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Stigma Damages: The Case for Recovery in Condominium Construction

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COMMENTS

Stigma Damages: The Case for Recovery in Condominium Construction Defect Litigation

For wherever the common law gives a right or prohibits an injury, it also gives a remedy by action; and therefore, wherever a new injury is done, a new method of remedy must be pursued.[1]

INTRODUCTION

Over the past decade, California has experienced explosive growth in condominium construction. "[T]oday the typical homeowner in California owns a real property interest in a planned development, condominium, cooperative, or other similar interest, rather than the detached single family home of the post-World War II years."[2] As opposed to owning single family dwellings, a condominium owner owns[3] only the airspace within his unit,[4] or

1. 3 W. BLACKSTONE, COMMENTARIES *123.

2. Raven's Cove Townhomes v. Knuppe Dev., 115 Cal. App. 3d 783, 794, 171 Cal. Rptr. 334, 340 (1981). The court notes Department of Real Estate estimates that as of 1978 there were 10,000 homeowner associations in California and they were being created at a rate of 160 per month, producing a projection of at least 19,000 more in the next decade. Between 1973 and 1981, condominium ownership more than tripled, indicating that the preferred form of housing may be changing. *The American Dream is Changing*, N.Y. Times, Oct. 28, 1984, § 12, at 1. Condominium sales accounted for 14.9% of all home sales in 1986, compared to 10.1% in 1984. CAL. REAL EST., July-Aug. 1987, at 6. Although the condominium market is currently "soft" in California (condominium sales dropped to 13% of all home sales in 1987, L.A. Times, Mar. 13, 1988, part VIII, at 8) the general market outlook for condos is good. *What You Should Know About Condo Sales*, CAL. REAL EST., June 1986, at 32. Citing lawsuits, higher costs, and the slow-growth movement, California home builders are apprehensive about the home construction market in 1989, but 1988 will nonetheless be a good year. *Caution Flag Up After Robust Years*, L.A. Times, Mar. 27, 1988, part VIII, at 1.

3. Condominiums are not always held in fee. "A condominium may, with respect to the duration of its enjoyment, be either (1) an estate of inheritance or perpetual estate, (2) an estate for life, (3) an estate for years, such as a leasehold or a subleasehold, or (4) any combination of the foregoing." CAL. CIV. CODE § 783 (West Supp. 1988).

4. What constitutes a condominium is codified in Title 6 of the CIVIL CODE:

> A condominium consists of an undivided interest in common in a portion of real property coupled with a separate interest in space called a unit, the boundaries of which are described on a recorded final map, or condominium plan sufficient in detail to locate all boundaries thereof. The area within these boundaries may be filled with air, earth, or water, or any combination thereof, and need not be physically attached to land except by easements for access and, if necessary, support.

"separate interests."[5] These separate interests are surrounded by the common areas:[6] the structure, roofing, hallways, plumbing, landscaping, and other areas in common use. The common areas are owned by the condominium homeowners as tenants in common[7] and managed by the homeowners association, which is responsible for their maintenance.[8]

The growth of condominium construction has been accompanied by a similar increase in construction defect litigation.[9] Problems with soil compaction, defective materials, or negligent construction supervision may result in physical damage to common area structures, leaky roofs or pipes, or dead foliage. Courts in the past have awarded damages for the cost of repairing common areas such as structural shoring, roof and plumbing repairs, and renewed landscaping.[10] However, for the individual unit own-

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The description of the unit may refer to (i) boundaries described in the recorded final map, parcel map, or condominium plan, (ii) physical boundaries, either in existence, or to be constructed, such as walls, floors, and ceilings of a structure or any portion thereof, (iii) an entire structure containing one or more units, or (iv) any combination thereof. The portion or portions of the real property held in undivided interest may be all of the real property, except for the separate interests, or may include a particular three-dimensional portion thereof, the boundaries of which are described on a recorded final map, parcel map, or condominium plan. The area within these boundaries may be filled with air, earth, or water, or any combination thereof, and need not be physically attached to land except by easements for access and, if necessary, support. An individual condominium within a condominium project may include, in addition, a separate interest in other portions of the real property.

CAL. CIV. CODE § 1351(f) (West Supp. 1988).

5. A "separate interest" in a condominium project refers to an individual unit. CAL. CIV. CODE § 1351(l)(2) (West Supp. 1988).

Unless the declaration or condominium plan, if any exists, otherwise provides, if walls, floors, or ceilings are designated as boundaries of a separate interest, the interior surfaces of the perimeter walls, floors, ceilings, windows, doors, and outlets located within the separate interest are part of the separate interest and any other portions of the walls, floors, or ceilings are part of the common areas.

CAL. CIV. CODE § 1351(l) (West Supp. 1988).

6. "Common area" means everything but the separate interests. CAL. CIV. CODE § 1351(b) (West Supp. 1988).

7. CAL. CIV. CODE § 1362 (West Supp. 1988). *E.g.* in a 200-unit complex, each homeowner owns 1/200th of the common area.

8. CAL. CIV. CODE § 1364 (West Supp. 1988).

9. Holm, *Special Problems Related to Condominium Construction Litigation*, 42 WASH. & LEE L. REV. 405 (1985); Natelson, *Mending the Social Compact: Expectancy Damages for Common Property Defects in Condominiums and Other Planned Communities*, 66 ORE. L. REV. 109 (1987). This proliferation of litigation has helped cause the cost of homeowner associations' liability insurance to increase by as much as 400%. CAL. REAL EST., Jan. 1986, at 12. The author has located 39 residential construction defect cases which have reached the trial stage from January 1, 1985 through August 19, 1988. Eighteen of these cases involved condominiums or townhouses. Of the 39 cases, 24 resulted in plaintiff verdicts and 4 were reported settled. *See* 29 JURY VERDICTS WEEKLY, no. 1-31, no. 44. These figures represent a small fraction of the total number of suits filed, as many settlements go unreported.

10. Other items of recoverable damages in appropriate cases include loss of use, costs

ers, this recovery may be far short of "the amount which will compensate [them] for all the detriment proximately caused"[11] by the defective construction. Injuries suffered by unit owners may include an economic loss in value of their unit in addition to the tangible physical damage to the common areas.

As the case of *Easton v. Strassburger*[12] makes clear, the seller of real property and the real estate agent have an affirmative duty to disclose to prospective buyers all facts affecting the value of the property.[13] This disclosure requirement has recently been codified in California.[14] This statute requires a seller of real property to deliver to all prospective buyers a written statement detailing any structural additions, alterations, repairs, or replacements of significant components of the structure. Although a successful legal action (usually initiated by the homeowners association) will recover the cost to repair all common area construction defects, the individual unit owners must nonetheless disclose to all prospective buyers the fact that poor construction required repair.

Disclosure of prior damage to the common areas may result in a lower resale price of the unit, depending upon the type of physical injury suffered by the common areas. If the construction defect is leaky roofs or pipes, peeling wallpaper, or another patent defect,[15] repair should restore the condominiums to the market value of comparable units in an undamaged complex. However, if the defect is soil subsidence, site drainage, structural, or another latent defect,[16] repair may not restore the condominiums to their undam-

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of expert investigations, and attorney's fees.

11. CAL. CIV. CODE § 3333 provides: "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

12. 152 Cal. App. 3d 90, 199 Cal. Rptr. 383 (1984).

13. *Id.* at 102, 199 Cal. Rptr. at 390.

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> As soon as practicable before transfer of title for the first sale of a unit in a residential condominium, community apartment project, or stock cooperative which was converted from an existing dwelling to a condominium project, community apartment project, or stock cooperative, the owner or subdivider, or agent of the owner or subdivider, shall deliver to a prospective buyer a written statement listing all substantial defects or malfunctions in the major systems in the unit and common areas of the premises, or a written statement disclaiming knowledge of any such substantial defects or malfunctions. The disclaimer may be delivered only after the owner or subdivider has inspected the unit and the common areas and has not discovered a substantial defect or malfunction which a reasonable inspection would have disclosed.

CAL. CIV. CODE § 1134 (West Supp. 1988). *See also* CAL. CIV. CODE §§ 1102-1102.14.

15. A "patent defect" is one that is plainly visible or which can be discovered by such an inspection as would be made in the exercise of ordinary care. *See* BLACK'S LAW DICTIONARY 1013 (5th ed. 1979). *See* CAL. CIV. PROC. CODE § 337.1 (West Supp. 1988).

16. A "latent defect" is one that is hidden or concealed. "One which could not be

aged value. Prospective buyers, whose judgment determines market value,[17] may fear the problem will recur despite assurances to the contrary. Because the cause of the physical damage may be hidden,[18] buyers cannot evaluate the situation for themselves. Being unable to understand the defect, the nature of its repair, and the chances of recurrence, the market will demand a lower price.

A condominium selling for a lower price because of prior defects in the common areas can be analogized to a new car depreciating when driven off the showroom floor. Even though a car with twenty miles on the odometer and a condominium with structural repair are both "as good as new," there may be a psychological "stigma" or "taint" on the property causing it to have a lower market value. Throughout this Comment the term "stigma" refers to the residual loss in market value suffered by previously damaged property despite repair. On the other hand, "diminution in value" refers to the total loss in market value of damaged property, or the loss in value prior to repair. However psychologically curious the stigma on a condominium owner's airspace may be, the result is a very real loss;[19] a loss which can be quantified by a real estate appraiser.

