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The Expanding Scope of Liability in the Home Construction Enterprise

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Introduction

The law fails in many respects to keep abreast of the necessary changes and needs confronting a rapidly expanding and sophisticated society. This is probably the reason for the uncertainty in the law which developed in the area of residential tract developments. The old common law doctrines developed in England and adopted by the United States were based on strict property law concepts which were applicable for that day and age. The post World War II era stimulated an almost assembly line, large scale production of residential homes. The old property law doctrines and concepts failed to meet the problems created by this rapid expansion of residential homes. The courts continued to apply such doctrines as *caveat emptor,* merger, and lack of privity of contract thus preventing the inexperienced, unsophisticated home purchaser from recovering damages caused by his vendor-builder, contractor or even architect. The results were in effect to disregard all concepts of risk allocation, equality of bargaining and duty owed to the public. In other words, most courts continued to follow the doctrine of *stare decisis* and left matters to the legislature if changes were to be made in the future.

Some courts recognized the fact that the various doctrines and concepts currently being employed by the courts were outdated and did not meet the problems confronting the home purchaser. These courts changed the outmoded views of liability in this area of the law by modifying, overruling and creating new concepts and doctrines. The total effect of this procedure was to update the law so as to meet the needs of our time. This procedure of updating the law is in conformity with the opinions of many legal scholars and is aptly expressed by Justice Cardozo who stated, "A rule which in its origin was the creation of the courts themselves, and was supposed in the making to express the mores

of the day, may be abrogated by courts when the mores have so changed that perpetuation of the rule would do violence to the social conscience."[1]

The process of updating the law is gradual and difficult since without congressional legislation the individual states interpret and apply the law as they see fit. This creates a lack of uniformity of the law among the states which leaves the door open to many unanswered questions. These questions are numerous, varied and their scope of inquiry results in a substantial range of legal consequences. These questions might range from the appropriate remedial doctrines and concepts available to the home purchaser to the limits and scope of liability of appropriate parties to the action. These questions which arise in the home construction field are troublesome and difficult to answer. The predictability of the law in this area is presently uncertain, but the direction of development toward broadening the scope of liability seems apparent. The following study of the cases, doctrines and concepts will state the current status of the law in the home construction field and indicate the possible course the law will follow in expanding the scope of liability for defectively constructed homes.

CAVEAT EMPTOR—AN OUTDATED DEFENSE

Both American and English law have almost entirely abolished the doctrine of *caveat emptor* in regard to the sale of chattels.[2] This doctrine has not been abolished in the area of real estate and some states still regard it as being in full force.[3] In 1958, the Oregon Supreme Court held that the doctrine applies to the sale of an existing home and there are no implied warranties in a contract for the sale of real property.[4] In 1963, the Georgia court in *Walton v. Petty*[5] enunciated a similar view stating that there being no implied warranties as to the condition of the house, the rule of caveat emptor applies. The court based its reasoning on the propo-

1. B. CARDOZO, THE GROWTH OF THE LAW, 137 (1924).
2. PROSSER, TORTS § 83, at 491 (2d ed. 1955).
3. Walton v. Petty, 107 Ga. App. 753, 131 S.E.2d 655, 658 (1963).
4. Steiber v. Palumbo, 219 Ore. 479, 347 P.2d 978, 983 (1959).
5. Walton v. Petty, *supra* note 3.

sition that the vendee could adequately protect himself by an expressed covenant in his deed. The court further stated that as a general rule no remedies are available for any breach by the vendor of any promise in the sales contract if omitted in the deed, since the two merge upon acceptance of the conveyance by the purchaser.[6] The concept of merger has been applied by many courts in the United States as a basis for their distinction in finding no implied warranty of fitness for habitation in completed homes as compared to unfinished homes. Once the purchaser accepts the deed, the sales contract and deed merge thus absolving the vendor-builder of further responsibility for covenants of title not included. The concept of merger is premised upon arm's length bargaining potential by people capable of examining the purchased house with reasonable expertise.[7] Some courts have not accepted the fact that the average home purchaser does not possess the expertise necessary to reasonably inspect the home. This was illustrated by the Indiana Appellate Court's decision which stated that since the vendee and the vendor dealt at arm's length the purchaser has no right to rely upon the representations of the vendor as to the house's quality, when he has had reasonable opportunity to examine the property.[8] The merger concept would have soundness in a non complex society and where the home is easily examinable, but today with the tremendous increase in tract developments, the buyer no longer stands on equal footing with the builder. The sophistication of the tract developer is far superior to that of the average home purchaser who is unable to protect himself from the unscrupuolus developer.

