup> See text accompanying notes 27-28 *supra*. The *Wright* court expressly noted that it would be "remiss in its responsibilities" if it did not weigh the necessity and effect of imposing liability without fault on a mass producer. 30 Colo. App. at 582, 498 P.2d at 1182.

<sup>142</sup> See Roberts, Implied Warranty Doctrine as Applied to the Sale of New Housing, [1967] N.Y. LAW REV. COMM'N REP. 37, 68-72. Roberts posits that negligence may in fact be an "overlooked remedy" in the area of defective housing. *Id.* at 68. Negligence theory is normally considered a remedy for personal injury resulting from the vendor's failure to disclose a latent defect. *Id.* at 69. It should be noted, however, that while the Restatement spoke in terms of "bodily harm," the Restatement, Second, uses the phrase "physical harm," leaving open the possibility of recovery for property damage caused by structural defects, under a negligence theory. See note 96 and accompanying text *supra*. Compare RESTATEMENT OF TORTS § 353 (1934) with RESTATEMENT (SECOND) OF TORTS § 353 (1965). Negligence theory may in fact have "implications of a perpetual duty far more sweeping than the warranty principle," Roberts, *supra*, at 69, since no statute of limitations would begin to run in a negligence suit against a builder-vendor until the harm actually occurred, *id.* at 71. Thus, although the fault requirement would serve to limit a builder-vendor's liability, the duration of his exposure to potential liability would be theoretically expanded far beyond the limits of contract-based warranty theory. See *id.* In the early case of *Fisher v. Simon*, 15 Wis. 2d 207, 112 N.W.2d 705 (1961), the plaintiff's recovery in negligence extended to the cost of repair of a defective floor. *Id.* at 214, 112 N.W.2d at 709. Although the court spoke in terms of property damage, *id.*, the cost of repair was mere loss of bargain damages. See note 144 *infra*. The court indicated that even absent privity, damage to the product itself should be recoverable, whether or not there is accompanying physical injury or property damage. 15 Wis. 2d at 216-18, 112 N.W.2d at 710-11. The creation of such open-ended liability in negligence may result, as it did in Wisconsin, in the enactment of a statute protecting builders from liability for damages sustained more than 6 years after construction. See WIS. STAT. ANN. § 893.89 (West Supp. 1981-1982).

The creative use of negligence theory to fashion consumer relief has been cited as highlighting an "intellectual dispute" between those who favor fault-based liability for builder-vendors and those who would impose enterprise liability under warranty or strict tort principles. Roberts, *supra*, at 69. It might be argued that requiring fault would serve to protect an overburdened and economically unstable housing industry, see note 162 *infra*, in the way that 19th-century negligence theory "subsidized" newly created, precarious industries. See note 16 *supra*. It is unlikely, as a practical matter, that courts having recognized strict liability as applicable to builder-vendors would revert to a system of fault, and the *Fisher* formulation can be read as merely a "mutation in the law, possibly the product of chance." Rob-

however, the court's rigid adherence to doctrine-based theories of action might serve to foreclose relief to a plaintiff who does not satisfy all of the components of any one theory; the *Wright* approach might thus be at odds with the policy of protecting the homeowner's safety.

The present state of the law governing defective housing reflects the type of inconsistent results that are the legacy of the *Schipper* and *Wright* approaches. The inadequacies of *Schipper*, for example, in creating a clear theoretical basis for liability, were not so glaring in the context of the case, since the equities so clearly were on the side of the physically injured infant plaintiff. As the cases involving defective realty have advanced beyond claims for personal injury, the *Schipper* court's invocation of a multiplicity of theories of recovery, the *Wright* court's stringent delineation of the components of each theory, and the traditional limitations on damages recoverable under each theory, have led to inconsistent results.

