

Aas v. Hicks: The Battle Begins

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Implied Warranty Liability Is Alive and Well In California

Prior to the Supreme Court's decision in *Aas v. Superior Court* (2000) 24 Cal.4th 627, the use of implied and express warranty causes of action in construction defect actions was all but forgotten. The recent case of *Hicks v. Kaufman & Broad* (2001) 89 Cal.App.4th 908, has demonstrated that the doctrine of implied warranty is alive and well in California for the recovery of defects that have not yet resulted in property damage. Because *Hicks* arises in a class action context and because most of the construction community's attention has remained focused on *Aas*, little attention has been paid to this "journeyman" case which reaffirms earlier implied warranty principles ingrained in California decisional law. In its broadest strokes, *Hicks* stands for the proposition that no damage need be alleged or proven to assert an implied warranty cause of action for defects that have not caused damage, as long as:

"[t]he product. . .contains an inherent defect which is substantially certain to result in malfunction during the useful life of the product." *Hicks* at 917-18.

The *Hicks* court noted:

"It is **not necessary** for each individual homeowner **to prove his foundation has already cracked or split or that he has suffered property damage** as a result of the cracking or splitting. We see no reason why a homeowner should have to wait for the inevitable injuries to occur before recovering damages to repair the defect and prevent the injuries from occurring." *Hicks* at 922.

Moreover, the *Hicks* court distinguished as inapplicable two implied warranty cases, *American Suzuki Motor Corp. v. Superior Court* (1995) 37 Cal.App.4th 1291 and *Feinstein v. Firestone Tire and Rubber Co.* (S.D.N.Y. 1982) 535 F. Supp. 595:

"Foundations, however, are not like cars or tires. **Cars and tires have a limited useful life.** At the end of their lives they, and whatever defect they may have contained, wind up on the scrap heap. If the defect has not manifested itself in that time span, the buyer has received what he bargained for. **A foundation's useful life, however, is indefinite.** Some houses continue to provide shelter for centuries." *Hicks* at 923.

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Now that plaintiffs cannot recover in tort against the developer, contractor and subcontractors who built their homes *where defects have not caused property damage*, plaintiffs should dust off common law and statutory warranty theories, because they may be the only viable option to recover for construction defects that have not caused property damage.

Tracing the History of Implied Warranties

Implied warranty is a traditional tort remedy developed from decisional law by judges who were dissatisfied with the “scorched earth” caveat emptor defense. It was in all likelihood the first court mandated consumer protection. Before implied warranty an owner who purchased a home that was defective could only sue in negligence because there was no strict products liability in real property cases.

For three centuries, the “maxim” of caveat emptor insulated the home seller from liability for construction defects. As late as 1962, California reaffirmed caveat emptor, denying homeowners claims for construction defects based on implied warranty. *Gustafson v. Dunman, Inc.* (1962) 204 Cal.App.2d 10, 13.

The doctrine of caveat emptor meant that no warranties of quality or fitness could be implied in sales of real estate. The exception to that rule was developed in England for *labor and material* contracts. In *Miller v. Canon Hill Estates* (1931) 2 K.B. 113 a buyer signed an agreement with a builder of a housing development to purchase a home which was in the “*course of construction.*” The court held that notwithstanding the doctrine of caveat emptor, the buyer could assert a cause of action for an implied warranty that the house was to be “built in an efficient and workmanlike manner of proper materials and was to be fit for habitation.” The court reasoned that one who contracts to buy a completed home could always inspect it as it stands and discover its flaws, while the purchaser of a house under construction had no such opportunity. In such a situation it was said, the purchaser must rely on the builder’s skill in constructing a house fit for habitation since the buyer was unable to inspect a completed structure at the time he signed the purchase agreement.

Thus, the *Miller* rule is that there should be a warranty not only of fitness for habitation but also of good structural quality implied in contracts for the sale of homes that are not yet completed. However, it was only a matter of time before implied warranty was extended to both homes in the *course of construction* and *fully completed homes*. Any other outcome would have been anomalous:

“The vendee who purchased his home one day before completion receives an implied warranty that his house is free from structural defects, while his neighbor, who by chance signed his contract the next day, buys without the implied warranty.” Further, the very nature of the distinction creates problems. For example, when is a house “still in the process of construction” for purposes of applying the warranty. 14 *Vanderbilt Law Review* 541, 546, citing *Perry v. Sharon Dev. Co.* (1937) 4 All E.R. 390.