Although some states reluctantly refuse to abrogate the doctrine of *caveat emptor* because of *stare decisis* or unrealistic property law concepts which are outmoded as to the times, a contrary course has been recognized by many courts in the United States. The current development of the law has been expressed in a recent 1968 Maryland decision involving an action by the purchaser of a house against the ven-

6. *Id.*
7. Roberts, *The Case of the Unwary Home Buyer: The House Merchant Did It*, 52 CORNELL L. Q. 835, 857 (1967).
8. Tudor v. Heugel, 132 Ind. App. 579, 178 N.E.2d 442, 444 (1961).

dor to recover damages caused by the basement subsequently flooding. In *Allen v. Wilkinson,*[9] the Maryland Court of Appeals recognized the "trend in some courts to find that an implied warranty exists where houses are mass produced and sold to individual purchasers by a builder-developer." The court further recognized the merits in such a view but refused to follow the trend leaving any changes to be made by the Maryland state legislature. It should be noted that when the courts applied the doctrine of *caveat emptor* basing their rationale on the fact that the purchaser could either obtain an express warranty or examine the premises independently, it was limited to the purchase and sale of completed homes. The courts did not invoke the doctrine or its rationale for unfinished homes but instead allowed recovery based on an implied warranty theory. This theory of recovery did not impose upon the builder an obligation to deliver a perfect house but entitled the purchaser to rescission and restitution for major defects which rendered the house unfit for habitation and which are not readily remediable.[10] The first case which established the implied warranty theory as a basis for recovery because of a defectively constructed home which was unfinished at the time of purchase was *Vanderschrier v. Aaron.*[11] The Ohio Court of Appeals refusing to discuss the legal question involved in the sale of completed homes proceeded to hold that the purchaser of an unfinished home has an implied warranty from the vendor-builder that it will be completed in a reasonable efficient workmanlike manner.[12] This theory of recovery was subsequently upheld in the states of Washington,[13] Oklahoma[14] and Illinois.[15]

The distinction between allowing recovery based on an implied warranty for unfinished homes and denying recovery with respect to the purchase of completed homes was finally abrogated by the Supreme Court of Colorado.[16] The Colo-

9. 250 Md. 395, 243 A.2d 515, 517 (1968).
10. Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966).
11. 103 Ohio App. 340, 140 N.E.2d 819 (1957).
12. *Id.* at 821.
13. Hoye v. Century Builders, Inc., 52 Wash.2d 830, 329 P.2d 474, 477 (1958).
14. Jones v. Gatewood, 381 P.2d 158, 160 (Okla. 1963).
15. Weck v. A:M Sunrise Construction Co., 36 Ill. App.2d 383, 184 N.E.2d 728, 734 (1962).
16. Carpenter v. Donohoe, 154. Colo. 78, 388 P.2d 399, 402 (1964).

rado Supreme Court in *Carpenter v. Donohoe*[17] stated that purchaser of a nearly completed home could rely on an implied warranty whereas a purchaser of a completed home could not is a distinction without reasonable basis for it. The court went on to hold that the implied warranty of fitness of the home to be constructed in a workmanlike manner and suitable for habitation applies to finished homes as well as unfinished homes. Two years later in 1968, the Supreme Court of Idaho in *Bethlahmy v. Bechtel*[18] in accordance with the flow of judicial opinion, upheld the doctrine of implied warranty of fitness in cases involving the sale of new homes by builders. The court stated that "the old rule of *caveat emptor* does not satisfy the demands of justice in such cases . . . To apply the rule of *caveat emptor* to an inexperienced buyer, and in favor of a builder who is daily engaged in the business of building and selling houses, is manifestly a denial of justice."[19] The Texas Supreme Court in *Humber v. Morton*[20] likewise recognized that the doctrine of *caveat emptor* has no application to the sale of a new house by a builder-vendor. The court based its reasoning on the assumption that the rule of *caveat emptor* is patently out of harmony with modern home buying practices. The Supreme Court of Washington in July of 1969 stated that the present trend is toward the implied warranty of fitness and away from *caveat emptor* when it comes to fitness and habitation of the newly purchased home.[21] The developing direction of the law toward allowing recovery for property damage caused by a defectively constructed home when based on an implied warranty of fitness for habitation seems well founded and essential to meet our current social needs.

