Product Liability Issues in Real Estate Brokerage

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Abstract. **The legal environment for real estate brokers is moving inexorably toward the doctrine of strict liability in a product liability context. The agency relationship model currently popular in real estate brokerage may not be able to withstand this threat. A recommendation is made that the industry move toward a market-making role which lies outside the chain of distribution of the real estate product. By moving out of the distribution channel, brokers may be able to revert to a "due care" standard of performance.**

Introduction

Real estate brokers[1] find themselves working in an increasingly hostile legal environment. The liability exposure of real estate brokers has steadily increased since the 1960s when *caveat emptor* (i.e., "buyer beware") was the rule. During the 1970s and 1980s additional requirements were gradually added to the role of the broker. The duty to speak accurately grew into the doctrine of negligent misrepresentation and, at least in some jurisdictions, to an affirmative obligation to inspect and reveal any and all material facts. This affirmative disclosure rule is based on the landmark cases of *Easton* v. *Strasburger* [4] and *Gouvera* v. *Citicorp Person to Person Financial Center* [6] which created a duty to conduct a reasonably diligent and competent inspection of residential property on behalf of the potential buyer.[2] Keep in mind that this is true even when the agency relationship is between the broker and the seller. Thus it may now be more appropriate to refer to the legal environment as one of *caveat vendor* (i.e., "seller beware").

The difficulties created by this legal environment are so pressing that the notion of risk reduction has been called the "new frontier in real estate education" [12] for the 1990s. These difficulties are well documented [see 1, 2, 3, 8, 9, 10, 14, 15, 17] and it is not our intention to elaborate on them once again. Rather it is our intention to point out that regardless of the ability of brokers to reduce the risk inherent in the agency relationships now utilized in real estate brokerage, another, potentially more severe threat is approaching from a different direction.

Much of the liability burden placed on brokers was done so in the name of "consumerism". Yet the major effect of the consumer movement has just now begun to appear in the real estate area. We contend that it is only a matter of time until property owners are allowed to recover damages from brokers under product liability theories. The rising tide of product liability law has begun to creep perilously close to real estate

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transactions. Two states, New Jersey and California, have already held that the rules governing manufacturers of defective chattels and builders of defective structures should be the same [13, para. 4180]. The reasoning that underlies these decisions is consistent with the modern development of product liability law, and there is every reason to believe that other states will adopt this posture in the future. It follows that as soon as homebuilders are swept into the strict liability rules of the product liability doctrine,[3] real estate brokers will be held to the same standard, given that they act as agents of sellers in the distribution chain for housing.

Origins of Product Liability Theories

Before continuing our analysis of this trend, it is useful to review the developments that led to the current theories of product liability. The theory was born in the decision of the California Supreme Court, in the case of *Greenman* v. *Yuba Power Tools* [7]. The plaintiff in that case had purchased a "three in one" power tool manufactured by the defendant company. Shortly after the purchase, the plaintiff was using the tool in his workshop when the machine broke suddenly, injuring the plaintiff severely. The California Supreme Court, speaking through its Chief Justice Roger Traynor, decided to hold the defendant manufacturer strictly liable for the injuries suffered by the plaintiff. In reaching this decision, Traynor first reviewed the common law doctrine of strict liability imposed on those engaged in unreasonably dangerous activities (e.g., the use of high explosives, flying an airplane, and the application of poisonous substances to control insects). Under that doctrine, it was well settled that injuries might occur from unreasonably dangerous occupations, even though the people engaged in the occupation used the highest possible standard of care and diligence. In fact, the common law test of an unreasonably dangerous activity was that the activity often resulted in injury, even when conducted competently. Given a choice between imposing the burden of an injury upon the victim of a dangerous instrumentality, or upon the operator of the instrumentality, the common law chose to cast the burden upon the operator.