The tension that exists in products liability law between the theories of strict tort and warranty liability<sup>143</sup> arguably reaches its most extreme state when a consumer seeks recovery because the product is worth less due to a defect. The majority view bars a remote purchaser from recovery for such "economic loss" in warranty because privity is lacking, and in strict tort because physical injury is lacking.<sup>144</sup> Even those desirous of maintaining the tradi-

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erts, *supra*, at 72. Just as the rapidly developing theory of strict products liability eclipsed and rendered almost obsolete the sales law of warranties, *see* note 59 *supra*, the use of negligence principles has been deemed to have "atrophied amidst the trend of decisions toward implied warranty proper." Roberts, *supra*, at 72.

<sup>143</sup> *See* Shanker, *supra* note 56, at 11 ("deplor[ing]" the evolution of twin theories of product liability law).

<sup>144</sup> *See* *Seely v. White Motor Co.*, 63 Cal. 2d 9, 14-19, 403 P.2d 145, 149-52, 45 Cal. Rptr. 17, 21-24 (1965) (en banc). In *Seely*, Justice Traynor explicitly declined to follow the *Santor* approach. *See id.* at 17, 403 P.2d at 151, 45 Cal. Rptr. at 23. The out-of-privity plaintiff in *Seely* had been awarded damages in the trial court against the manufacturer of the defective truck, on the basis of an express warranty. *Id.* at 13-14, 403 P.2d at 147-49, 45 Cal. Rptr. at 22. Thus, Justice Traynor's formulation of the rule that a manufacturer who does not expressly warrant his product is not strictly liable in tort for defects causing only economic loss is mere dictum. *Id.* at 18, 403 P.2d at 150-51, 45 Cal. Rptr. at 23. The *Seely* dictum, upholding application of warranty rules for loss of bargain damages arising out of the sales transaction, has nonetheless become the majority view. PRACTISING LAW INSTITUTE, PRODUCT LIABILITY UPDATE 1981, at 158. The rationale for the majority view is that, absent express representations, a manufacturer should only be answerable for the product's safety, not for its economic performance. *Id.* at 158-59. Justice Traynor went further, in *Seely*, in approving the application of strict liability not merely to recovery for personal injury, but also to recovery for physical injury to property, on the theory that the two were "so akin

tional bifurcation of tort and warranty theory in products liability cases have been troubled by the necessity of drawing the line between tort and warranty principles, given the substantive results that flow therefrom.<sup>145</sup> Moreover, line-drawing and categorization in the law continues to provoke the type of criticism that is reminiscent of the nineteenth century reaction to legal science.<sup>146</sup> Thus, it appears that any theoretical construct which states that one of two separate systems must provide the complete solution to a given class of claims inevitably will be challenged as artificial.<sup>147</sup> In

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. . . that there is no reason for distinguishing them." 63 Cal. 2d at 19, 403 P.2d at 152, 45 Cal. Rptr. at 24. The difficulty that subsequent courts have had in distinguishing physical damage to the defective chattel itself (recoverable under strict liability) from mere economic loss (not recoverable) is exacerbated in the context of defective housing. See note 153 *infra*. One commentator has summarized the general distinction as follows:

Property damage can be conceptualized as the physical injury sustained by an object, including a defective product itself, as a result of an accident caused by the product. Economic loss may be viewed as not merely the appendage of a risk or occurrence of personal or property damage, but as loss in product value (direct economic loss) and loss stemming indirectly from that loss of product value, such as loss of goodwill or anticipated profits (consequential economic loss). Damage to the defective chattel itself is often regarded as an exclusively economic loss, but American courts have long been prepared to award out-of-privity property damages to a buyer whose chattel self-destructs in a suitably dramatic manner. An automobile which catches fire because of an electrical fault has sustained 'physical' damage, while another which oxidizes at a more sedate pace by rusting causes 'mere' economic loss to its buyer.

Edmeades, *The Citadel Stands: The Recovery of Economic Loss in American Products Liability*, 27 CASE W. RES. L. REV. 647, 651-52 (1977) (footnotes omitted).