The cases presented thus far have applied contractual law and theory to find liability on the part of vendor-builders for the construction of a defective home. The doctrine of *caveat emptor* has steadily deteriorated to the point where

17. *Id.*
18. Bethlahmy v. Bechtel, *supra* note 10, at 710.
19. *Id.*
20. 426 S.W.2d 554 (Tex. 1968).
21. House v. Thornton, ___ Wash. ___, 457 P.2d 199, 203 (1969). *See also* Wawak v. Stewart, ___Ark. ___, 449 S.W.2d 922 (1970); Rothberg v. Olenik, ___ Vt. ___, 262 A.2d 461 (1970).

the legal course is decisively against its application to the purchase and sale of residential homes. The doctrine of implied warranty has emerged and expanded to protect the unsophisticated home purchaser from bearing the risk and financial loss incurred from the purchase of a defectively constructed home regardless of being unfinished or completed at the time of purchase. Although some courts seem to distinguish liability on the basis of whether the developer is a mass producer or a single home builder, the direction of future decisions seems apparent that liability will be imposed on any residential home builder that causes property damage to the purchaser based on the theory of implied warranty of fitness and habitation.

THE MACPHERSON DOCTRINE—AN EXPANDING REMEDY

A purchaser of a new home who suffered personal injury as compared to property damage because of its faulty construction had no recourse against the builder-vendor in the early nineteen hundreds. This was clearly illustrated in *Smith v. Tucker*[22] where the Supreme Court of Tennessee aplied the doctrine of *caveat emptor* thus disallowing recovery when based on the grounds of negligence. Not only did the court deny recovery relying on the doctrine of *caveat emptor* but also refused to recognize a cause of action sounding in negligence because the parties lacked privity. This view was soon to change. The 1916 case of *MacPherson v. Buick Motor Co.*[23] marked a shift from the generally accepted rule that no liability existed where there was lack of privity. Judge Cardozo held an automobile manufacturer liable for the negligent construction of a defective wheel which resulted in the personal injury of the ultimate purchaser. The decision avoided the absence of privity of contract by placing a duty of responsibility of care upon the manufacturer toward the ultimate purchasers when the foreseeability of harm was evident.[24]

Ten years after the *MacPherson* decision, the District of

22. 151 Tenn. 347, 270 S.W. 66 (1925).
23. 217 N.Y. 382, 111 N.E. 1050 (1916).
24. *Id.*

Columbia Appellate Court held that the *MacPherson* rule was not applicable to builders or contractors whose defective construction caused injury to a person not under a contractual relationship with them.[25] The court further stated that the contractor's liability ceased with the acceptance of the completed structure by the owner. In the 1948 case of *Moran v. Pittsburgh-Des Moines Steel Co.*,[26] the Third Circuit rejected this ancient rule of law. By analogy to the *MacPherson* decision, the court held that a building contractor was liable to an injured third person not in privity of contract. The result of the court's decision was to abolish any distinction between a seller of goods and a building contractor in regard to the duty of care owed to any one who might foreseeably be endangered by their negligence.[27] The courts did not apply this new concept again until 1954. At that time the Supreme Court of Florida held the contractor of a new home liable for the death of a boy who was struck by a falling window frame.[28]

Then in 1956, a New York case[29] and two District of Columbia cases[30] enunciated the rationale and trend of cases to follow. In the New York case of *Inman v. Binghamton Housing Authority*,[31] a child was injured when he fell from the porch of his apartment due to faulty construction. An action based on the theory of negligence was brought against the landlord, architect and the builder of the apartment. Although the court was reversed on appeal because of a defective complaint, the basic rationale of the decision was not questioned. The court stated that the trend among modern legal scholars is to expand the *MacPherson* doctrine, which dealt only with personal property, to structures erected upon real property and consequently to abolish any distinc-

25. Ford v. Sturgis, 14 F.2d 253 (D.C. Cir. 1926).
26. 166 F.2d 908 (3d Cir. 1948).
27. PROSSER, TORTS § 99, at 695 (3d ed. 1964).
28. Carter v. Livesay Window Co., 73 So. 2d 411 (Fla. 1954).
29. Inman v. Binghamton Housing Authority, 1 App. Div. 2d 559; 152 N.Y.S. 2d 79 (1956).
30. Caporaletti v. A-F Corp., 137 F. Supp. 14 (D.D.C. 1956), *rev'd on other grounds*, 240 F.2d 53 (D.C. Cir. 1957); Hanna v. Fletcher, 231 F.2d 469 (D.C. Cir. 1956), *cert. denied*, 351 U.S. 989 (1956).
31. Inman v. Binghamton Housing Authority, *supra* note 29, at 82-83.