Traynor believed that he was extending this doctrine only slightly by holding that a product that is manufactured with due care, and still causes injury to people who use it for its intended purpose, must contain an unreasonably dangerous defect. And just as the common law had chosen to cast the burden of injury on the operator of a dangerous instrumentality, Traynor chose to cast the burden of injury upon the manufacturer of a dangerous product.

In the *Greenman* decision, the California court was also careful to outline the reasons that seemed to compel the choice of who should receive the burden of the injury. By casting the burden upon the manufacturer, the court expected to provide a financial incentive to all manufacturers to produce only products that were safe for use. The expected result was a reduction in the total burden of injury experienced by American society, to be achieved by providing sound financial reasons for manufacturers to release products to the public only when the product posed little or no risk of injury.

The degree to which the Traynor court's expectations have been realized can be demonstrated by an example. One of the authors received a gift for his then small children in the late 1970s. The gift, purchased in the Soviet Union, was a scale model of the Kremlin clock tower, complete with small wooden points to symbolize the Red Star

atop the tower. Some weeks later, a tragedy was narrowly averted when the author happened to notice that his eighteen-month-old infant had sucked off one of the star points, completely blocking his windpipe.

In the 1940s and 50s parents routinely monitored their children's toys for hazards of this type. However, by 1978, the financial incentives to manufacture casual hazards out of American products (aided and abetted by the efforts of the Consumer Products Safety Commission) had almost completely obviated the need for such parental monitoring.

The example is offered to demonstrate how much a part of American culture the doctrine and the impact of product liability rules have become. One may argue about whether the relaxed vigilance that is born of increased safety in the products manufactured and sold in the U.S. is good or bad. But there can be no argument that the safety standards imposed by the *Greenman* decision and its progeny have played a decisive role in forming the expectations that citizens of this country have about the products that they own and use. In view of this development, it is unlikely that the rising tide of burden-casting in product liability cases can be resisted.

The Distinction between Product Liability and Negligence Claims

The difference between strict liability theories and negligence theories is subtle but important. In a traditional negligence action, the plaintiff must provie that: a) the plaintiff was injured, and; b) the injury was caused by the defendants' failure to use due care. Obviously, the second point is much more difficult to prove. The nature of the plaintiff's injury is, in most cases, manifest and easy for the jury to understand. But the fault of the defendant, which is the essence of the proof required in a negligence action, is usually less clear. In a negligence action, the plaintiff must persuade the jury that the injury could have been avoided if the defendant had been more careful. The phrase "could have been avoided" is a subjective one, and often poses severe difficulties of proof.

However, those who make and sell products are strictly liable for any injuries sustained by plaintiffs who use the products. In a strict liability action, the plaintiff is presumptively entitled to recover damages as soon as proof is presented that the plaintiff was injured while using the product. In a very real sense, strict liability doctrines require the makers and sellers of products to perform the function of insurance companies. In strict liability actions, defendants must pay for all damages suffered in connection with the use or ownership of a product, regardless of fault. This rule is different from the rule in negligence actions, where defendants must pay only for damages that are "their fault".

The Expanding Legal Definition of "Product"

Since strict liability rules are applied whenever an injury was suffered in connection with the use of ownership of a product, the legal meaning of the term "product" requires clarification. Originally, the term was applied only to personal property (e.g., power tools, home appliances, automobiles) placed into the stream of commerce with the intention of earning a profit by sale of the item. This relatively narrow legal definition

clearly excludes the kinds of properties that real estate professionals typically sell, and for this reason strict liability rules have not been applied to real estate transactions thus far. However, during the last three decades, the legal definition of the term "product" has been steadily expanded and is now edging closer to the inclusion of homes and commercial space.

For example, in 1980, the Illinois Supreme Court ruled that a storage tank that allegedly developed cracks was a product within the ambit of strict liability. The product was placed into the stream of commerce by its manufacturer, who apparently turned a profit on the transaction [11]. The court ruled that even though the tank had been affixed to the realty upon which it was located prior to cracking, the incorporation into the real estate did not change the application of the strict liability doctrine to the sale of the tank.