Although the law in California regarding recoverable damages for construction defects is unclear, court decisions suggest that stigma damages for injury to real property are not recoverable.[20]

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discovered by reasonable and customary inspection; one not apparent on face of goods, product, document, etc." BLACK'S LAW DICTIONARY 794, 795 (5th ed. 1979). *See* CAL. CIV. PROC. CODE § 337.15 (West Supp. 1988).

17. "Value is extrinsic to the commodity, good, or service to which it is ascribed; it is created in the minds of people who constitute a market." AMERICAN INSTITUTE OF REAL ESTATE APPRAISERS, THE APPRAISAL OF REAL ESTATE 31 (7th ed. 1983). "Market value" is defined as "[t]he most probable price in cash, terms equivalent to cash, or in other precisely revealed terms, for which the appraised property will sell in a competitive market under all conditions requisite to fair sale, with the buyer and seller each acting prudently, knowledgeably, and for self-interest, and assuming that neither is under undue duress" (AMERICAN INSTITUTE OF REAL ESTATE APPRAISERS, *supra*, at 33) or "[t]he price in cash and/or other identified terms for which the specified real property interest is expected to sell in the real estate marketplace under all conditions requisite to a fair sale." Korpacz, *Market Value: Contemporary Applications*, APPRAISAL J., Jul. 1985, at 439. *See also* Sacramento R.R. v. Heilbron, 156 Cal. 408, 104 P. 979 (1909).

18. The latent/patent distinction is only illustrative. The two types of defects are defined in the Civil Code for statute of limitations purposes. The defects discussed herein—improper soil compaction or subsidence, i.e. structural or foundational defects--need not be (but typically are) latent. The affect these serious defects have upon market value is not diminished by their being apparent or easily discoverable. The distinguishing characteristic is their affect upon market value, due perhaps to the layperson's inability to appreciate the physical nature of the problem and the engineering principles behind the repair.

19. An example helps illustrate the magnitude of this damage. A 200-unit complex whose undamaged units sell for $100,000 may command 10% or $10,000 less upon disclosure of defective construction (despite repair). This results in a $2,000,000 total loss.

20. *See infra* notes 93-108 and accompanying text.

This Comment presents analyses by which a court can allow stigma damages and remain consistent with prior decisions which hold that the law of damages is flexible, and uphold the recovery of stigma damages for injured automobiles,[21] and other goods.[22] Decisions from other jurisdictions that allow stigma damages for construction defects[23] and other types of property damage;[24] and trends in California trial courts[25] all make a strong case for recovery of stigma in California for general construction defect cases. However, the stigma on individual condominiums caused by defective construction of the common areas is unique and requires a separate analysis.

Stigma suffered by a detached home is derived from physical defects in the home itself. The same is true of a damaged automobile—the property suffering the stigma is the damaged property. However, an individual condominium derives its stigma from property outside the unit—i.e. the defective common areas. This fact is made necessary by the condominium ownership scheme wherein the unit owner owns essentially airspace. The airspace can suffer no physical damage itself, and defective interior surfaces (wallpaper, floor coverings, and the like) will not cause stigma because these deficiencies can be readily understood and fixed by a homebuyer without fear of recurrence. Because the unit owner must seek recovery for stigma which derives from previously damaged common areas, and not from physical damage to their own property,[26] the legal analysis for recovery of stigma in condominium construction defect cases is distinct.[27]

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21. *See infra* note 118 and accompanying text.
22. *See infra* notes 119-25 and accompanying text.
23. *See infra* notes 59 & 68 and accompanying text.
24. *See infra* notes 119-25 and accompanying text.
25. *See infra* note 85 and accompanying text.
26. This is the case even though the unit owner has a fractional tenancy-in-common interest in the common areas.
27. Another problem is standing to sue. Condominium construction defect actions are most economically brought by the homeowner's association. The association clearly has standing to sue for damage to the common areas, but recovery for damage to the individual interests depends on the jurisdiction. In some states the individual owners must initiate a class action suit, and in others the association may only sue in a representative capacity for damage to the separate interests. In California, associations have been given statutory standing to sue, as the real party in interest, for damages to individual interests which "arise out of, or [are] integrally related to, damage to the common area." CAL. CIV. PROC. CODE § 374(d). Although this statute has been called "a model of clarity whose interpretation cannot be left to conjecture," Holm, *supra* note 9, at 427; it is not altogether clear whether an association has standing to sue for individual stigma damages. Certainly stigma is damage which "arises out of" damage to the common areas, as long as "damage" does not mean merely physical damage. California construction defect cases discussing the standing issue include: Shell Petroleum N.V. v. Graves, 570 F. Supp. 58 (N.D. Cal.), *aff'd*, 709 F.2d 593 (9th Cir.), *cert. denied*, 464 U.S. 1012 (1983); Central Mut. Ins. Co. v. Del Mar Beach Club Owners Ass'n, 123 Cal. App. 3d 916, 176 Cal. Rptr. 895 (1981); Del

Apart from the legal issues, a prerequisite to recover stigma damages is proof of their existence. A real estate appraisal and the testimony of a real estate appraiser will supply the evidence necessary to recover stigma damages. Therefore, the basic principles of real estate appraisal in the condominium context and the methods by which real estate appraisers evaluate and quantify stigma will be discussed first. Second, guideline cases from other states allowing recovery of stigma for construction defects will be discussed. Third, the legal theories which might be used in California to recover this damage will be evaluated (1) for construction defects in general, and (2) for the special case of condominiums. Recovering stigma damages under causes of action sounding in tort (negligence, negligent interference with prospective economic advantage, and strict products liability) will be discussed, with the goal of clarifying existing law.[28] Finally, while urging an expansion in the law to provide compensation for stigma caused by defective construction, emphasis will be placed on the need to maintain reasonable limits on recoverable damages for injury to real property.

It is proposed that the proper measure of damages for construction defects is the cost to repair plus stigma remaining after repair, or the total loss in value prior to repair; whichever is less. This remedy should be afforded to all homeowners, including owners of condominiums.

I. THE APPRAISER'S ROLE

A general understanding of the appraisal process is a prerequisite to understand the methods of quantifying stigma loss in condominiums. An appraisal is an unbiased estimate of the value of

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Mar Beach Club Owners Ass'n v. Imperial Contracting Co., 123 Cal. App. 3d 898, 176 Cal. Rptr. 886 (1981); Raven's Cove Townhomes, Inc. v. Knuppe Dev., 114 Cal. App. 3d 783, 171 Cal. Rptr. 334 (1981); Salton City Area Property Owners Ass'n v. M. Penn Phillips Co., 75 Cal. App. 3d 184, 141 Cal. Rptr. 895 (1977); Residents of Beverly Glen, Inc. v. City of Los Angeles, 34 Cal. App. 3d 117, 109 Cal. Rptr. 724 (1973); Greater Westchester Homeowners Ass'n v. City of Los Angeles, 13 Cal. App. 3d 523, 91 Cal. Rptr. 720 (1970); Professional Fire Fighters, Inc. v. City of Los Angeles, 60 Cal. 2d 276, 384 P.2d 158, 32 Cal. Rptr. 830 (1963); and Juneau Spruce Corp. v. International Longshoremen's & Warehousemen's Union, 119 Cal. App. 2d 144, 259 P.2d 23 (1953). Discussion of this complex issue is beyond the scope of this Comment.

28. Associations seeking to recover for construction defects may also utilize causes of action for breach of implied/express warranty, breach of fiduciary duty, fraud, deceit, nuisance, inverse condemnation, and destruction of subjacent/lateral support. *See* Glovatorium, Inc. v. NCR Corp., 684 F.2d 658 (9th Cir. 1982) (fraud); Nelson v. Gaunt, 125 Cal. App. 3d 623, 178 Cal. Rptr. 167 (1981) (fraud); Younan v. Equifax, Inc., 111 Cal. App. 3d 498, 169 Cal. Rptr. 478 (1980) (breach of fiduciary duty); and Delos v. Farmers Ins. Group, 93 Cal. App. 3d 642, 155 Cal. Rptr. 843 (1979) (fraud). However, discussion of these causes of action is beyond the scope of this Comment.

property based on pertinent data, application of appropriate analytical techniques to the data, and the knowledge, experience, and professional judgment of the appraiser.[29] An appraisal requires consideration of all market value influences.[30] Therefore, to appraise the market value of a particular piece of real property, the appraiser must take into account not only all the qualities of the property itself, but also the social, economic, governmental, and environmental circumstances affecting the property.[31]

In appraising the present value of a condominium unit, an appraiser must consider the quality of the neighborhood in which the complex is located,[32] the quality of the "subneighborhood" (the complex) in which the unit is located,[33] the amenity facilities in the complex,[34] and any unique quality of the unit.[35] The conscientious appraiser will perform a considerable amount of footwork by talking to neighbors and owners, viewing the area, and generally "getting to know" the property.

Once the pertinent data has been gathered, the appraiser estimates the market value of the subject property by comparison to similar properties.[36] The value of the property is indicated by the sale price of comparable property, plus or minus an adjustment for features present in one property but not the other.[37] Important adjustments include those for off-site as well as on-site features,

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29. AMERICAN INSTITUTE OF REAL ESTATE APPRAISERS, *supra* note 17, at 11.

30. *Id.* at 21.

31. *Id.* at 29.

32. These qualities include the price-value range of single-family housing alternatives in the area, financing conditions, owner versus tenant occupancy ratio, trends in condominium construction and conversion, number of units available, and the projected sales absorption rate. R. DOMBAL, RESIDENTIAL CONDOMINIUMS: A GUIDE TO ANALYSIS AND APPRAISAL 69 (1976).