tion between the two.[32] The same year that the *Inman*[33] decision was handed down the U.S. District Court for the District of Columbia in *Caporaletti v. A-F Corp.*[34] expressed in its opinion the basic reasoning and approach the courts would follow in order to impose liability upon tract developers, builders and vendors. Judge Holtzoff in his opinion stated that the ordinary purchaser lacks sufficient familiarity with the complexities of building construction and the intricacies of applicable regulations and must rely on those who design, build and sell the house to him.[35] Also, in 1956, the U.S. Court of Appeals for the District of Columbia Circuit in *Hanna v. Fletcher*[36] held the landlord's contractor liable for injuries to his tenant resulting from negligent repairs. The court analogized *MacPherson* to the facts of the case by stating "the tenants were to use the steps, not the landlord, as in MacPherson the ultimate purchaser was to use the car, not the dealer."[37] Nine years later, the New Jersey Court of Appeals held in accord with the current development of the law in *Schipper v. Levitt & Sons, Inc.*[38] that there is no visible reason for any distinction between the liability of one who supplies a chattel and one who erects a structure. The court further stated that "The law should

32. *Id.* The court stated, "The doctrine announced in the case of MacPherson v. Buick Motor Co. . . is pressed upon us. We recognize that if the complaint of the infant against the architects and builder in this case is held to state a good cause of action we are in effect extending the doctrine of the MacPherson case, which dealt only with personal property, to structures erected upon real property. . . . The trend of modern legal scholarship appears to sustain the view that no cogent reason exists for continuing the distinction . . . ."
33. *Id.*
34. Caporaletti v. A-F Corp., *supra* note 30, at 16.
35. *Id.* Judge Holtzoff stated in his opinion: "Conditions have radically changed since the origin of the general common-law rule. Homes are being constructed on a large scale by persons engaged in the building business for the purpose of selling them to individual owners. The ordinary purchaser is not in a position to discover a latent defect by inspection, no matter how thorough his scrutiny may be, because usually he lacks sufficient familiarity with the complexities of building construction and the intricacies of applicable regulations. He should be able to rely on the skill of the builder who sells the house to him. Otherwise he would be at the vendor's mercy. The realities of modern life necessarily lead to the conclusion that the builder should be liable for injuries caused by his negligence under such circumstances, either to the purchaser or to an invitee. Any other result would be unjust and intolerable. It would encourage unscrupulous builders who may be tempted to reduce their costs and increase their profits by palming off defective and inferior construction on their customers."
36. Hanna v. Fletcher, *supra* note 30.
37. *Id.* at 474.
38. Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314, 322 (1965).

be based on current concepts of what is right and just and the judiciary should be alert to the never-ending need for keeping its common law principles abreast of the times."[39]

The current development of the law has been necessary and proper to prevent future harm and to curtail the present evil of negligent practices existing in residential tract developments. The current concept of liability will no doubt continue to expand to allow recovery for the negligence of those who have a duty to exercise reasonable care in the conduct of their enterprises. The future direction in court decisions seems apparent. When a duty exists to protect those individuals who suffer injury from the acts, conduct or products of another, liability will be assigned to the negligent party.

STRICT LIABILITY—A POSSIBLE BUT DOUBTFUL REMEDY

The rapid development in the residential home construction enterprise has given rise to various theories of recovery for the unsophisticated home purchaser. Some of the more prominent remedial theories upon which the courts have allowed the home purchaser to recover damages are implied warranties of fitness, covenants and negligence. One theory of recovery which has come into focus recently but has not gained much approval by the courts is the doctrine of strict liability in tort. Although no case has extended the strict liability doctrine to the sale of real estate,[40] the mere fact that courts have expressed their views on its merits but hold contrary because of other distinguishing factors might point toward the future trend in tract development liability.