<sup>145</sup> See Roberts, *supra* note 64, at 854. The author noted that his defense of the segregation of tort and warranty, a defense "rooted in a willingness to let sales law govern the market place and in an unwillingness to let the chance result of any particular bargaining session affect liability for personal injury," was somewhat of an "oversimplification." *Id.*

<sup>146</sup> See notes 19-20 and accompanying text *supra*.

<sup>147</sup> See, e.g., Shanker, *supra* note 56, at 15. While it has been conceded that a certain amount of "line-drawing" is inherent in any system of jurisprudence, the lines along which the developing law of products liability was ordered have been surveyed with disapproval: "[d]eveloping a new system of law which increases the amount of line-drawing and then accentuates the substantive results that follow from the placement of the line is clearly a negative factor which may need to be carefully weighed before the new system is finally accepted." *Id.* One commentator, in the modern products liability context, has rephrased the tension between comprehensive doctrines and policy-based decisions identified in the late 19th-century, see note 7 *supra*, as the conflict between "principled" and "non-principled" development. Donnelly, *After the Fall of the Citadel: Exploitation of the Victory or Consideration of All Interests?*, 19 SYRACUSE L. REV. 1, 2 (1967). Principled development is identified with Prosser's insistence on complete separation of tort from warranty law; the initial use of the warranty doctrine to extend strict liability to remote purchasers is considered an instance of nonprincipled development. *Id.* at 2-3. Faced with the artificial tort/warranty construct, and cognizant of the reasons for the demise of legal science as the prevailing philosophy of jurisprudence, the author noted that "[o]nly a purist who has not

this vein, several products liability commentators have suggested that the "cross-fertilization" of tort and contractual warranty concepts has been a healthy process in the law and should be continued, moving toward integration rather than further stratification of theories.<sup>148</sup>

The significance of characterizing an action as sounding in tort or in contract is not lessened in cases involving defective housing.<sup>149</sup> If a suit for breach of implied warranty is viewed as a con-

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learned the lessons taught by legal realism would insist upon a choice." *Id.* at 3; *accord*, Shanker, *supra* note 56, at 35 (the "real lesson of history" is "the folly of assuming that products liability cases must be placed in a particular jurisprudential pigeonhole and then decided entirely within the framework of that theory of law").

<sup>148</sup> See, e.g., Donnelly, *supra* note 147, at 3; Rabin & Grossman, *Defective Products or Realty Causing Economic Loss: Toward a Unified Theory of Recovery*, 12 SW. U.L. REV. 4, 9 (1981).

<sup>149</sup> The rejection of caveat emptor in sales of real property has not, as a general rule, paved the way for recovery by a second purchaser in either strict liability or implied warranty. See Note, *Builders' Liability for Latent Defects in Used Homes*, 32 STAN. L. REV. 607, 608 (1980). With respect to implied warranty, a court's adherence to the privity requirement tends to be a function of its interpretation of the implied warranty as a contract or a tort concept. See *id.* at 614-15, 624. If recovery under implied warranty is analogized to products liability principles, then a second purchaser would be permitted to recover under breach of implied warranty, as under strict tort, absent privity. See *Barnes v. Mac Brown & Co.*, 264 Ind. 227, 229, 342 N.E.2d 619, 620 (1976). The dissenting justices in *Barnes* viewed the implied warranty as a contract concept, *id.* at 231, 342 N.E.2d at 621 (De Bruler & Prentice, JJ., dissenting), and strenuously opposed abolition of the privity requirement, *id.* at 232, 342 N.E.2d at 622 (De Bruler & Prentice, JJ., dissenting). Recoverable damages are in part a function of the expectations of the parties to a bargain, and these expectations are reflected in the purchase price. *Id.* (De Bruler & Prentice, JJ., dissenting). The *Barnes* dissenters deemed it inequitable, in calculating liability to subsequent purchasers, to refer to a purchase price which the builder-vendor had no hand in fixing. *Id.* (De Bruler & Prentice, JJ., dissenting).