Relatedly, there is a growing trend to hold building developers strictly liable for defects in the "products" they introduce into the stream of commerce. As mentioned earlier, the New Jersey Supreme Court has held that the rules governing the manufacturers of defective chattels and the builders of defective structures should be the same. The California Court of Appeals noted that in modern society there are no meaningful distinctions between the mass production of houses and the mass production of automobiles; both should be subject to strict liability doctrines. Because of unequal bargaining position, the buyers of each product are equally vulnerable to automakers and building developers. The Supreme Court of Nevada has agreed with this position [13, para. 418Y].

All sellers who engage in the business of selling products are exposed to the doctrine of strict liability [13, para. 4120]. The rationale for this aspect of the product liability doctrine is consistent with the pure insurance motivation that created the field in the first place. When a plaintiff is injured through the use or ownership of a product, the law seeks to provide recompense for the injury with minimum inconvenience to the plaintiff. For this reason, plaintiffs are allowed to sue any seller in the chain of distribution that begins with the manufacturer of the product and culminates in the seller from whom the plaintiff actually purchased the product. Given that strict liability doctrine has already begun to include building developers, the inclusion of real estate brokers in the distribution chain appears to be inevitable.

Plaintiffs are allowed to choose the nearest defendant with the ability to pay for the damages. The law then leaves it to all of the sellers in the distribution chain to sort out among themselves who will ultimately bear the burden of the plaintiff's injury. Each seller in the chain may sue any other seller further back in the chain to recover the damages they may have been required to pay. Since real estate brokers, acting as agents of builders and developers, are in the chain of distribution for real property, they may be strictly liable for all damages suffered by owners or users of the property they sell.

Defenses against Strict Liability

As stated earlier, a plaintiff who is injured by a product is presumed to be entitled to recover damages in an amount sufficient to compensate him or her for the injury. However, this statement requires some further clarification. The complete doctrine of product liability states that a defendant is strictly liable for damages whenever a plaintiff is injured in connection with the use or ownership of a product that contains an

unreasonably dangerous defect. In modern practice, the law presumes that any product that injures a plaintiff contains an unreasonably dangerous defect.

However, manufacturers and sellers can present evidence to overcome this presumption and escape the application of strict liability. Two of the possible defenses to product liability actions are foreseeability and warning labels. First, an examination of foreseeability is in order, because it is the most perplexing and difficult of the two.

Unreasonably dangerous defects in product liability law can have either of two flavors; manufacturing defects and design defects. Manufacturing defects are the easiest to spot. When the particular product that caused the plaintiff's injury is "out of spec," it contains a manufacturing defect. Faulty wiring, substitution of inappropriate materials, or missing parts in a product would all constitute a manufacturing defect.

Design defects are more difficult to identify, since all of the products manufactured in accordance with the design are identical. The most famous design defect in recent memory was the fuel tank of the Ford Pinto. All Pintos manufactured had a fuel tank in the rear of the vehicle and adjacent to the muffler, so this placement was not a manufacturing defect. However, when a Pinto was involved in a rear end collision, the force of the crash tended to rupture the gas tank, and spray a fuel air mixture across the hot muffler. Frequently, the heat from the muffler was sufficient to ignite the volatile mixture of air and gasoline sprayed from the ruptured gas tank, causing a flash fire within the passenger compartment of the automobile. As a result of this design defect, Ford ultimately was required to suspend production of the car, and alter the fuel tank arrangement on all the cars it sold that were still in service.