The doctrine of strict liability has generally been confined to consequences which lie within the extraordinary risk whose existence calls for special responsibility.[41] It has been recognized in the unwholesome food product area and similar areas whose defective products would create a comparable damage to the public. The principle of strict

39. *Id.* at 325.
40. Connelly v. Bull, 65 Cal. Rptr. 689, 696 (1968).
41. PROSSER, TORTS § 78, at 533 (3d ed. 1964).

liability in tort as applied to manufacturers was clearly enunciated by the California Supreme Court in *Greenman v. Yuba Power Products, Inc.*[42] Justice Traynor speaking for the court stated, "A manufacturer is strictly liable in tort when an article he places in the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."[43]

One of the earliest cases to announce and discuss the principle of strict liability in tort was *Schipper v. Lewitt & Sons,*[44] which involved an action brought by an injured plaintiff against the mass producer of houses. The plaintiff was the minor son of the lessee. The lessor who had rented the house to the plaintiff's father had previously purchased the house from the defendant, a mass producer of houses. The plaintiff was seriously scalded by water from the hot water tap resulting from no temperature regulator on the hot water tank. The evidence concluded that the absence of the temperature regulator was a result of the defendant's effort to keep production cost down. Although the opinion stated that strict liability principles might apply, it went on to hold that the burden of proof still remains with the plaintiff to establish to the jury's satisfaction from all the circumstances that the design was unreasonably dangerous and proximately caused the injury.[45] The court thereby rested its decision on a negligent theory of liability rather than on strict liability principles. It would seem that the liability was being placed on the enterprise sounding in negligence since the defendant was a mass producer of residential homes. The New Jersey court continued to apply this same line of reasoning in the subsequent case of *Totten v. Gruzen.*[46] Although the application of strict liability principles by the New Jersey Supreme Court seems uncertain, the direction

42. 27 Cal. Rptr. 697, 377 P.2d 897, 900 (1962).
43. *Id.*
44. Schipper v. Levett & Sons, Inc., *supra* note 38.
45. *Id.* at 382.
46. 52 N.J. 202; 245 A.2d 1 (1968). The court not only recognized the negligence principles adopted in Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965) with respect to mass housing developers, but also extended them to include all builders, contractors and architects. The court refused to reach the question whether the doctrine of strict liability applied in Schipper v. Levitt & Sons, Inc., *supra* was equally applicable to other situations.

of development as indicated by other states would allow one to reasonably conclude that liability will be imposed on the tract development enterprise sounding in negligence and not by the application of the strict liability principles.

The California courts flatly rejected the strict liability doctrine finding no analogy between manufacturers of products and builders of homes.[47] The court rejected the strict liability theory of recovery by noting three differences between products liability and construction cases.[48] The first difference is that the builders and contractors can seldom limit their liability by expressed warranties and disclaimers. The second difference is that the home purchaser has less difficulty tracing the source of the defect to the builder or contractor as compared to the average consumer tracing a defective product to its manufacturer. The final difference is the distinction in the opportunity to make a meaningful inspection of retailed products as contrasted with inspection of a newly purchased residential home.

Two years later the California court had another opportunity to express its opinion on the strict liability question and its application to tract developments. In *Connolley v. Bull,*[49] the First District's Court of Appeals reiterated the basic reasons for denial of the strict liability doctrine as set forth in prior cases and continued to stress that the laws governing the sale of commercial products developed along completely different lines than those of property and cannot be equated. With the advent of the Uniform Commercial Code which did not treat the subject of express or implied warranties in contracts for the purchase of real property

47. Halliday v. Greene, 244 Cal. App. 2d 482, 53 Cal. Rptr. 267 (1966).

48. *Id.* at 271. *Held;* Strict liability has no application as to builders of homes. The court noted three differences between products liability and construction cases. The first difference was "the builder or contractor is seldom in a position to limit his liability by express warranties and disclaimers and thereby defeat the recovery of an occupant injured by a defective building. In the second place, it is considerably less difficult for the occupant of a building to trace the source of a defect to the builder or the contractor than it is for a consumer to trace the source of a defect through the modern, complex system of manufacture and assembly of a product and its distribution through jobbers and retailers. Third, . . . the most important distinction lies in the opportunity to make a meaningful inspection of the retail product as contrasted with inspection of a building before using it."

49. Connelly v. Bull, *supra* note 40.

but kept its language in terms of buyer-seller and not manufacturer-producer, it would seem that residential home construction liability was left to case law development.[50] The case law development not being in accord with the strict liability principles governing personal products, the court thereby rejected the strict liability doctrine and imposed liability on the real estate developer for damages to the purchaser's new home based on tort concepts sounding in negligence.