At the end of World War II the G.I.’s returning from the war created an enormous demand for new housing. Before 1945 new construction was estimated at \$2 billion annually. In 1945 new housing starts jumped to \$15 billion annually and increased to \$18 billion by 1950. New housing produced in these astonishing quantities lead inevitably to repeated instances of poor quality from hurried construction and skimping on materials. Buyers who had purchased from builder-vendors, often in haste and with little attempt at inspection, or indeed knowledge of how to inspect new housing, turned to the courts for relief.

Courts’ Consistent Basis for Imposition of Implied Warranty, Products Liability

In 1964, the Colorado Supreme Court became the nation's first high Court to reject caveat emptor and to hold a developer liable in implied warranty for construction defects. *Carpenter v. Donohoe* (1964) 154 Colo. 78, 83.

Since *Carpenter*, an avalanche of appellate decisions throughout the nation have rejected the doctrine of caveat emptor, holding developers liable for construction defects in strict liability and implied warranty. *Schipper v. Levitt & Sons, Inc.* (1965) 44 N.J. 70; *Pollard v. Saxe & Yolles Development Company* (1974) 12 Ca1.3d 374, 378; *McDonald v. Miannecki* (1979) 79 N.J. 274, 285.

The doctrine of implied warranty in a sales contract is based on the actual and presumed knowledge of the seller, reliance on the seller's skill or judgment, and the ordinary expectations of the parties. This policy basis is found repeatedly in the early implied warranty cases.

In the New Jersey Supreme Court decision of *Schipper v. Levitt & Sons, Inc.* (1965) 44 N.J. 70, the purchaser of a mass-produced home sued the builder-vendor for severe injuries sustained by his 16 month old son. The child was injured by excessively hot water drawn from a faucet in a hot water system that had been installed without a mixing valve. The water came out of the faucet at 190°, the same temperature as the water in the boiler. *Schipper* held that there was an implied warranty of reasonable construction and that the costs of defective construction should be borne by the builder-vendor.

“When a vendee buys a development house from an advertised model . . . he clearly **relies on the skill of the developer and on its implied representation that the house will be erected in a reasonably workmanlike manner and will be reasonably fit for habitation.** He has no architect or other professional adviser of his own, he has no real competency to inspect on his own, his actual examination is, in the nature of things, largely superficial, and his opportunity for obtaining meaningful protective changes in the conveyancing documents prepared by the builder vendor is negligible. . . . Public interest dictates that . . . **cost should be borne by the responsible developer who created the danger and who is in the better economic position to bear the loss** rather than . . . the third party who justifiably relied on the developer's skill and implied representation.” (*Schipper* at 91)

Schipper also sagely noted that purchasers of development homes are not on equal footing with building vendors and cannot protect themselves in the deed.

“Buyers of mass produced development homes are not on an equal footing with the builder-vendors and are no more able to protect themselves in the deed than are automobile purchasers in a position to protect themselves in the bill of sale.” (*Schipper*,91)

California Imposition of Implied Warranty

In the 1960's California courts began imposing the doctrine of implied warranty for construction defect litigation. The California courts imposed the same rationale as the New Jersey courts for avoiding caveat emptor, (“*material and labor*” contracts were excluded), the inability of buyers to meaningfully inspect and the necessary reliance on the builder's reasonable skill and judgment.

Until 1961 when the Supreme Court decided *Aced v. Hobbs-Sesack Plumbing Co.* (1961) 55 Cal.2d 573, contractors had successfully argued that implied warranty was inapplicable because they were not sellers of goods. In *Aced*, the radiant heating system set inside a concrete slab developed leaks in the tubing. *Aced* stipulated with the owners for a judgment and *Aced* then sued a plumbing subcontractor for breach of a non-statutory, common-law implied warranty of merchantability of the *labor and materials* supplied for a radiant heating system.

The Supreme Court concluded that the contract was not a sale under the Uniform Sales Act but a contract for "*labor and material*," because the tubing was imbedded in concrete as part of a heating system designed for a particular house. Nevertheless, the Supreme Court declared:

"[a]lthough the provisions of the Uniform Sales Act with respect to implied warranty. . . apply only to sales, similar warranties may be implied in other contracts not governed by such statutory provisions when the contracts are of such a nature that the implication is justified." *Aced* at 582 (emphasis added).

The Supreme Court remarked that there was no reason why a warranty of merchantability should not apply to a product furnished in connection with a construction contract citing earlier California and out-of-state decisions.