33. These qualities include the price-value range of units within the complex; characteristics of other unit owners, including age, occupation and income; owner versus tenant occupancy ratio, and resale price trends. *Id.*

34. Amenity facilities include recreation rooms, pools, laundry facilities, garages, and golf courses. *Id.*

35. Important are the legal description of the air-lot and the net saleable area, the utility of the unit and its physical condition, the presence of built-in's and extras, and the existence of balconies or patios. *Id.*

36. This method of appraisal is called the "direct market comparison approach," and is the most appropriate method of appraising residential real estate. A second method is the "cost approach" wherein the property's value equals the cost of the improvements (structures) minus the depreciation of the improvements, plus the value of the situs. This method is generally inappropriate for condominiums as they are built as a whole and sold by unit, therefore having no per unit cost basis. A third method is called the "income approach." Market value is based on the income, or return on investment, that a buyer expects from the property. Property value equals the net operating income of the property divided by the rate of return. This third method is most appropriate for income-producing property and is generally inappropriate for residential property. *See* W. VENTOLO, FUNDAMENTALS OF REAL ESTATE APPRAISAL (4th ed. 1987); and R. DOMBAL, *supra* note 32, at 70.

37. W. VENTOLO, *supra* note 36, at 9.

the conditions of sale, and the time from the date of the sale.[38] Before selecting a final appraised value, the appraiser performs this computation on a number of similar properties recently sold.[39] In condominium appraisal it is desirable to compare the subject property to other units within the same complex.[40] After gathering information about the unit and comparing it to similar properties, the appraiser arrives at an appraised market value. Before outlining how appraisal is used to quantify stigma, it is helpful to understand why and in what situations stigma arises.

The term "stigma" is used by real estate appraisers in the same sense as it is used here—to denote the residual loss in market value experienced by damaged property after repairs have been accomplished.[41] The residential property market is more irrational than some other markets. "Prospective home buyers often look more for 'magic' than for value and may shun property with admitted defects . . . ."[42] After all, market value is "created in the minds of people who constitute a market."[43] The subjective nature of market value explains why stigma arises when the defect was in subsurface or structural components, but not when the defect was, for example, roofing or plumbing. Despite repair, prospective buyers more rationally fear recurrence of problems from the former group than from the latter. The nature of leaky roofs and their repair are more easily appreciated by a layperson than the integrity of structural repair or soil compaction.[44]

Appraisal literature talks of stigma as arising often in the case of landslide-damaged property.[45] Stigma is also discussed as it arises from other forms of land failure, including soil creep, subsidence, mudflows, erosion, and expansion.[46] Thus, stigma may arise from property damage caused naturally or damage precipitated by defective construction. There is no reason to distinguish the threat

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38. *Id.*
39. *Id.*
40. R. DOMBAL, *supra* note 32, at 71.
41. The word "stigma" appears in Levy, *Casualty Loss Appraisals of Landslide Damaged Real Estate*, THE REAL ESTATE APPRAISER AND ANALYST, Fall 1984, at 10 [hereinafter Levy, *Casualty Loss*]; and, Levy, *Landslides: Implications on the Appraisal Process*, THE REAL ESTATE APPRAISER AND ANALYST, Spring 1986, at 6 [hereinafter Levy, *Landslides*].
42. Natelson, *supra* note 9, at 123.
43. *See supra* note 17.
44. A knowledgeable buyer, such as an engineer, may perceive no fear of recurrence. Because the market value of the property is nonetheless depressed due to stigma, the knowledgeable buyer may find the purchase of repaired subsidence-damaged property a profitable long-term investment. His gain may be realized in subsequent years when the engineering has proved effective, in the mind of the market, as indicated by a return to the "proper" appraised market value; when the stigma has dissipated.
45. Levy, *Casualty Loss, supra* note 41.
46. Levy, *Landslides, supra* note 41.

of landslides from other types of defects which threaten serious structural damage. Stigma loss can arise whenever the market perceives a threat of future damage. The uniqueness of condominium stigma is revealed by applying this analysis of the cause of stigma in the condominium context.

In the case of a single-family detached home, stigma arises because of fear of future damage to the home itself. In the case of a condominium unit, stigma arises not only because of fear of future damage to the unit itself, but more importantly, fear of future damage to the surrounding common areas. Damage to the common areas will affect the value of a condominium interest in two ways: (1) a present direct loss in value of the fractional share in the common areas, and (2) a continuing vicarious loss in value of the unit's airspace due to stigma. Subsequent repair of the common area structure or soil will remove the present loss in value of the fractional share, but the stigma loss in the unit airspace will remain.[47] Perhaps the idea that repair cannot entirely remove a loss in value to an individual condominium is more easily understood than residual loss in a detached home. The home itself can be physically repaired, but the unit airspace can be affected only by repair of the surrounding structure; i.e., the unit's value can only be restored indirectly. With this background of appraisal principles and stigma in hand, the process of evaluating stigma can be discussed.

Two methods to quantify residual loss in market value or stigma associated with property damaged by landslides have been set forth.[48] These are the "modified cost" and the "case history" approaches.[49] They are simply variations on the "cost" and "market comparison" approaches for estimating market value in general.[50] The variations are necessary because in addition to estimating the "after" value of the property (the market value of the property after repair), the appraiser must also estimate the

47. It is conceivable that the stigma loss is directly associated with a residual loss in value of the fractional common area interests. In other words, the loss in value of the condominium interest might be due to a fear that future damage to the common areas will result in a direct loss in value of the fractional interest, rather than a derivative loss in value of the unit airspace. However, because the airspace unit is more a "home" than is a fractional interest in a common structure, it seems more appropriate to associate the stigma with the airspace rather than with the common area. The unit is where a buyer looks for "magic" and where value is determined by subjective considerations, whereas the common structure's value is more likely determined by objective considerations. The buyer is likely to view his interest in the common areas as a commercial property interest, reserving his sentiment for his individual unit. Commercial and other nonresidential property is not prone to stigma (however it is often subject to another intangible loss—loss of goodwill).

48. Levy, *Landslides, supra* note 41, at 8.

49. *Id.* at 9.

50. *See supra* note 36 and accompanying text.

"before" value of the property (the value of the property before the damage occurred).[51] If the property has not yet been repaired, the "after" value must be estimated from an appraisal of the property in its present (damaged) condition and the cost and nature of recommended repairs.[52] The residual loss in value is the difference between the "before" value of the property and the "after" value.[53]

Evaluation of stigma loss in condominiums proceeds in a similar manner. The condominium unit is valued considering the repaired condition, the undamaged condition and the stigma loss of the common areas. Because the market comparison technique is the most appropriate method to appraise condominiums,[54] stigma can be evaluated among units in a building by comparing the units' physical proximity to the damaged common area.[55] The total loss claimed by a homeowners association suing on behalf of all individual owners, or as the real party in interest, is the sum of all individual stigma losses.[56]

The use of a real estate appraiser is vital to the recovery of stigma damages. It is his testimony and appraisal that will establish the proof needed at trial. Certified appraisals[57] are the most desirable. It is the appraiser's experience and professional judgment that determine what defects cause stigma. To properly quantify the stigma caused by the discovery and repair of construction defects, an appraiser must become familiar with the design and construction of the common areas, defects in the property, repair efforts that were undertaken, and the value of similar but unaffected condominiums. It is therefore important that an appraiser be consulted in the early stages of the lawsuit.[58]

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51. Levy, *Landslides, supra* note 41, at 9.

52. *Id.*

53. *Id.* Both the "before" and "after" values are measured in present dollars. Stigma is measured by the difference in value of the property in two different states (damaged and not), not based on the time it is measured.

54. *See supra* note 36 and accompanying text.

55. As a general guideline, stigma loss equal to 10-15% of the unit's market value will result from serious common area defects. The loss will be the most in those units directly adjacent to or above the common area defect and may drop off to nothing in remote units. Conversations with real estate appraisers Gerald Kibbey, MAI and Harold Godwin, MAI, San Diego.

56. After recovery of a damage award, the money must be distributed to the individual owners according to the stigma loss suffered by each. *See* Natelson, *supra* note 9 for a discussion of allocation and distribution formulas, taking into account many complications including the problem of successive owners.

57. Pursuant to the Lancaster-Montoya Appraisal Act, effective January 1988. CAL. CIV. CODE § 1922-1922.14 (West Supp. 1988).

58. Several articles have been written regarding the use of expert real estate appraisers in court, including: Hay, *When an Appraiser Takes the Stand*, THE REAL ESTATE APPRAISER AND ANALYST, Fall 1985, at 27; Mainous, *Court Testimony: An Appraisal of*

In California, establishing stigma loss is only the first step to actual recovery by a homeowners association. No California case involving real property has allowed stigma as an item of damages, therefore, condominium and other homeowners have an uphill legal battle. Ammunition may be found in the rationale and decisions of two cases outside of California.

II. Recovery Permitted in Other States

In the Wyoming case of *Anderson v. Bauer*,[59] eight homeowners brought actions in negligence and breach of warranty against the builder for damages arising from water seepage in their basements.[60] Soils tests revealed a water table problem as the cause of the damage.[61] The trial court found that after repair, each of the eight homeowners incurred additional damage, described as the diminished value of their property due to the area's reputation for having a water problem.[62]

On appeal, the defendant builder contested the measure of damages.[63] Although the Supreme Court of Wyoming recognized that "so much is subjective and uncertain in determining fair market values before and after the damage . . ."[64] it nevertheless held that "the diminished value of the property, because of a public awareness of a water problem, is also recoverable [in addition to cost to repair]."[65] The court reasoned that it was "sufficient that they [damages] be determined with a reasonable degree of certainty based upon the evidence adduced and the nature of the injury."[66] Here the evidence of diminished market value consisted of the testimony of plaintiff's expert; a real estate appraiser.[67]

A similar decision was reached in Colorado. In *McAlonan v. U.S. Home Corp.*,[68] the plaintiff, soon after buying her condominium[69] from defendant builder, discovered construction defects, in-

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Oral Presentation, The Real Estate Appraiser and Analyst, Spring 1986, at 75; and, Howe, *Lawyers and Real Estate Appraisers: How They Can Prepare for Litigation*, The Real Estate Appraiser and Analyst, Fall 1986, at 26.