The only state which has imposed the strict liability doctrine upon the builder-vendor of a house is Mississippi. The Supreme Court of Mississippi in *State Stove Manufacturing Co. v. Hodges,*[51] imposed strict liability on the manufacturer of a product and to the contractor who builds and sells a house with the product in it by specifically adopting § 402A of the Restatement of Torts 2d.[52] The action was initiated against the manufacturer of a water heater and the builder of the house who installed the heater which exploded and caused the total destruction of the plaintiff's house. The court dismissed the action as to the manufacturer since if the heater had been installed by the builder according to the instructions, the explosion would not have occurred. The court, however, held that the builder-vendor was liable under § 402A since the builder by installing such a product in homes constructed by them expected it to reach the purchaser in that condition. The court specifically emphasized

50. Hogan, *Commercial Law,* SYRACUSE L. REV. 225, 228 (1965).

51. 189 So. 2d 113 (Miss. 1966).

52. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

STRICT LIABILITY

§ 402 A Special Liability of Seller of Product for Physical Harm to User or Consumer.

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) The seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

that § 402A did not preclude liability when based upon the alternative ground of negligence of the manufacturer or vendor-builder.[53]

ANALYSIS OF THE EXPANDING SCOPE OF LIABILITY

The entire scope of liability of the home construction enterprise has continued to expand to include more prospective defendants and remedies. Liability has recently been imposed on a financial lending institution for the negligent construction of a defective home which they instrumental in providing the necessary funds for the tract development.[54] The California Supreme Court in *Connor v. Great Western Sav. & Loan Ass'n,*[55] applied the *MacPherson* doctrine to the facts and held the Savings and Loan Association liable to the home owner as a matter of public policy and law. Other state courts besides California have based their decisions on public policy considerations such as risk allocation concepts, duty of care and foreseeability of harm concepts and the policy of preventing future harm in the area of tract developments. There is little doubt in light of current policy considerations and the current status of the law that a court would not allow a home purchaser to recover personal or property damages for a defective home which has recently been constructed or purchased. Some courts have extended recovery to subsequent purchasers when the defect is material to the fitness and habitation of the house. There also seems little justification to impose liability on a mass developer of residential homes as compared to a single home builder since the evil the law is attempting to prevent is the same. The courts will no doubt impose liability on any and all members who participate in the specific residential home construction enterprise.

The courts seem very reluctant to extend the doctrine of strict liability to the mass producer of residential homes. The trend seems to indicate that liability should be imposed

53. State Stove Manufacturing Co. v. Hodges, 189 So. 2d 113, 118 (Miss. 1966).
54. Connor v. Great Western Sav. & Loan Ass'n., 73 Cal. Rptr. 369; 447 P.2d 609 (1968).
55. *Id.*

on all manufacturers, contractors, designers and builder-vendors by allowing the unsophisticated home purchaser to recover on a negligence theory. The liability exerted on the tract developer should be expressed more in terms of enterprise liability instead of strict liability. That is liability imposed on those members in the tract development who actively initiate the project, undertake and assume the risks and profits of the venture and participate in the undertaking. This enterprise liability facing the tract developer today is basically threefold. First, the developer, vendor-builder, contractor or architect can be held liable for completed as well as unfinished homes under an implied warranty theory. Secondly, they can be held liable under expressed covenants. The third and most expanding method of placing liability on the enterprise are tort concepts sounding in negligence. Under this concept a vendor-builder can be held directly liable for his negligence and any member of the enterprise can be held liable to those not in privity by reason of the *MacPherson* doctrine. In essence the doctrine of strict liability seems inappropriate and premature as to the manufacturing of a single house or on a large scale basis, since the home purchaser has appropriate remedies against the enterprise which would avail the protection and needs of our society.

CONCLUSION

The unsophisticated home owners and home purchasers in most states are no longer at the mercy of the unscrupulous home builders or subject to the archaic property law concepts imposed by the non-enligthened courts. The home owners and purchasers have appropriate legal remedies available whether the injury is personal or to their property. The courts have placed the liability on the home development enterprise thus providing better protection to the average home purchaser and allocating the financial risk of loss to those with deeper pockets. The courts have imposed liability where liability should be imposed. They have expanded the concepts of implied warranty, negligence, and duty to exercise reasonable care by the application of the *MacPherson*

doctrine and sound public policy decisions to shift the loss from the purchaser to the builder of the defectively constructed home. The courts, however, have not gone so far as to impose strict liability on the developers for their negligent practices in the tract development enterprise. Although all indications are that strict liability will not be imposed on tract developers or manufacturers of homes, it would appear that the legal concepts and doctrines previously cited will continue to grow to allow a larger class and number of persons to recover for the negligent acts or products of others.

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