In *Kuitem's v. Covell* (1951) 104 Cal.App.2d 482, roofing contractors installed a roof covering on a flat roof deck. The allegations were that the roofing material used was insufficient and that the roof deck was not of a proper slope to withstand static water resulting from rainfall. The drainage outlets were placed on the wrong side of the roof deck. Quoting from an earlier California decision involving a contract to drill a well, the *Kuitem's* court stated:

"[A]ccompanying every contract is a **common-law duty to perform with care, skill, reasonable expedience, and faithfulness** the thing agreed to be done, and a negligent failure to observe any of these conditions is a tort as well as a breach of contract.' The **rule which imposes this duty is of universal application** as to all persons who by contract undertake professional or other business engagements requiring the exercise of care, skill and knowledge; the obligation is imposed by law and need not be stated in the agreement." *Kuitem's* at 485 (emphasis added).

Some confusion was created however, when the California courts began imposing strict products liability for defective construction cases, using the exact same rationale they used to impose implied warranty. Thus, implied warranty lost some of its luster in the late 1960's, with the Supreme Court's landmark strict liability decisions including *Kriegler v. Eichler* (1969) 269 Cal.App.2d 224, *Avner v. Longridge Estates* (1969) 272 Cal.App.2d 606; *Sabella v. Wisler* (1963) 59 Cal.2d 21, and *Connor v. Great Western Saving* (1968) 69 Cal. 2d 850. Put simply, why work to prove up implied warranty when the same thing could be accomplished with less work in strict liability?

Nonetheless, the California Supreme Court continued the imposition of implied warranty and in 1974, *Pollard v. Saxe & Yolles Development Co.* (1974) 12 Cal. 3d 374, extended implied warranty to commercially owned apartment buildings. *Pollard* imposed liability on the builder of a new apartment building based on a common-law implied warranty that a new apartment building should be "designed and constructed in a reasonably workmanlike manner." The defects in *Pollard* included buckling ceilings, sticking doors, and improper drainage. The Supreme Court held that plaintiff could sue on a breach of the implied warranty of quality and fitness:²

"The doctrine of implied warranty in a sales contract is based on the actual and presumed knowledge of the seller, reliance on the seller's skill or judgment, and the ordinary expectations of the parties.

In the setting of the marketplace the builder of new construction, not unlike the manufacturer of merchandise, makes implied representations ordinarily indispensable to the sale, that the builder has used reasonable skill and judgment in constructing the building. On the other hand, the purchaser does not usually possess the knowledge of the builder and is unable to fully examine a completed house and its components without disturbing the finished product. Further, unlike the purchaser of an older building, he has no opportunity to observe how the building has withstood the passage of time. Thus, he generally relies on those in a position to know the quality of work to be sold, and his reliance is surely evident to the construction industry." *Pollard* at 379 (citation omitted).

² In *Seely v. White Motor Co.* (1965) 63 Cal.2d. 9, the court upheld a recovery for a "galloping truck" in warranty but not tort. (*Seely* at 13) *Seely* held that products liability was not available because there was no proof that the defect caused the physical damage to the truck thus in effect, there was no property damage. In *dicta*, *Seely* issued its now famous passage: "Even in actions for negligence, a manufacturer's liability is limited to damages for physical injuries and there is no recovery for economic loss alone." *Seely* at 18-19

Summary of Basis for Imposition of Implied Warranty

The assumptions for California's public policy basis underlying its implied warranty and products liability cases are summarized below:

Builder / Developer / Contractor:	Buyer / Owner
1. Reasonable workmanlike construction	1. Not on equal footing with builder
2. Reasonably fit for habitation	2. Has no real expertise in construction
3. Public interest dictates that builder is in better economic position to bear loss	3. Has no real opportunity for meaningful inspection of the finished construction

Now that all tort theories (products liability and negligence) require evidence of physical damage, a plaintiff may still allege and prove breach of implied warranty; fitness for a particular purpose and / or merchantability *without physical damage*. It must be understood that implied warranty is a common law tort remedy which was codified for the sale of goods in the Uniform Commercial Code. The UCC however, does not have an implied warranty for the sale of housing and thus its provisions are used by the courts by analogy only. Moreover, the common law implied warranties originally dealt with the sale of goods, not real property, and this has caused additional confusion. The most frequently named implied warranties are listed below:

- (1) Warranty of reasonable workmanship
- (2) Warranty of habitability
- (3) Warranty of fitness
- (4) Warranty of merchantability
- (5) Warranty of quality, sometimes used instead of workmanship

Challenges and Limitations To Implied Warranty Claims

Implied warranty, while useful in a "post-Aas" environment does, however, have certain limitations. It is good practice for the construction defect attorney to be aware of limitations that will succeed and challenges that can be overcome.