59. 681 P.2d 1316 (Wyo. 1984).
60. *Id.* at 1319.
61. *Id.* at 1320.
62. *Id.* at 1324.
63. *Id.* at 1319.
64. *Id.* at 1323-24.
65. *Id.* at 1324.
66. *Id.* at 1325.
67. *Id.*
68. 724 P.2d 78 (Colo. App. 1986).
69. Here the plaintiff buyer owned the cracked foundation. Thus, this is not a case where the stigma derives from other property, as is the case in a typical condominium where only the airspace is owned individually.

cluding severe cracks in the foundation.[70] The complaint alleged negligence and breach of implied warranty.[71] On appeal from a judgment in favor of the plaintiff, the defendant argued that the trial court erred in instructing the jurors that if they found for the plaintiff, to "award as her actual damages the reasonable cost of repairing the property, together with the decrease in market value, if any, to the property, as repaired."[72]

The court first recognized that the plaintiff was entitled to recover damages as necessary to make her whole.[73] The court then noted that there was "a possibility that the property, as repaired, may nevertheless have a reduced market value."[74] Thus, the Colorado Court of Appeals concluded that the instruction was proper and affirmed the judgment.[75] The court reasoned that the property, from the time the damage was discovered in 1981 to the time of judgment in 1986, failed to appreciate as it would have had it been properly built.[76] The court reasoned that "[a]ppreciation or added value may properly be considered a loss."[77] The court permitted the plaintiff to recover more than her purchase price (but not more than the present market value of her home) in compensatory damages from the builder.[78] The court summarily rejected defendant's argument that the award constituted double recovery.[79]

Both the Colorado and Wyoming courts determined that the difference in the property's present value, as repaired, and its estimated present value, had there been no defect, was compensable.[80] While Colorado saw the cause of diminution in market value as a "failure to appreciate"[81] and Wyoming saw it as a "reputation for problems,"[82] both jurisdictions recognized what appraisers call stigma. Both defects involved severe problems with fundamental elements of the property—the soil and foundation.[83] In both cases

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70. *McAlonan*, 724 P.2d at 79.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* at 79-80.
76. *Id.* at 80.
77. *Id.*
78. *Id.*
79. *Id.* The feared double recovery was of both the cost to repair the foundation and the loss in value of the property as damaged, as opposed to both the cost to repair the foundation and the loss in value of the property as damaged and repaired (stigma).
80. *See* Anderson v. Bauer, 681 P.2d 1316, 1324 (Wyo. 1984); McAlonan v. U.S. Home Corp., 724 P.2d 78, 79-80 (Colo. App. 1986).
81. *See McAlonan*, 724 P.2d at 80.
82. *See Anderson*, 681 P.2d at 1324.
83. *See id.* at 1320; *McAlonan*, 724 P.2d at 80.

the jury, relying on expert testimony, was allowed to find that despite repair, the property was not restored to its full market value.[84] The diminution in value was not because the repair efforts were insufficient, but because of the market's perception of a stigma on the property described as a "reputation" or a "failure to appreciate" by the courts.

These are the only reported appellate cases allowing stigma damages for construction defects and therefore provide guidance for California courts.[85] However, neither opinion gives a thorough analysis of how the decision fits in with the law of damages. Both suits sounded in negligence and breach of warranty.[86] However, neither court made clear which legal theory was used to recover for stigma. The Colorado Court of Appeals simply relied on the maxim that the plaintiff is entitled to be made whole,[87] without discussing the various rules of measuring damages which have been developed for the two causes of action. Similarly, the Supreme Court of Wyoming discussed the appropriate measure of damages in general terms. Nonetheless, the decisions do suggest that stigma caused by construction defect damage to one's property should be a ground for recovery in California. The step to allow compensation for stigma to a condominium from damage to common areas is a small and sensible one because of the growing importance of the condominium as a form of home ownership, and the close connection between damaged common areas and stigmatized units.

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84. *See Anderson*, 681 P.2d at 1325; *McAlonan*, 724 P.2d at 80.

85. California trial courts have taken the initiative in allowing recovery for stigma arising from construction defects. For example, in Mount La Jolla Ass'n v. Marview Investors, No. 474790 (San Diego Super. Ct. 1986), Superior Court Judge William Todd upheld remaining "diminution in value" as a recoverable item of damages over and above cost to repair. The case involved serious soil subsidence problems and subsequently settled out of court for $17 million. San Diego Union, June 14, 1987, § F at 25, 28. Judge Todd is now on the 4th District Court of Appeal and is in a position to set important precedent. *See also* Pacifica Terrace Homeowners' Ass'n v. Pacifica Terrace, Ltd., No. C417-425 (Los Angeles County 1988, Judge Edward M. Ross), and Bitzer v. G.W.C., Dev. Corp., No. 521192 (San Diego County 1988, Judge Arthur W. Jones).

Trial courts have also allowed stigma damages in several landslide cases. *See, e.g.*, the following trial court dispositions as reported in JURY VERDICTS WEEKLY: Oakes v. City of Hayward, No. 582049 (Alameda County 1984); Press v. Ins. Co. of N. Am., No. 112985 (Marin County 1986); Crowley v. Kramer, No. 80335 (Santa Cruz County 1986); Walsh/George v. California, No. 199364 (San Bernardino County 1986); Rials v. California, No. 286173 (San Mateo County 1987); Oceanside Manor Homeowner's Ass'n. v. Summers, Inc., No. N13925 (San Diego County 1987); Rappaport v. City of Berkeley, No. 565428-0 (Alameda County 1987); Priestly v. Town of Hillsborough, No. 275613 (San Mateo County 1987); Goodrich v. Pancallo, No. 90138 (Santa Cruz County 1987); and Chatman v. City of Oakland, No. 575572-1 (Alameda County 1988).

86. *See Anderson*, 681 P.2d at 1319; *McAlonan*, 724 P.2d at 79.

87. *See McAlonan*, 724 P.2d at 79.

III. TORT THEORIES

The California rules of damages will now be examined to determine whether recovery of stigma is compatible with theories of negligence, negligent interference with prospective economic advantage, and strict liability. "To avoid an arbitrary discretion in the courts, it is indispensable that they be bound down by strict rules and precedents . . . ."[88] Commentators on California law have stated that "[i]t . . . seems logical that a claim for diminution in value of each individual unit could be included to the extent that a stigma remains with the unit notwithstanding the repairs"[89] and "[a]rguably, . . . the appropriate measure of damages can include residual loss of market value above and beyond the cost of repair."[90]

A. Negligence

In the leading case of *Sabella v. Wisler*,[91] the California Supreme Court held the doctrine of *caveat emptor*, or "let the buyer beware," inapplicable to a contractor's negligent construction of a residential unit.[92] Thus, negligence law was applied to the construction industry, which imposed upon a builder the duty of reasonable care. Although the measure of damages is still unclear for breach of this duty, a strong argument can be made for allowing recovery of stigma damages in California within the guidelines set by the court.

The general rule is that the measure of damages for negligent injury to property is the difference in value of the property immediately before and immediately after the injury, or the cost of repair, whichever is less.[93] This "lesser of" formula has long been the rule. Contrary to the Colorado Court of Appeals holding in *McAlonan v. U.S. Home*,[94] the California Court of Appeals has held that a jury instruction which stated that the plaintiff was "entitled to recover the reasonable cost of necessary repairs . . . and the difference between the market value of said property immediately before the damage and after the damage, after making any necessary repairs" was prejudicially erroneous as it permitted

88. THE FEDERALIST No. 78 (A. Hamilton).
89. T. MILLER, CALIFORNIA CONSTRUCTION DEFECT AND LAND SUBSIDENCE LITIGATION 45 (1986).
90. J. MCGUIRE, LANDSLIDE AND SUBSIDENCE LIABILITY 79 (Supp. 1986).
91. 59 Cal. 2d 21, 377 P.2d 889, 27 Cal. Rptr. 689 (1963).
92. *Id.* at 25, 377 P.2d at 891, 27 Cal. Rptr. at 691.
93. Mozzetti v. City of Brisbane, 67 Cal. App. 3d 565, 576, 136 Cal. Rptr. 751, 757 (1977).
94. 724 P.2d 78 (Colo. App. 1986).

double recovery.[95] Three years later a California Court of Appeals approvingly noted the holding, saying "it is clear . . . that *either* the diminution in value *or* cost of restoration, whichever is less, is the proper measure of damages in a property damage case."[96]

The "lesser of" rule is not contrary to a rule that would allow stigma damages. Stigma is the residual loss after repair, not the total diminution in value. Cost of repair plus stigma is a closer approximation of the total diminution in value or the actual loss sustained. However, the jury instruction held to be erroneous could have been read as authorizing cost of repair plus stigma. Perhaps the court was concerned that the jury might be confused by the instruction's language and find damages based on cost of repair plus the difference between the market value before the damage and after the damage, rather than "the difference between the market value of said property immediately before the damage and after the damage, *after making any necessary repairs*" as instructed.[97] The court may not have held the instruction erroneous had it been as clear as the one given in Colorado.[98] Therefore the decision does not necessarily express the court's disapproval of stigma damages, but may only stress the need for jury instructions to be clear. Allowing stigma damages plus cost of repair does not violate the "lesser of" rule, and it is the "lesser of" rule that is discussed by the court as being violated by the instruction.[99]

In the case of condominiums, the "lesser of" rule does not create a problem. Separate instructions to compensate for damaged common areas and damaged individual units should be given. The award for physically damaged common areas can be measured by the cost of repair or the loss in value, whichever is less. The award for damage to the individual units can only be measured by the loss in value because the intangible unit airspace cannot be physically repaired. Because the awards for cost of repair and stigma are to compensate for injury to two different properties, the possi-

95. *Mozzetti*, 67 Cal. App. 3d at 575-76, 136 Cal Rptr. at 756-57. The court did not discuss the distinction between recovery of (1) cost to repair plus diminution in value (double recovery) and (2) cost to repair plus residual diminution in value after repair (stigma).