A variation on the argument that a builder-vendor has no input as to the sale price to a second purchaser was advanced in *Oliver v. City Builders, Inc.*, 303 So. 2d 466 (Miss. 1974). In denying recovery to a remote purchaser who sued in implied warranty, the court noted that the original purchaser may have knowingly waived defects and accepted the property as is. *Id.* at 468. Thus, the court concluded, it would be incongruous to allow a subsequent purchaser to recover for the same defects. *Id.* One commentator has noted that courts which view the theory of implied warranty as a contract doctrine may still grant recovery to a remote purchaser by deeming him to be a third-party beneficiary of the implied warranty. Note, *supra*, at 627. Such a strained construction is reminiscent of the awkward theories under which strict liability was initially extended to food and drink. See note 35 *supra*. Even courts which espoused a contract-based implied warranty in home sales did not apply it absolutely. See, e.g., *Utz v. Moss*, 31 Colo. App. 475, 478, 503 P.2d 365, 367 (Ct. App. 1972) (implied warranty extended to first purchaser-occupant, even if realty company was first purchaser); *accord*, *Gay v. Cornwall*, 6 Wash. App. 595, 598, 494 P.2d 1371, 1373 (Ct. App. 1972).

Remote purchasers have fared somewhat better under strict liability principles, but this theory is sometimes limited to the context of mass producers of homes. See *Kriegler v.*

tract action, a second purchaser would be barred from recovering damages for economic loss because of his lack of privity. In a jurisdiction which follows the majority view of prohibiting recovery for economic loss in strict tort, this remote plaintiff would seek to characterize his injury as physical property damage, which is recoverable in strict tort, and would likely prevail in a court oriented toward consumer relief.<sup>150</sup> Under a different scenario, a remote purchaser might bring suit in a jurisdiction which permits actions in breach of implied warranty absent privity. Such a plaintiff might argue that the notion of a manufacturer/builder impliedly warranting the merchantability/habitability of his product/house by putting it on the market<sup>151</sup> should be extended, in this context, to include an implied warranty of the resale value of the house on which the loss of bargain action may be predicated.<sup>152</sup>

Compounding the inequities potentially inherent in a forced choice of one "artificial" theory of recovery over another are the peculiar characteristics of the housing industry. One particularly troublesome peculiarity, for example, attends the attempt to distinguish actual physical property damage to the house, which in a majority of courts would be recoverable under a theory of strict liability, from a condition which merely lowers the value of the house, and, as a commercial loss, would only be recoverable in an action in breach of warranty, by a party in privity with the builder-vendor.<sup>153</sup> A house with a cracking foundation, for exam-

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Eichler Homes, Inc., 269 Cal. App. 2d 224, 227, 74 Cal. Rptr. 749, 752 (Ct. App. 1969); Avner v. Longridge Estates, 272 Cal. App. 2d 607, 610, 614-15, 77 Cal. Rptr. 633, 636, 639 (Ct. App. 1969); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 90, 207 A.2d 314, 325 (1965). *But see* Patitucci v. Drelich, 153 N.J. Super. 177, 179-80, 379 A.2d 297, 298 (Super. Ct. Law Div. 1977). Recovery for purely economic loss has also been precluded under strict tort liability. *See* Note, *supra*, at 613; note 144 *supra*.

<sup>150</sup> *See* Rabin & Grossman, *supra* note 148, at 21-22.

<sup>151</sup> *See* Donnelly, *supra* note 147, at 16-17.

<sup>152</sup> *See* Rabin & Grossman, *supra* note 148, at 44-45.