Thus, the question in a strict liability case is, When is a defect, either in manufacture or design, unreasonably dangerous? The answer is that a defect is unreasonably dangerous whenever it injures a consumer who is using the product in a reasonable manner. It is here that the issue of foreseeability may be raised by a defendant in a product liability action.[4] Hypothetically, if a homeowner is injured while using his power mower to trim a hedge, the manufacturer of the mower would certainly argue that hedge trimming is not a foreseeable use for a lawn mower. Since this is true, there is no obligation to design a lawn mower that can be used safely as a hedge trimmer, and the lack of design features that make hedge trimming with a lawn mower safe will not constitute an unreasonably dangerous design defect. On the other hand, finding a Pinto involved in a rear end collision is reasonably foreseeable. Therefore, a design that substantially increases the likelihood or magnitude of injury in a rear end collision is an unreasonably dangerous defect.

Between these extremes, there is an extremely broad and very gray area. For example, lawn mower manufacturers can reasonably foresee the possibility that a user of the product would reach under the deck of the mower to remove grass clippings that have become clogged in the discharge chute. Thus, lawn mower manufacturers must now include a "dead man" switch that disengages the mower blades unless the user is grasping the switch on the handle of the lawn mower. This design feature allows the blades to turn only when the user's hands are safely out of the way. Arguably, the absence of such an arrangement constitutes an unreasonably dangerous defect in design.

Warning labels are a more economical means of avoiding the application of strict liability rules. "When a warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if [the warning] is followed, is not in defective condition nor is it dangerous." [13, paras. 4085–86]

However, to be effective the warnings must be specific and conspicuous. Lawn mower manufacturers chose initially to deal with risk of injury described above by placing warnings both in the owner's manual and on the metal deck of the machine advising users not to put their hands under the lawn mower deck while the engine was running. Thus, the manufacturer would not be held strictly liable for injuries that resulted from failure to heed the warnings. But, if the user stopped the lawn mower on a hill and was injured when the mower rolled over his foot, then the manufacturer and sellers of the mower would be strictly liable for the injury. As a result, the warning label approach was ultimately deemed to be inadequate for this product. Warning labels will likely be equally ineffective for the real estate housing "product".

Product Liability and the Real Estate Professional

Having examined the history and the development of product liability law, it is appropriate to evaluate the possible impact of this doctrine on real estate professionals in the future. As a point of departure, recall the trend toward holding building developers strictly liable in the same way manufacturers of any other product are strictly liable. In the future, it appears that homes and commercial real estate space will be included in the expanding legal definition of "products". Logically, real estate brokers who are engaged in the business of selling real property as agents of the owners of the property will take their place as potential defendants in the chain of distribution for these products.

What kinds of defects can exist in properties (soon to be products) sold by real estate professionals? For a start, manufacturing defects may include faulty wiring, missing hand rails on staircases, inadequate ventilation for gas appliances, in fact any violation of applicable building codes. Add to that the substitution of inferior materials (intentional or otherwise; *strict* liability does not differentiate), use of materials later discovered to be hazardous or noxious (urea formaldehyde insulation, for example) or the installation of furnaces, water heaters or other appliances that later turn out to be defective. When the current trend reaches its logical conclusion, building developers could be strictly liable for any injury that occurs during the use or ownership of the product they develop. This includes liability for injury caused by a defect in any appliance installed in the building. Developers could be strictly liable for injuries resulting from their products, even when the proximate cause of the injury was a product from another manufacturer that was incorporated into the building. Keep in mind that as members of the distribution chain engaged in selling these products, real estate brokers could carry the same burden borne by the developers.

More complicated problems will arise from design defects. For example, "Manufacturers of a pool can be held strictly liable for injuries when the non-skid material which covered the diving board did not extend over the edges of the board, and a diver who slipped on the board might fall over a concrete coping." [16] If the manufacturer of the pool is strictly liable, then the developer who built the house next to the pool shares in that strict liability (because the pool is incorporated into the developer's product), and the real estate broker who sold the house as agent for the developer also may be strictly liable as a member of the chain of distribution.