96. Ferraro v. Southern Cal. Gas Co., 102 Cal. App. 3d 33, 50, 162 Cal. Rptr. 238, 248 (1980) (emphasis in original).

97. *Mozzetti*, 67 Cal. App. 3d at 575-76, 136 Cal. Rptr. at 756-57 (emphasis added).

98. *McAlonan*, 724 P.2d 78. In *McAlonan*, the jury was instructed to award damages for "the reasonable cost of repairing the property, together with the decrease in market value, if any, to the property, as repaired." *Id.* at 79. *See supra* notes 68-79 and accompanying text.

99. *Mozzetti*, 67 Cal. App. 3d at 576, 136 Cal. Rptr. at 757.

bility of double compensation for the same injury, in violation of the "lesser of" rule, does not arise.

Despite the apparent rigidity of the "lesser of" rule in California, the courts continue to emphasize that it is only a "general rule"[100] and that "there is no fixed, inflexible rule for determining the measure of damages for injury to, or destruction of, property, and whatever formula is most appropriate in the particular case will be adopted . . . ."[101] However, California seems to have created a special rule for measuring damages when injury to property is caused by construction defects.

In *Raven's Cove Townhomes, Inc. v. Knuppe Development Co.*,[102] construction defects affected the landscaping and exterior walls of the individual units of a condominium project.[103] The court did not mention the well-accepted "lesser of" rule, but merely concluded that the plaintiff was entitled to recover the cost of repair (plus compensation for loss of use).[104] Commentators are the only authority cited by the court for its rule that damages for construction defects are measured by the cost of repair.[105] The court's use of this authority has been criticized as a "misleading if not a direct misquote."[106] Nonetheless, the facts of *Raven's Cove* are distinguishable from those which give rise to stigma, as it did not involve subsurface, structural, or other serious defects. *Raven's Cove* is best understood as applying an appropriate measure of damages considering the facts of the case, and not as fashioning a new rule for all construction defect cases. To regard the decision as a new general rule would undermine the flexibility of the court in fixing "the amount which will compensate for all the detriment proximately caused"[107] by a defendant's negligence. Thus, allowing stigma damages for construction defects is not contrary to the general rule of real property damages, and is in keep-

100. Heninger v. Dunn, 101 Cal. App. 3d 858, 863, 162 Cal. Rptr. 104, 107 (1980) (citing *Mozzetti*).

101. *Mozzetti*, 67 Cal. App. 3d at 576, 136 Cal. Rptr. at 757.

102. 114 Cal. App. 3d 783, 171 Cal. Rptr. 334 (1981).

103. *Id.* at 787, 171 Cal. Rptr. at 335.

104. *Id.* at 802, 171 Cal. Rptr. at 345.

105. *Id.* at 801-02, 171 Cal. Rptr at 345. The court cites H. MILLER & M. STARR, CURRENT LAW OF CALIFORNIA REAL ESTATE, § 9:20, 475 and *Review of Selected 1976 California Legislation—Business Associations and Professions; Real Estate Developments—Real Party in Interest*, 8 PAC. L.J. 211 (1977) for the idea that the proper measure of damages is cost of repair. However, earlier the opinion quotes Witkin as saying that "[a]nother permissible measure is the reasonable cost of repair . . . ." 4 WITKIN, SUMMARY OF CALIFORNIA LAW (8th ed. 1974) Torts, § 919, 3204. Therefore, the precise holding of *Raven's Cove* is not that cost to repair is the measure of damages in all construction defect cases but, that it is a proper measure of damages.

106. T. MILLER, *supra* note 89, at 235.

107. CAL. CIV. CODE § 3333 (West Supp. 1988).

ing with a flexible approach.[108] However, to date there is no direct precedent for recovery of stigma damages to real property.

On the other hand, California courts have been confronted with personal property cases where the court was persuaded to award damages based on evidence of the repair costs and depreciation remaining, despite repair. In *Byrne v. Western Pipe & Steel Co.*,[109] the plaintiff's truck was negligently damaged in a collision.[110] Because the evidence showed that the truck was worth less despite repair,[111] the court found the measure of damages to be "the difference between its value before the damage and its value after the repairs have been made, plus the reasonable cost of making the repairs."[112] The same result was reached in another automobile case, *Brown v. Roland*.[113]

In *Merchant etc. Assn. v. Kellogg E. & D. Co.*,[114] plaintiff's woodworking machinery was damaged while being transported by the defendant.[115] Despite repair, the machine "would nevertheless remain a secondhand machine on the market,"[116] and therefore the plaintiff was entitled to recover the "cost of repairs and the depreciation notwithstanding such repairs."[117] Authority for this rule in the case of personal property damage is abundant outside of California.[118]

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108. California BAJI jury instructions offer five alternative measures of damages for injury to property, depending on the "evidentiary posture of the case." BAJI No. 14.20 (7th ed. 1986 and Supp. July 1987). These alternatives include a "cost to repair" rule, No. 14.20(C), a "lesser of" rule, No.14.20(C), and a "cost to repair plus remaining loss in market value" rule if the property cannot be completely repaired, No. 14.20(C). Thus, according to BAJI the most appropriate measure of damages in a specific case depends upon the evidence adduced at trial.

109. 81 Cal. App. 270, 253 P. 776 (1927).

110. *Id.* at 271, 253 P. at 777.

111. *Id.* at 273, 253 P. at 777.

112. *Id.* at 274, 253 P. at 778.

113. 40 Cal. App. Supp. 2d 825, 104 P.2d 138 (1940).

114. 28 Cal. 2d 594, 170 P.2d 923 (1946).

115. *Id.* at 596, 170 P.2d at 924.

116. *Id.* at 601, 170 P.2d at 927.

117. *Id.* at 600, 170 P.2d at 926-27.

118. In the early Kansas case of Monroe v. Lattin, 25 Kan. 243 (1881), the plaintiff's horse, buggy, and harness were damaged due to the defendant's negligence. On appeal a jury instruction that the plaintiff was entitled to recover "the difference in value of the horse, buggy, and harness before the injury and after the repairs, . . . and, in addition, the reasonable cost of repairs" was upheld. With the advent of the automobile came a long line of cases allowing cost to repair plus remaining residual depreciation as the proper measure of recovery for negligent injury to an automobile. These cases include:
Arizona: Farmer's Ins. Co. of Ariz. v. R. B. L. Inv. Co., 138 Ariz. 562, 675 P.2d 1381 (1983).
Connecticut: Cook v. Packard Motor Car Co. of New York, 88 Conn. 590, 92 A. 413 (1914) (concurring opinion).
Georgia: Olliff v. Howard, 33 Ga. App. 778, 127 S.E. 821 (1925).
Illinois: Koch v. Pearson, 219 Ill. App. 468 (1920).
Iowa: Halferty v. Hawkeye Dodge, Inc., 158 N.W.2d 750 (Iowa 1968).

Other jurisdictions have not limited this measure of recovery to compensation for injured automobiles. Cost to repair plus an amount to compensate for remaining depreciation (stigma) has been upheld as a proper measure of damages for injuries to a surveyor's transit,[119] canned goods,[120] a bridge,[121] transformers,[122] a porcelain portrayal of the Last Supper,[123] aluminum panels,[124]