<sup>153</sup> *See, e.g.*, Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (Ct. App. 1969); Avner v. Longridge Estates, 272 Cal. App. 2d 607, 77 Cal. Rptr. 633 (Ct. App. 1969). In *Kriegler*, the second purchaser of a house sued the builder for failure of a defectively built heating system. Although the court labeled the action as one for "physical damage," 269 Cal. App. 2d at 225, 74 Cal. Rptr. at 751, it awarded the plaintiffs damages for "diminution in value" of their home, *id.* at 226, 74 Cal. Rptr. at 751. The court's reliance on *Schipper*, a personal injury case, created even further confusion. *Id.* at 227-28, 74 Cal. Rptr. at 752-53. In *Avner*, the plaintiffs recovered from the defendant developer, who "manufactured" their lot, for damage to their house caused by improper land fill. *Id.* at 615, 77 Cal. Rptr. at 639. Damage caused by subsidence of the soil was treated as property damage, even absent impact or accident, and recovery was granted in strict tort. *Id.*

When a court following *Seely* declines to award damages for economic loss under the

ple, has not been the target of violent physical impact, yet the damage to the property will undoubtedly impair its value.<sup>154</sup> The blurred line between the two types of damage, and the strictures imposed by doctrines defining when they are recoverable, has understandably led the out-of-privity plaintiff who suffers loss of value damages to try to characterize his loss as physical property damage in order to recover in strict tort, absent privity.<sup>155</sup> In products liability cases, the ramifications of this type of theory-selection have been criticized as an untenable circumvention of the warranty principles embodied in the U.C.C. through appeal to the policy-based principles of strict tort.<sup>156</sup> Proposed remedies have included the elimination of privity as a component of an action in breach of implied warranty<sup>157</sup> or, under the minority view, recovery

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strict liability doctrine, it may, nevertheless, grant recovery under the theory of implied warranty, despite the absence of privity. See *Nobility Homes v. Shivers*, 557 S.W.2d 77, 79, 81 (Tex. 1977). The court in *Nobility Homes* noted that the UCC, as enacted in Texas, is neutral with respect to privity, thereby leaving the issue to be decided by the courts. *Id.* at 81 (citing TEX. BUS. & COM. CODE ANN. § 2.316 (Vernon 1968)). Relying on *Morrow v. New Moon Homes, Inc.*, 548 P.2d 279 (Alaska 1976), wherein a remote purchaser of a mobile home sued for economic loss, the *Nobility Homes* court agreed that it would be unfair to deny a consumer recovery for economic loss under an implied warranty theory when he could recover, absent privity, for the "slightest physical injury" caused by a defective product. 557 S.W.2d at 81. The court also discussed negligence as a workable theory for recovery of economic loss absent privity. *Id.* at 83; see note 142 *supra*.

<sup>154</sup> See Rabin & Grossman, *supra* note 148, at 23-24. A violent impact or accident serves, in some jurisdictions, to clarify that the damage to the product itself is physical property damage. *Id.*

<sup>155</sup> See note 153 *supra*.

<sup>156</sup> See Rabin & Grossman, *supra* note 148, at 7-8. The authors criticized the "wilder-ness of theories" characterizing suits for defective products, listing six potential avenues of recovery: negligence, strict liability, misrepresentation, express warranty, implied warranty of fitness for a particular purpose, and implied warranty of merchantability. *Id.* One of their major criticisms is that it is possible for the selection of a particular theory of liability to affect the outcome of a case. *Id.* at 8. Strict tort liability thus employed becomes "a device to nullify defenses specifically allowed by statute." *Id.* at 17. To avoid this result, the authors contend that strict tort liability should be limited to personal injury only, in order to preclude plaintiffs from evading warranty rules by the fiat of styling their actions in tort. *Id.* at 8. In a similar vein, they would preclude actions in negligence absent personal injury, again in order to foreclose any sidestepping of applicable warranty rules. *Id.* at 9-10.