While this may not seem fair, fairness is not the issue in product liability law; insurance is the issue. This body of law was developed to ensure that the victims of dangerous instrumentalities are not required to bear the burden of their injuries. Strict liability was developed to cast the burden of injury upon the makers of the instrumentality. It may be true that the development of this initially reasonable proposition had led to the conclusion that any instrumentality that causes injury is presumed to be dangerous. But the foreign toy example cited earlier makes it clear that the presumption of "dangerous until proven otherwise" has become a guiding principal that shapes the values and expectations of 225 million Americans. Those who ignore the impact of such a broadly held set of values do so at their own peril.

Determining the Damages

The final issue for consideration is determining the measure of damages that will be used to compute the total payment owed by a defendant to a successful plaintiff in a product liability action. In order to simplify the analysis, consider the following hypothetical event. Suppose that in 1995, the California Supreme Court adopts the rule already proposed by the Court of Appeals:[5] that homes are products within the ambit of product liability law. The following year, a plastic surgeon in Beverly Hills purchases a home at a cost of $1.5 million and fills it with personal effects and household goods valued at $300,000. Also assume that the house was sold by the listing broker, netting him a commission of $85,000 on the deal. A short time later, the house catches fire and burns to the ground. The owner and her husband were at home when the fire broke out, and the plastic surgeon suffered third degree burns on her hands and arms during her effort to escape the blaze. As a result of these injuries, scars form that render the surgeon incapable of practicing her profession. After the fire, an investigation by the Beverly Hills fire department concludes that the wiring in the house was improperly grounded. As a result, the kitchen appliance circuit overheated, setting off the blaze that destroyed the dwelling and injured the surgeon.

The plaintiffs in the lawsuit that inevitably will follow this event are entitled to damages both for property loss and personal injury. The amount of the property loss is fairly easy to calculate; $1.8 million, being the fair market value of the property destroyed. The damages for personal injury are more difficult to determine. They include the actual out-of-pocket medical expenses incurred by the plaintiff as a result of her injury. The plaintiff also is entitled to damages for pain and suffering. The monetary value of the pain and suffering endured by the physician is determined by the jury at the time of the trial to be an additional $1.8 million.

Furthermore, the plaintiff is entitled to recover an amount equal to his or her income during the period s/he was unable to work while recovering from the injuries. In addition, since Dr. Smith is no longer able to practice plastic surgery, she is entitled to receive the present value of her future income until retirement. Assuming that Dr. Smith is fifty years old, and she can be expected to earn $650,000 per year for the fifteen years remaining until her retirement age, the present value of that income is just under $5 million. The hypothetical broker, who a short time ago was very pleased with his $85,000 commission, is now horrified to discover that his firm is strictly liable for a damage award approaching $9 million.

Two questions come to mind. First, why would the doctor sue the broker instead of the developer who built the house and created the manufacturing defect in the first place? Second, since all or most of the damages are covered by insurance, why would the doctor want to sue anybody at all?

In response to the first question, consider the following scenario. The developer who built the house also had some interests in real estate developments in Houston, Texas. The developer lost its corporate shirt during the oil bust of the early 1980s and is no longer in business. However, under product liability law, the plaintiff may choose anyone in the distribution chain as the defendant for the action. The real estate broker was handy and had a personal net worth of $3.5 million, which would probably realize over $2 million in liquidation. Since $2 million is better than nothing, the broker was elected as the defendant of choice.

With regard to the second question, certainly Dr. Smith had adequate insurance coverage for her property loss and her medical expenses. Upon receiving the check for these items, let us assume that she was not predisposed to sue anyone. However, the insurance policy under which Dr. Smith made her claim very likely contained a standard form subrogation clause. By virtue of its subrogation rights, the insurance company can bring the action against any defendant Dr. Smith could sue. Since insurance companies have paid out billions of dollars for product liability claims over the last twenty years, they can be expected to jump at the chance to become product liability plaintiffs under subrogation rights.