Kansas: Broadie v. Randall, 114 Kan. 92, 216 P. 1103 (1923); Venable v. Import Volkswagen, Inc., 214 Kan. 43, 519 P.2d 667 (1974).
Louisiana: Mask v. Monroe, 9 La. App. 431, 121 So. 250 (1928); U-Drive-It-Car Co. v. Texas Pipe Line Co., 14 La. App. 524, 129 So. 565 (1930); Blevins v. Drake-Lindsay Co., 144 So. 257 (La. App. 1932); Aschenbach v. Herrin Transfer & Warehouse Co., 153 So. 316 (La. App. 1934); Dupuy v. Graeme Spring & Brake Serv. Inc., 19 So.2d 657 (La. App. 1944) (recognized).
Maryland: Fred Frederick Motors, Inc. v. Krause, 12 Md. App. 62, 277 A.2d 464 (1971).
Missouri: Gilwee v. Pabst Brewing Co., 195 Mo. App. 487, 193 S.W. 886 (1917); Blanke v. United Rys. Co., 213 S.W. 174 (Mo. App. 1919); Yawitz Dyeing & Cleaning Co. v. Erlenbach, 221 S.W. 411 (Mo. App. 1920); Conley v. Kansas City Ry. Co., 259 S.W. 153 (Mo. App. 1921); General Exch. Ins. Corp. v. Young, 206 S.W.2d 683 (Mo. App. 1947); *aff'd*, 357 Mo. 1099, 21 S.W.2d 396 (1948).
Montana: Hoenstine v. Rose, 131 Mont. 557, 312 P.2d 514 (1957).
New Hampshire: Smith v. Turner, 92 N.H. 49, 24 A.2d 498 (1942); Copadis v. Haymond, 94 N.H. 103, 47 A.2d 120 (1946).
Pennsylvania: Bauer v. Armour & Co., 84 Pa. Super. 174 (1924); Finkerbinder v. Eberly, 30 Pa. D & C 312 (1937); Holt v. Pariser, 161 Pa. Super. 315, 54 A.2d 89 (1947); Herr v. Erb, 163 Pa. Super. 430, 62 A.2d 75 (1948).
South Carolina: Coleman v. Leukoff, 128 S.C. 487, 122 S.E. 875 (1924); Newman v. Brown, 228 S.C. 472, 90 S.E.2d 649 (1955).
Tennessee: Stoops v. First Am. Fire Ins. Co., 160 Tenn. 239, 22 S.W.2d 1038 (1930).
Texas: Cooper v. Knight, 147 S.W. 349 (Tex. Civ. App. 1912); Pecos & N. T. Ry. Co. v. McMeans, 188 S.W. 692 (Tex. Civ. App. 1916); Main St. Garage v. Eganhouse Optical Co., 223 S.W. 316 (Tex. Civ. App. 1920); W. F. Norman & Sons v. Clark, 221 S.W. 235 (Tex. Civ. App. 1920); Chicago, R. I. & G. Ry. Co. v. Zumwalt, 239 S.W. 912 (Tex. Com. App. 1922); Schmoker v. French, 7 S.W.2d 177 (Tex. Civ. App. 1928); Northern Tex. Traction Co. v. Singer, 34 S.W.2d 920 (Tex. Civ. App. 1931); McElwrath v. Dixon, 49 S.W.2d 995 (Tex. Civ. App. 1932); Chase Bag Co. v. Longoria, 45 S.W.2d 242 (Tex. Civ. App. 1931); Tinney v. Williams, 144 S.W.2d 344 (Tex. Civ. App. 1940); Higgins v. Standard Lloyds, 149 S.W.2d 143 (Tex. Civ. App. 1941); Hodges v. Alford, 194 S.W.2d 293 (Tex. Civ. App. 1946).
Utah: Metcalf v. Mellen, 57 Utah 44, 192 P. 676 (1920); Hill v. Varner, 4 Utah 2d 166, 290 P.2d 448 (1955).
Vermont: Purington v. Newton, 114 Vt. 490, 49 A.2d 98 (1946).
Virginia: Averett v. Shircliff, 218 Va. 202, 237 S.E.2d 92 (1977).
Wyoming: Meredith GMC v. Garner, 78 Wyo. 396, 328 P.2d 371 (1958).
Federal: Magnolia Petroleum Co. v. Harrell, 66 F. Supp. 559 (W.D.Okla. 1946); The Zeller No. 12, 68 F. Supp. 795 (S.D.N.Y. 1946).
Canada: Chotem v. Porteous, 13 Sask. L.R. 209, 51 D.L.R. 507 (1920); Nesbitt v. Carney, 25 Sask. L.R. 129, 1 D.L.R. 106 (1930).

119. Thompson v. Field, 164 S.W. 1115 (Tex. Civ. App. 1914).
120. Larson Bros. Wholesale Grocery Co. v. Kansas City, 115 Kan. 589, 224 P. 47 (1924).
121. Shell Oil Co. v. Jackson County, 193 S.W.2d 268 (Tex. Civ. App. 1945).
122. Kirkhof Elec. Co. v. Wolverine Express, Inc., 269 F.2d 147 (6th Cir. 1959).
123. Olsen v. Ry. Express Agency, 295 F.2d 358 (10th Cir. 1961).
124. Conditioned Air Corp. v. Rock Island Motor Transit Co., 253 Iowa 961, 114 N.W.2d 304 (1962).

and railroad cars.[125] Notably, the court responsible for many of the automobile cases, the Court of Civil Appeals of Texas,[126] has held this is a proper measure of damages for injury to a brick building.[127] In a suit sounding in negligence, the plaintiff in *McDaniel Bros. v. Wilson* sought damages for the cost to repair the building plus remaining depreciation.[128] The court said:

> The difference between the value before injury and immediately after the repairs were made did not fully indemnify appellees. . . Had the repairs fully restored the building, their cost would have been the measure of recovery; but since the repairs did not fully restore the building, their cost, being reasonable and necessary, was a proper item of recovery, in addition to the depreciation in the value of the building.[129]

Furthermore, the American Law Institute has adopted the "cost to repair plus remaining depreciation" measure of recovery for damage to personal property.[130]

The rationale of the various courts is instructive. In *Metcalf v. Mellen*[131] the Utah Supreme Court said "*[i]t is obvious* that repairs may not restore a damaged car to the condition in which it was before the damage was inflicted, and that after being repaired the reasonable market value may still be less than before it was damaged."[132] This rationale is especially persuasive in cases where the car is damaged when new. The "disfigurement of the car and the restoration of the same necessarily diminished its value to ordinary purchasers desiring new cars . . ."[133] because "even if that [restoration was] done, it would still be a repaired and renovated car, which would make its market value much less than that of a new car, which had never been injured, repaired, or repainted."[134] Even though after repair the property is "equally as serviceable,

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125. Soo Line Ry. Co. v. Fruehauf Corp., 547 F.2d 1365 (8th Cir. 1977).

126. *See supra* note 43.

127. McDaniel Bros. v. Wilson, 70 S.W.2d 618 (Tex. Civ. App. 1934).

128. *Id.* at 622.

129. *Id.* at 622-23.

130. RESTATEMENT (SECOND) OF TORTS § 928, provides: "Where one is entitled to a judgment for harm to chattels not amounting to a total destruction in value, the damages include compensation for (a) the difference between the value of the chattel before the harm and the value after the harm or, at his election, the reasonable cost of repair or restoration where feasible with due allowance for any difference between the original value and the value after repairs . . . ."

Section 928 is cited approvingly in the recent case of Carlson Indus. v. E.L. Murphy Trucking Co., 168 Cal. App. 3d 691, 696, 214 Cal. Rptr. 331, 333 (1985), involving injury to a truck crane by a commercial carrier.

131. 57 Utah 44, 192 P. 676 (1920).

132. *Id.* at 48, 192 P. at 678. (emphasis added).

133. Broadie v. Randall, 114 Kan. 92, 93, 216 P. 1103, 1104 (1923).

134. *Id.* at 94, 216 P. at 1104.

or better,"[135] there still remains depreciation in its market value[136] because "[t]he fact that the equipment has been damaged has a psychological effect upon the mind and judgment of a buying customer . . . ."[137] These statements indicate judicial recognition of the subjective, psychological cause of stigma.

Many reasons for allowing recovery in money damages for this psychological effect have been expressed. The most basic is to maintain a flexible approach: "The specific rule applied must depend upon the facts in the case."[138] Another is fairness. Since a recovering plaintiff's damages are often reduced if the market value of the property is increased upon repair, similar allowance should be afforded when repairs cannot restore the property to the market value before the injury.[139] Also, because a plaintiff has a duty to mitigate damages, a plaintiff undertaking reasonable repairs in discharge of this duty should be entitled to recover the costs of these reasonable repairs plus any remaining depreciation.[140]

Thus, there is a basis on which California courts could conclude that in a construction defect case, where the defect causes a stigma which can be quantified by an expert appraiser, the loss in value is recoverable, in addition to the cost of repairs. That repair of severe construction defects may not restore a home to its pre-injury market value is as logically clear as that a repair of an automobile may not restore its market value.[141] This is especially true in the case of a condominium because of the way in which the units derive much of their value from the surrounding common areas. Because a home is the single most expensive investment the average person will make, the psychological effect of disclosing prior damage/repair to a buying customer is certainly as strong as in the case of an automobile. Home buyers especially look for quality.[142] Therefore, any perceived flaws in the home will have a large and foreseeable effect on market value.

If the rule that stigma is compensable in addition to cost of

135. General Const. Co. v. Kemplin, 309 Ky. 587, 588, 218 S.W. 384 (1949).

136. *Id.* at 589, 218 S.W. at 385.

137. Kirkhof Elec. Co. v. Wolverine Express, Inc., 269 F.2d 147, 149 (6th Cir. 1959) (Miller, J., dissenting).

138. Larson Bros. Wholesale Grocery Co. v. Kan. City, 224 P. 47, 50 (1924).

139. Blanke v. United Rys. Co., 213 S.W. 174 (Mo. App. 1919); Chicago, R. I. & G. Ry. Co. v. Zumwalt, 239 S.W. 912 (Tex. Com. App. 1922); Broadie v. Randall, 114 Kan. 92, 216 P. 1103 (1923); Larson Bros. Wholesale Grocery Co. v. Kan. City, 115 Kan. 589, 224 P. 47 (1924); Gen. Exch. Ins. Corp. v. Young, 206 S.W.2d 683 (Mo. App. 1947).

140. Thompson v. Field, 164 S.W. 1115 (Tex. Civ. App. 1914); Larson Bros. Wholesale Grocery Co. v. Kan. City, 115 Kan. 589, 224 P. 47 (1924); Coleman v. Levkoff, 128 S.C. 487, 122 S.E. 875 (1924).