<sup>157</sup> *Id.* Under the Rabin-Grossman proposed comprehensive system of relief in products liability cases, the requirement of privity would be eliminated in actions for economic loss brought under a theory of implied warranty. *Id.* at 9. Moreover, such theory would be the exclusive remedy for both physical property damage and economic loss. *Id.* at 10. The argument generally advanced for the abolition of privity in implied warranty actions is that under modern marketing conditions, the mere placing of an article in the "channels of trade" raises an implied warranty from the manufacturer to the ultimate consumer of the product's fitness. *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 59, 207 A.2d 305, 309 (1965).

for economic loss in strict tort.<sup>158</sup>

Conceivably, resolution of the damages issue in the housing context could be undertaken by continued analogy to products liability law. Unfortunately, however, a court pursuing such a path must determine whether the proper analogy would be to a contract-based implied warranty of merchantability, or to a policy-based system of liability such as that embodied in section 402A of the Restatement. An additional impediment to such an approach is that, just as the analogy between a defective product and a defective house may not be altogether apt, neither is the exclusive choice of one set of ordered doctrines capable of furnishing comprehensive rules to govern all factual situations.<sup>159</sup>

Consequently, it is suggested that the nature of a house,<sup>160</sup> the position of a second purchaser,<sup>161</sup> and the condition of the housing industry<sup>162</sup> all militate toward an idiosyncratic theory of home

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<sup>158</sup> See text accompanying note 124 *supra*.

<sup>159</sup> Cf. Shanker, *supra* note 56, at 36 (the rules governing strict products liability have become as confining as those which previously had governed breach of warranty). Examining the tension between tort and contract theory in products liability law, the author questioned the legitimacy of the search for exclusive principles as follows:

Why must the legal mind look so desperately for an exclusive pigeonhole? Has not the time come to recognize that the business of law is to determine liability between people and not to place their claims in pigeonholes? In determining liability, is it too much to ask of the courts that they consider all relevant legal theories rather than playing a game of logic with only one?

*Id.*

<sup>160</sup> See note 127 *supra*.

<sup>161</sup> See note 149 *supra*.

<sup>162</sup> See Lindsey, *Housing Slump, The Impact Spreads*, N.Y. Times, Oct. 28, 1981, § 4, at 1. The health of the home building industry is intimately tied to the state of the nation's economy as a whole, with the economic recovery of the housing industry traditionally signaling the nation's emergence from a recession. *Id.* Thus, the current slump in the housing industry, the longest since World War II, has been characterized by housing specialists as "cutting deeply across a broad spectrum of the nation's economy." *Id.* As the potential for large judgments in strict tort is introduced into the housing industry, the question of insurance coverage inevitably must arise. Since the 1930's, when the "massive infiltration" of liability insurance militated toward the view that tort law is primarily compensatory, tort law and insurance have been considered to be linked. G.E. WHITE, *supra* note 1, at 147-48. This relationship has been analyzed in both critical and laudatory terms. See, e.g., G. SULLIVAN, *PRODUCTS LIABILITY: WHO NEEDS IT?* 125 (1979) (products liability theory has become linked with erroneous presumption of seller's "infinite ability" to procure insurance); Friedman, *Social Insurance and the Principles of Tort Liability*, 63 HARV. L. REV. 241, 263-65 (1949) (tort law has moved toward a social insurance principle but justification exists for continued separation); James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549, 569-70 (1948) (liability insurance has made possible a system of social insurance in the face of inadequate "horse and buggy rules" of tort law); James & Thornton, *The Impact of Insurance on the Law of Torts*, 15 LAW & CONTEMP. PROB. 431,

buyer relief,<sup>163</sup> employing what is valuable and applicable from the law of defective products. In fashioning such relief, what may serve to create proper perspective, if not absolute order, is a recognition that the reaction against caveat emptor that led to the emergence

440-42 (1950) (insurance has impacted beneficially on risk distribution and on prevention of torts). The growth of products liability litigation is responsible for comprehensive levels of insurance becoming the norm in most spheres of manufacturing. *See generally* W. KIMBLE & R. LESHER, PRODUCTS LIABILITY §§ 391-396, at 416-27 (Supp. 1981); G. SULLIVAN, *supra*, at 17-19; Henderson, *Insurance Protection for Products Liability and Completed Operations—What Every Lawyer Should Know*, 50 NEB. L. REV. 415, 415-46 (1971), reprinted in PRODUCT LIABILITY: LAW, PRACTICE, SCIENCE 705-36 (2d ed. P. Rheingold & S. Birnbaum 1975); Wallace, *Products Liability Insurance: Scope of the Protection and Coverage Issues*, reprinted in PRODUCT LIABILITY OF MANUFACTURERS: PREVENTION AND DEFENSE 423-59 (1980).