A Recommendation

The preceding example suggests that real estate professionals should begin preparations against the day when courts decide to include real property developments within the ambit of product liability law. The following short list contains some protective measures that brokers might want to undertake immediately to guard against the possibilities discussed above.

- Never sell a house to a physician.
- Never take a listing on a house with a swimming pool.
- Never allow your net worth to reach a level that might attract the interests of an insurance company shopping for defendants.
- Carry lots of insurance.

If these measures seem unpalatable, there is another direction that the real estate industry can take to ward off the dangers of product liability litigation. This direction involves a small but radical change in the way real estate professionals view their industry.

Currently, the culture of the real estate industry, and the REALTORS® Code of Ethics are built upon a common understanding that real estate brokers act as agents of the seller in most transactions. As an agent of the seller, a real estate broker is engaged in the business of selling houses. This common understanding causes some difficulty for brokers. The problem of dual agency conflicts is well known to everyone in the industry, and the Code of Ethics warns all real estate professionals against allowing dual agency obligations to occur.

The *Easton* rule, now codified in California,[6] represents the largest encroachment to date on the understanding of the broker's role that is held by the real estate professional. Unfortunately, even with the disclosure rules now in effect in most states, some real estate buyers are unaware that the broker they contacted and worked with does not represent them. *Easton* rule courts have shown themselves to be sympathetic to this defect in the knowledge of real estate buyers and have imposed affirmative duties of disclosure owed by the broker to the buyer. While the duty of disclosure owed to buyers may often conflict with the fiduciary duties brokers owe to their principals, it is reasonable to expect that the industry will learn how to cope with these problems.

However, the product liability issue is more difficult. By insisting that brokers always act as agents of the seller, the real estate industry is insisting that brokers sell houses. When houses are finally included within the legal definition of "products," the real estate industry will find itself insisting that brokers sell products and are therefore strictly liable for any injuries sustained by the use or ownership of the product sold. Brokers who sell houses may escape personal liability for their activities under the *Easton* rule by being extraordinarily careful about how they do their jobs. But brokers who sell products cannot escape liability for injury caused during the ownership or use of that product because liability is strictly imposed, without regard to knowledge, care or diligence on the part of the defendant.

The only way to escape from product liability is to avoid selling the product and this is exactly what we recommend. The time has come for the real estate industry to proclaim itself to be a service industry. Brokers who sell their services to participants in the real estate market are immune to product liability doctrines, while brokers who sell the houses that are listed by their principals will be subject to the doctrine on and after the day that houses are included within the legal definition of "product".

The service business exception to the product liability doctrine was created primarily for the benefit of the medical profession. For example, blood banks are relieved of product liability because they do not sell the blood; they sell the service of matching blood donors to blood recipients. In the same way, a physician who prescribes medication for a patient is not strictly liable for injury caused by taking the medication. Both the physician and the blood bank can be held liable for negligent behavior, but this liability can be avoided through the exercise of due care.

By viewing itself as a service industry, the real estate profession can take advantage of the service industry exception to the product liability doctrine and escape liability imposed for injuries that occur in spite of the effort, knowledge and diligence of the broker who sold a house that later turned out to contain a defect in design or manufacture. By retaining the current understanding of an industry that sells houses, working as the agents of owners, real estate professionals will be overwhelmed by the inescapable duty-to-pay feature of product liability.

We believe that retaining the current agency framework is not in the best interests of the real estate profession. Nor is the insistence that real estate brokers sell a commodity required by law in most states. A review of the real estate licensing laws of half the states revealed that the jurisdictions that, by statute, impose a fiduciary agency duty on licensed practitioners are a distinct minority.[7]

It appears that the agency relationship taken for granted in the real estate industry is more a historical artifact than anything else. The agency relationship had some factual validity during the middle part of the nineteenth century, when a large proportion of real

estate work was done by the commission agents of the railroads, who were employed to sell the thousands of square miles of land acquired from the government as an incentive to lay down track. But in the twentieth century, other models of business activity seem more appropriate.