141. *See supra* note 132 and accompanying text.

142. *What Do Homebuyers Want?*, REAL EST. TODAY, Mar. 1987, at 19.

repair is adopted, it should be reconciled with the spirit of the "lesser of" rule in putting a reasonable limit on damages. It is again useful to look to other jurisdictions for guidance.

A variation on the "lesser of" rule expressly including an amount for stigma has been expressed in Pennsylvania. In the case of *Ridington v. Lare*[143] the court said: "of the different measures of damage, whether the cost to repair plus any [remaining] depreciation, or the difference in value of the car before and after the accident, the lesser measure of damage must be adopted."[144] The plaintiff is entitled to recover either the total diminution in value or the cost to repair plus any residual loss in value (stigma), whichever is less. This rule seems to be a good solution because: (1) it is in keeping with a long line of cases from many jurisdictions involving negligent injury to a variety of property, both real[145] and personal;[146] (2) the change would be in accord with California's own flexible "general rule;"[147] and (3) it would keep in place a long-standing limit on recoverable damages.

As noted earlier, recovery for damaged condominiums does not require the use of a "lesser of" rule, as the cost to repair goes towards damage to the common areas and the loss in value goes towards damage to the separate interests. It can be argued that allowing this type of recovery will result in a flood of plaintiff claims of a loss in value in their property due to damage to another's property. Anyone living in a neighborhood with a defective home may claim stigma loss. On the other hand, there are several reasons to confine recovery of stigma loss derived from damage to other property to condominiums. The condominium units suffering the stigma are entirely surrounded and supported by the damaged common area property which causes the stigma. Each unit owner has a property interest in the surrounding common areas. Usually each unit and its surrounding common areas are built by the same contractor at the same time on similar soil. These considerations make condominium stigma arising from common area defects foreseeable, and provide a rationale for distinguishing such cases. Certainly stigma in a detached home arising from a neighbor's construction defects is not foreseeable.[148]

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143. 58 Montg. Co. L. 334 (1942). In Ridington v. Lare the court said that of the different measures of damage, whether the cost of repairs plus any depreciation, or the difference in value of the car before and after the accident, the lesser measure of damage must be adopted. *Id.*

144. *Id.*

145. *See supra* notes 59 & 68 and accompanying text.

146. *See supra* notes 118-27 and accompanying text.

147. *See supra* note 100 and accompanying text.

148. Except perhaps in the case of a large development of single-family houses constructed by a common builder, in close proximity to each other, built upon common soil.

The case for recovery of stigma as an additional item of damages for negligent injury to real property is strong, but there remains another tactic in negligence. Stigma damage may give rise to an additional cause of action for construction defects. Rather than viewing the stigma as compensable because it is caused by physical damage to property, stigma can be viewed as an economic injury giving rise to a cause of action itself.

B. Negligent Interference with Prospective Economic Advantage

It appears that in the case of damage to property, the concepts of "residual depreciation" after repair and "loss of profit" from resale of the tainted property refer to the same thing. Upon sale of the property a loss in expected profit equal to the irreparable depreciation will be realized. Loss of expected profit is often termed an "economic loss."[149] While the rule that economic losses alone are not recoverable in negligence[150] has not been expressly overruled,[151] the rule is now otherwise. As Chief Justice Bird explained in *J'Aire Corp. v. Gregory*:[152]

> Where a special relationship exists between the parties, a plaintiff may recover for loss of expected economic advantage through the negligent performance of a contract although the parties were not in contractual privity. . . .
>
> [The] criteria are (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's conduct, and (6) the policy of preventing future harm.
>
> . . . .
>
> Recovery for injury to one's economic interests, where it is the foreseeable result of another's want of ordinary care, should not

149. Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965); Anthony v. Kelsey-Hayes Co., 25 Cal. App. 3d 442, 102 Cal. Rptr. 113 (1972); Pisano v. Am. Leasing, 146 Cal. App. 3d 194, 194 Cal. Rptr. 77 (1983); J'Aire Corp. v. Gregory, 24 Cal. 3d 799, 598 P.2d 60, 157 Cal. Rptr. 407 (1979); Huang v. Garner, 157 Cal. App. 3d 404, 203 Cal. Rptr. 800 (1984).

150. Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965); Anthony v. Kelsey-Hayes Co., 25 Cal. App. 3d 442, 102 Cal. Rptr. 113 (1972).

151. In Golden Eagle Distrib. Corp. v. Burroughs Corp., 103 F.R.D. 124 (N.D. Cal. 1984), the court imposed sanctions under FED. R. CIV. P. 11 against an attorney for citing *Seely* without citing *J'Aire* or *Pisano* or *Huang* (*see infra* note 155 and accompanying text). Although this decision was overruled in Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531 (9th Cir. 1986), these three later cases should not be ignored. Shepard's Citations lists *Seely* as "criticized" in *Huang*.

152. 24 Cal. 3d 799, 598 P.2d 60, 157 Cal. Rptr. 407 (1979).

be foreclosed simply because it is the only injury that occurs.[153]

These six criteria were held to have been satisfied in the construction defect case of *Huang v. Garner*.[154] In *Huang*, the defendant construction company built the Caroline Apartments in 1965 on land owned by defendant Garner.[155] Garner sold the property to Bartels, who sold to the Piper Banning Group who, in turn, sold to plaintiff Huang in 1974.[156] Upon purchase of the property, Huang discovered extensive structural damage in the garage area that led to the discovery of other purported design defects in the property.[157] An issue on appeal was whether a partial nonsuit as to the claim for economic loss in the plaintiff's negligence cause of action against defendants Garner (the original owner) and Encinal Park, Inc., (the general contractor) was proper.[158]

The court observed that "our Supreme Court in *J'Aire Corp. v. Gregory*, [citation], has allowed recovery of economic loss . . . by permitting plaintiffs to recover economic losses in actions for negligent interference with prospective economic advantage where a 'special relationship' exists between the parties . . . ."[159] The court applied the six criteria[160] and noted that:

> [I]t [is] reasonable to assume that as a developer of numerous housing projects, Garner intended eventually to sell the apartments and must have foreseen that the property would be purchased by individuals or entities for investment purposes. It was certainly foreseeable that defects in construction . . . would damage subsequent purchasers of the property as well as subsequent residents.[161]

The court held that the nonsuit constituted reversible error.[162]

Because "[f]oreseeability of the risk is a primary consideration in establishing the element of duty,"[163] loss of economic advantage should be recoverable by the purchasers of individual homes affected by construction defects. It is certainly foreseeable that individual buyers will suffer the same loss as that suffered in *Huang*. Certainty that damage has occurred can be established by testimony of an expert appraiser. The "closeness of the connection"

153. *Id.* at 804-05, 598 P.2d at 63, 157 Cal. Rptr. at 410. *See also* Pisano v. Am. Leasing, 146 Cal. App. 3d 194, 194 Cal. Rptr. 77 (1983).
154. 157 Cal. App. 3d 404, 203 Cal. Rptr. 800 (1984).
155. *Id.* at 411, 203 Cal. Rptr. at 803.
156. *Id.*
157. *Id.*
158. *Id.* at 419, 203 Cal. Rptr. at 808.
159. *Id.* at 422, 203 Cal. Rptr. at 811.
160. *See supra* note 153 and accompanying text.
161. *Huang*, 157 Cal. App. 3d at 424, 203 Cal. Rptr. at 812-13.
162. *Id.* at 425, 203 Cal. Rptr. at 813.
163. *J'Aire*, 24 Cal. 3d at 806, 598 P.2d at 64, 157 Cal. Rptr. at 411.

requirement between the builder's conduct and the injury is satisfied by a showing of direct cause.[164] Violation of the Uniform Building Code constitutes sufficient "moral blame" to meet the fifth of the six criteria adopted in *J'Aire*.[165] Finally, a policy to prevent future harm "supports the eligibility to receive economic damages . . . because such a policy inheres in every building code and would be advanced by penalizing a violation thereof."[166]

Thus, recovery of stigma under the theory of negligent interference with prospective economic advantage requires only an application of the six *J'Aire* criteria and comparison of the facts in *Huang*. No special distinctions are necessary for condominium construction defects because the cause of action does not require damage to plaintiff's property, it only requires a "close connection" between the defendant's negligence and the plaintiff's economic injury. Indeed, this theory will be especially useful to condominium owners because their cause of action may be independent of any other action brought to recover for the damaged common areas, and can therefore be brought after the main action is resolved.