The nature and extent of builders' insurance presently falls short of the level available to many defendant companies in products liability suits. The initial response of the housing industry to its growing scope of liability was the creation, in 1973, of a Home Owner's Warranty (HOW) program, a 10-year combined warranty and insurance plan applicable to new single-family homes and condominiums. Note, *The Home Owners Warranty Program: An Initial Analysis*, 28 STAN. L. REV. 357, 357-58 (1976). Builder membership in the plan is voluntary, so its effectiveness as a consumer protection device remains uncertain. *See id.* at 370-71, 374. As of 1979, the program was in operation in 46 states and approximately 14,000 builders were registered. Wolff, Herbert & Riechers, *'HOW' Settles Consumer Disputes*, 17 URB. L. ANN. 333, 334 (1979). During the first year of the plan, the builder warrants against defects in materials and workmanship as measured against HOW-approved standards, and in the second year the warranty continues to cover "major" structural defects and malfunctions. During these 2 years, the HOW insurance carrier will pay any claims that the builder is unable to meet. After the third year, the insurance carrier directly insures the home against major structural defects. R. POWELL & P. ROHAN, *supra* note 68, ¶ 938.7[5], at 370.76-.76(6)(a); Wolff, Herbert & Riechers, *supra*, at 334-35; Note, *supra*, at 362-63. For a discussion of an alternative to industry self-regulation, see Note, *supra*, at 370-80.

<sup>163</sup> Courts faced with the particular problems of creating a system of relief for injured home buyers often have called for legislative enactments to resolve the confusion. *See, e.g.*, *Thomas v. Cryer*, 251 Md. 725, 727, 248 A.2d 795, 796 (1969); *Bruce Farms, Inc. v. Coupe*, 219 Va. 287, 293, 247 S.E.2d 400, 404 (1978). Several states have adopted statutory schemes of home buyer remedies. *See, e.g.*, CONN. GEN. STAT. §§ 47-116 to 120 (1981); MD. REAL PROP. CODE ANN. §§ 10-201 to 205 (1981); MINN. STAT. ANN. §§ 327A.01-.08 (West 1981); N.J. STAT. ANN. §§ 46:3B-1 to 12 (West Supp. 1981-1982). The ultimate efficacy of legislative solutions to problems in real property sales is questionable. On a basic level, it can be argued that caveat emptor, as a doctrine built up and maintained for so many years by the courts, should be dismantled, and a new system created, by the courts. *See* 28 OHIO ST. L.J., *supra* note 127, at 351. On a deeper level, however, it can be argued that the kinds of fine distinctions and considerations of conflicting interests inherent in home buyer transactions are not amenable to inflexible statutory articulation. *Id.*; cf. Traynor, *The Ways and Means of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 367 (1965) (no one definition of "defect" can resolve all cases). Judicial remedies have been upheld, in general, as superior to legislative schemes on the grounds of both greater comprehensiveness and narrower focus. *See* D. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 12 (1977). Horowitz noted that while legislative remedies might be "more systematic and inclusive," judge-made remedies have "a directness, a concreteness, and a lack of equivocation notably absent in schemes that emerge from the political process." *Id.*



of an implied warranty of habitability was premised upon a desire, or policy, to compensate the home buyer for personal injury,<sup>164</sup> not to insure him against the economic risks that are inherent in any commercial transaction. Thus, the proper *scope* of relief becomes evident: any defect in a house which has the *actual* or *potential* ability to endanger the safety of the occupants should be deemed a compensable defect.<sup>165</sup> That such recoveries might comprehend so-called "cost of repair" damages, traditionally limited to a warranty action, is certainly defensible under the strong policy of protecting occupant safety. Indeed, it would be inconsistent with such a policy to deny a plaintiff damages to remedy a potentially dangerous condition, while allowing recovery for personal injuries suffered as a result of the unremedied condition. Of course, because such damages involve a personal as opposed to an economic interest, it is clear that the proper *theory* of relief is strict tort, for it is this vehicle by which personal losses typically have been redressed.<sup>166</sup>