Stock brokers, commodity dealers and other market-makers provide a clear contemporary example of new ways to perceive the real estate industry. Just as changes in the way we do business are inexorably leading the courts to characterize real property as a product, these same changes are increasing the market-making aspects of real estate brokerage and reducing the agency nature of the function. The prospect of product liability theories being introduced into the real estate industry makes it imperative for practitioners to examine these models and begin to change the way they think about their profession. The following suggestions provide initial direction in the avoidance of strict product liability on the part of real estate brokers:

- Rewrite all contractual material, particularly listing agreements, to eliminate all references to agency relationships. Instead, refer to obligations as a market-maker.
- Require full disclosure to buyers in the form of a prospectus prepared by a third party.
- Require a third-party physical inspection of the property.

While these actions may seem extreme, they facilitate the shift from agency relationships toward market-maker relationships.

We anticipate that sometime between 1993 and the year 2000, the sale of residential properties will come under the auspices of the product liability doctrine. Furthermore, commercial property may be included within the doctrine during the same time period. Thus, real estate professionals have a very short time to restructure their industry, and turn it into a service business that lies outside the chain of distribution of the real estate product.[8]

In conclusion, two related questions encapsulate our position. First, if the real estate brokerage industry gains the needed revisions to state statutes and takes the recommended steps to make the industry a true service business, will that achievement exempt real estate brokers from strict liability rules after real property is determined to be a product? We cannot speak with certainty, but there is reason to hope that the answer would be *yes*.

Second, if the real estate industry retains its current structure, will real estate brokers be held strictly liable at some time in the future for any injuries suffered during the normal course of owning or using the property they help to sell? The answer to this question is clearly, and unequivocally, *yes*.

Notes

[1]The term *broker* is used in a generic sense in this paper and is meant to refer to all individuals licensed to conduct transactions involving real estate. Included within this definition are brokers, salespersons, and in some states, associate brokers.

[2]The disclosure rules that emerged from the *Easton* case were enacted by the California Legislature as California Civil Code Section 2079 *et seq.*, recognizing the duty of a real estate broker to "inspect and disclose" to the buyer of residential real property of one to four units.

[3]According to *Black's Law Dictionary*, product liability refers to the legal liability of manufacturers and sellers to compensate buyers, users, and even bystanders, for damages or injuries suffered because of defects in goods purchased. Relatedly, strict liability is a concept applied by the courts in product liability cases whereby a seller is liable for any and all defective or hazardous products which unduly threaten a consumer's personal safety.
[4]While unforeseeable, abnormal, or unintended use is often cited as a defense in strict liability actions, actual examples of the success of this defense are virtually nonexistent.
[5]This rule was proposed by the California Court of Appeals in *Kriegler* v. *Eichler Homes, Inc.*, 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969).
[6]As California Civil Code Section 2079 *et. seq.*
[7]This refers to an informal survey conducted by the authors. Additional information is available upon request.
[8]Even if the real estate industry decides to emphasize the service nature of its business rather than the sales nature, brokers will still be required to exercise due caution. In particular, brokers will need to be aware of and comply with applicable truth in advertising laws. Colgate Palmolive Co. and its advertising agency were cited by the Federal Trade Commission for the use of a prop in a commercial for Rapid Shave. In the TV commercial [5], Rapid Shave was placed on what the announcer identified as a piece of sandpaper. A razor was then shown effortlessly and smoothly cutting the sand off of the sandpaper. Actually, the commercial used a plexiglass prop with sand applied to it. After extended litigation, the U.S. Supreme Court ruled that the undisclosed use of a prop to make a visual claim that is intended to induce the purchase of a product is deceptive, unless the nature of the prop is disclosed to the viewer. Brokers who use video or other presentations as a part of their promotional activities must be careful to avoid deceptive presentations.

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