C. *Strict Products Liability*

In *Schipper v. Levitt & Sons*,[167] housing units were first classified as manufactured products, thus extending strict products liability to defectively constructed homes.[168] Since this time, jurisdictions are split on the issue of whether damages for economic loss[169] should be recoverable in strict liability.[170] However, the majority of states, including California, disallow recovery.[171] The rationales given are that an extension of strict liability would displace the law of sales, which has been specifically designed to govern the economic relations between merchants and consumers;[172]

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164. *Huang*, 157 Cal. App. 3d at 424, 203 Cal. Rptr. at 812.
165. *Id.*
166. *Id.*
167. 44 N.J. 70, 207 A.2d 314 (1965).
168. *Id.* at 73, 207 A.2d at 325.
169. Economic loss is defined as "damages for inadequate value, costs of repair and replacement of the defective product or consequent loss of profits—without any claim of personal injury or damages to other property . . . ." Sacramento Regional Transit Dist. v. Grumman Flxible, 158 Cal. App. 3d 289, 294, 204 Cal. Rptr. 736, 739 (1984) (quoting Alfred N. Koplin & Co. v. Chrysler Corp., 49 Ill. App. 3d 194, 364 N.E.2d 100, 102 (1977)).
170. *See* Comment, *Manufacturers' Liability to Remote Purchasers for "Economic Loss" Damages—Tort or Contract?*, 114 U. PA. L. REV. 539 (1966); Schneier, *Recovery of Economic Loss Damages in Strict Liability*, CONST. LIT. RPTR. 702, 703 (1986).
171. J. MCGUIRE, *supra* note 90, at 174.
172. Moorman Mfg. Co. v. National Tank Co., 91 Ill. 2d 69, 435 N.E.2d 443 (1982).

manufacturers should not be held to a specific level of business performance without representing that the product meets the consumer's business needs;[173] economic losses are properly recoverable in warranty, thus the availability of recovery in strict liability is unnecessary;[174] consumers are capable of purchasing a warranty, thereby internalizing the economic risks;[175] and the legislature, not the courts, should decide whether economic losses are recoverable under strict products liability, because such an extension would have radical economic consequences in the market place.[176]

There are many reasons why recovery should be permitted: (1) "the source of liability must be put 'where it ought to be;' "[177] (2) unsophisticated consumers may not be able to bargain for warranties;[178] (3) the extent of the victim's harm is not dependent upon the existence of physical injury;[179] and (4) a defective product may create a hazardous condition, yet not cause "physical harm" damages which are recoverable in tort.[180]

Reconciling these two views with respect to all product liability cases is a formidable task. "Limiting the strict liability/economic loss issue to the construction industry, however, may make the task of reconciliation significantly easier."[181] There are several arguments in support of this proposition: (1) the parties to a construction contract are sophisticated and can make informed cost-benefit analyses; (2) the risks are well known (and therefore allowance will not lead to "damages of unknown and unlimited scope");[182] (3) the business activities are covered by insurance or bonding; (4) the consequences of misfeasance are foreseeable; and (5) the parties know that others will rely upon their products.[183] As Justice Peters argued in his dissenting opinion in *Seely v. White Motor Co.*:[184]

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173. Seely v. White Motor Co., 63 Cal. 2d 9, 18, 403 P.2d 145, 151, 45 Cal. Rptr. 17, 23 (1965).

174. Jones & Laughlin Steel Corp. v. Johns Manville Sales, 626 F.2d 280, 288 (3d Cir. 1980).

175. *Id.*

176. Schiavone Constr. Co. v. Elgood Mayo Corp., 439 N.Y.S.2d 933, 938 (N.Y. App. Div. 1981).

177. Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305, 312 (1965).

178. *Id.*

179. *Seely*, 63 Cal. 2d at 24-25, 403 P.2d at 155-56, 45 Cal. Rptr. at 27-28 (Peters, J., concurring and dissenting).

180. Cloud v. Kit Mfg., 563 P.2d 248, 251 (Ala. 1977).

181. Schneier, *supra* note 170, at 706.

182. *Seely*, 63 Cal. 2d at 25, 403 P.2d at 156, 45 Cal. Rptr. at 28. (Peters, J., concurring and dissenting).

183. Schneier, *supra* note 170, at 706.

184. 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965)(Peters, J., concurring and dissenting).

> Suppose, for example, defective house paint is sold to two home owners. One suffers temporary illness from noxious fumes, while the other's house is destroyed by rot because the paint proved ineffective . . . . Although the latter buyer may clearly suffer the greater misfortune, the majority would not let him recover under the strict liability doctrine because his loss is solely "economic," while letting the first buyer recover the minimal costs and lost earnings caused by his illness.[185]

Notwithstanding the above arguments, allowance of recovery for economic damages, e.g. loss of expected profits or residual depreciation in strict products liability, is a minority position.[186] But perhaps an analogy to insurance coverage will provide an avenue for recovery in strict liability.

In *Geddes & Smith v. Saint Paul Mercury Indem. Co.*,[187] the plaintiff sought to recover from defendant insurance company under a policy providing coverage for "injury to or destruction of property, including the loss of use thereof, caused by accident."[188] In discussing the types of damages recoverable under this language, the court drew a distinction between two issues: (1) the type of injury covered by the policy, and (2) the method by which the damage to the property is to be measured.[189] The court held that "economic" damages, such as the salaries of repair workers and overhead, while not an insured *type* of injury, were "recoverable because they provide a *measure* of the dollar amount of the injury to the houses."[190] Here the injury giving rise to "property damage" was the installation of defective doors in plaintiff's insured houses.[191]

The California court again interpreted similar language in *Eichler Homes, Inc. v. Underwriters at Lloyd's, London.*[192] Here the court held that the loss in market value to the plaintiff's home due to a defectively installed heating system was a proper measure of damages that is "separate and distinct from any claim based upon the cost of repair or replacement of the defective heating system itself," and hence was covered by the insurance.[193] In *Gogerty v. General Accident, Fire & Life Assurance Corp.*,[194] the court disapproved the lower court's holding that there was no property damage, within the meaning of the policy, where defec-

185. *Id.* at 25, 403 P.2d at 155-56, 45 Cal. Rptr. at 27-28.
186. Schneier, *supra* note 170, at 703.
187. 63 Cal. 2d 602, 407 P.2d 868, 47 Cal. Rptr. 564 (1965).
188. *Id.* at 604, 407 P.2d at 870, 47 Cal. Rptr. at 566.
189. *Id.* at 607, 407 P.2d at 871-72, 47 Cal. Rptr. at 567-68.
190. *Id.* at 609, 407 P.2d at 873, 47 Cal. Rptr. at 569 (emphasis added).
191. *Id.* at 604, 407 P.2d at 869, 47 Cal. Rptr. at 565.
192. 238 Cal. App. 2d 532, 47 Cal. Rptr. 843 (1965).
193. *Id.* at 538-39, 47 Cal. Rptr. at 847.
194. 238 Cal. App. 2d 574, 48 Cal. Rptr. 37 (1965).

tive components were incorporated in the structure because no property, other than the components themselves, were damaged.[195] "The injury occurred when the [defective components] were made a part of the building . . ."[196] despite the lack of visible, tangible damage to other parts of the structure.

Analogously, while "stigma/taint" may not be a recoverable type of injury in strict liability because it is "economic damage," it may be recoverable because it provides a *measure* of the dollar amount of the intangible injury to the property. Here the injury would be the defective[197] construction, measured by the cost to repair plus remaining depreciation (rather than considering the stigma a separate type of injury). Following the reasoning of *Geddes, Eichler,* and *Gogerty*, a tangible injury in components of the building (the defective common areas being analogous to the defective doors, heating system, and structural components) causes a "physical" injury to the entire property, measured by loss in value and/or cost to repair (otherwise considered "economic" damages). In the condominium situation, stigma could be conceived of as a measure of the intangible damage to the unit airspace, rather than as an additional item of damages.

A third approach for the recovery of stigma by condominium owners suggests itself from the language of the court in *Sacramento Regional Transit Dist. v. Grumman Flxible.*[198] "The rule imposing strict liability in tort presupposes (1) a defect and (2) *further* damage to plaintiff's property caused by the defect. When the defect and the damage are one and the same, the defect may not be said to have caused physical injury [but only economic damage]."[199] The stigma on an individual unit might be considered the "further damage" caused by the defect in the common areas. In this way, stigma on a condominium unit is not economic damage at all but is further property damage apart from the defects in the common areas.

Therefore, stigma might be recoverable using a number of strict liability arguments, despite the exclusion of recovery for "economic" items of damages.

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195. *Id.* at 579, 48 Cal. Rptr. at 40.

196. *Id.*

197. Just what constitutes a "defect" is not entirely clear. *See* T. MILLER, *supra* note 89, at § 5.2, and cases cited therein.

198. 158 Cal. App. 3d 289, 204 Cal. Rptr. 736 (1984).

199. *Id.* at 294, 204 Cal. Rptr. at 739 (emphasis in original).

CONCLUSION

This Comment has analyzed the concept of stigma as a recoverable item of damages for construction defects in general, and those involving condominiums in particular. In causes of action for negligence, the "lesser of" rule initially seems to present difficulty. However, the courts have often expressed a flexible approach in awarding damages. Furthermore, an award of stigma damages plus cost of repair is not strictly violative of the "lesser of" rule, as stigma is the residual diminution in value after repair, not the total diminution in value. The rule should be modified to allow recovery of the cost of repair *plus residual depreciation*, or the total depreciation, whichever is less. In the case of condominiums, the "lesser of" rule is not a problem, as damages to the individual units and common areas are distinct.

Under the negligent interference with prospective economic advantage cause of action, stigma damages can be found recoverable by a straightforward application of the six required elements. Recovery in strict liability will require more complicated arguments. Again, the fact that the common areas and individual units are regarded as separate property interests provides an additional argument for recovering condominium stigma damages.

Because of the multiple theories alleged by construction defect plaintiffs, it is likely that stigma will soon be recognized as recoverable in California. For the condominium owner such a holding will be especially welcome. An award of stigma damages to the individual owners will compensate them directly for their intangible loss, rather than the owners having to seek a share of any award to the homeowners association for cost to repair.

With due consideration to the arguments set forth here, precedents set by other states in construction defect cases, the rules of damages for injury to personal property in California and elsewhere, and recent trends in local trial courts, California courts should be in a position to award stigma damages in condominium construction defect litigation. The final difficulty is one of proof. Appraisers may simply become another in a long list of experts required to investigate and testify in these already complicated cases.

*Charles L. Stott**

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* To my wife Rochelle, thank you for your love, support, and encouragement.