Under the foregoing approach, those damages which related only to diminution in resale value of a house, with no concomitant hazard to its occupants, would not be recoverable in strict tort, since the policy considerations which supported the extension of strict tort liability to home builders are simply not applicable in that circumstance. Moreover, a balancing of all competing interests would appear to justify a continuation of an action in breach of implied warranty, by a party in privity, as the sole means of recovery for purely economic loss. The basis of such a restriction is not, however, the mere impulse to create and maintain ordered categories. Rather, the result rests upon explicit recognition that a policy of consumer protection is valid in formulating a theory of relief for

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<sup>164</sup> See note 108 and accompanying text *supra*.

<sup>165</sup> Whether physical damage to a house is recoverable in strict tort, or is deemed economic loss and not recoverable absent privity, might be made to turn on the same distinction employed by the Oregon Supreme Court in *Russell v. Ford Motor Co.*, 281 Or. 587, 575 P.2d 1383 (1978) (discussed in Rabin & Grossman, *supra* note 148, at 25). The *Russell* court held that where a product is "dangerously defective," *id.* at 594, 575 P.2d at 1386, or "man-endangering," *id.* at 595, 575 P.2d at 1387, and the damage results as a consequence of the defective condition, a cause of action in strict liability is established, *id.* Economic loss due to malfunction or loss in resale value, even of a dangerously defective product, would not be recoverable in strict tort. *Id.* Translated into the vocabulary of defective realty, this distinction would function to define the "habitability" of a house as its safety, not its potential resale value, and strict liability recovery would attach only to those defects affecting occupant safety.

<sup>166</sup> See Rabin & Grossman, *supra* note 148, at 18 (growth of products liability law prompted by increased volume of personal injuries caused by defective products).

one class of plaintiffs, and that such policy considerations are not relevant to another class of plaintiffs. The judicial process involved in creating a system of relief for purchasers of defective housing is thus a more sophisticated one, with a certain amount of order flowing organically, and not as an end unto itself.

#### CONCLUSION

The battle against caveat emptor having been largely won in real estate sales, the task facing the courts has become the fashioning of theories of relief for injured home buyers. The recurrent tension in judicial thought between remedies which comprehend policy considerations and dissatisfaction with the essentially ad hoc nature of such remedies was apparent in the development of products liability law. As that body of law was applied by analogy to cases involving defective realty, a similar strain has developed, most particularly identifiable in the conflicting bases for recovery of loss of bargain damages, or economic loss. Inconsistency among cases decided under warranty and strict tort principles highlights the need for a purely idiosyncratic system of home buyer relief, in which the interests of both the consumer and the home building industry are balanced. Such balancing, it is suggested, justifies recovery, under strict tort principles, for any defect in a house which poses potential danger to the safety of its occupants, regardless of whether such recovery includes the cost of repairing an as yet latent condition. Mere loss of bargain, which leaves the homeowner holding a less valuable piece of property, does not raise the policy considerations that prompted creation of strict liability theory, and thus should not be recoverable under that theory. Defects which threaten neither health nor safety are risks of the commercial sales transaction, and as such should be recoverable only by a party to that transaction—through an action in breach of implied warranty.

The formulation of an interstitial theory, situate within but not restricted by the characteristics of products liability law, will perhaps bring to the area of defective realty the kind of order that is not an end in itself, but rather the natural result of a policy-oriented analysis cognizant of all competing interests.

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