Privity Challenge: Privity Not Required

Although the UCC rule is that a cause of action for breach of implied warranty requires privity of contract, Civil Code §1559 (codification of common law implied warranties) and the cases interpreting that section permit a third party beneficiary of a contract to bring a cause of action for breach of implied warranty. In *Gilbert Financial Corp. v. Steelform Contracting Co.* (1978) 82 Cal.App.3d 65, plaintiff was the owner of a building and had entered into a construction contract with Sheldon Appel to be general contractor for a bank records storage building. Appel subcontracted with Steelform for the construction of the roof, roof parking deck, roof supports and accompanying structural components of the building.

After the building was completed, water damaged the building and Gilbert sought to recover its damages from the subcontractor, Steelform. Steelform contended that Gilbert could not state a cause of action against it for breach of implied warranty, because there was no privity of contract between Steelform and Gilbert. The court of appeal disagreed and held that since Gilbert was a third party beneficiary of the contract between Appel and Steelform, Gilbert could sue for breach of the implied warranty of fitness under California law:

“Under the facts of this case we do not need to decide the issue of privity, per se. Under Civil Code section 1559 and the cases interpreting it, we conclude Gilbert is a third party beneficiary of the contract between Appel and Steelform and therefore can sue for breach of the implied warranty of fitness. California cases permit a third party to bring an action even though he is not specifically named as a beneficiary, if he more than incidentally benefited by the contract.” *Gilbert* at 69-70.

The *Gilbert* court discussed California cases adopting the third party beneficiary approach and concluded that Gilbert was a creditor beneficiary of the contract between Appel and Steelform:

In the case at bar the general contractor, Appel, had the duty under the contract with Gilbert to furnish all the material and labor necessary to construct the building in question. Steelform subcontracted with Appel to furnish the materials and labor necessary for the construction of the roof. Clearly, Steelform (promisor) realized it was assuming Appel’s (the promisee) duties for this phase of the construction, and that Gilbert was the ultimate beneficiary of its performance as the owner of the building. . . .Gilbert would obviously be a creditor beneficiary.” *Gilbert* at 70.

Notice Limitation: Implied Warranty Requires Notice

The Supreme Court in *Pollard* held that a party had to give notice within a reasonable time. The Supreme Court imposed this requirement on the ground that notice of the defects will give the defendant the opportunity to repair the defective item, reducing damages, avoiding defective products in the future and negotiating settlements. Notice also protects against stale claims. Since plaintiffs knew about the problems for almost 4 years before giving notice, they could not bring an action for breach of implied warranty. *Pollard* at 380.

Statute of Limitations for Implied Warranty Claims

If a claim falls within the latent or patent defect statute of limitations, Code of Civil Procedure §337.1 and §337.15 will apply. A product manufacturer, however, may be subject to different statutes of limitation depending on the nature of the injury. The one year statute of limitation in Code of Civil Procedure §338 would apply for personal injury. Either the two year statute of limitation in Code of Civil Procedure §339 or the four year statute in Code of Civil Procedure §337 may apply to a breach of implied warranty relating to property damage claims. The California decisions are conflicting. If the product manufacturer and buyer falls under the Commercial Code, the four year statute of limitation would apply, set forth in Commercial Code §2725.

Implied Warranty May Only Apply To "New Construction"

A further limitation and challenge to the imposition of implied warranty is that some courts only apply it to new construction. In *East Hilton Drive Homeowners Association v. Western Real Estate Exchange, Inc.* (1982) 136 Cal.App.3d 630, the court interpreted *Pollard* to extend implied warranties to sellers of "new construction only." *East Hilton*, however, may be less of a "rogue" case and more of a misunderstood case.

In *East Hilton*, a foreclosure resulted in the acquisition of the condominiums by Bank of America who then sold them to Western Real Estate Exchange (Western). Neither Bank of America nor Western were builders, much less "builders of new construction." Four years after construction, the condominiums were sold by Western to

plaintiff owners. Plaintiffs asserted that after Western purchased from Bank of America, it repaired and rehabilitated the condominiums which had experienced some drainage, water intrusion and mildew problems. The *East Hilton* court however, did not consider Western a builder or seller of new construction.

“The Supreme Court in 1974 extended the doctrine of contractors’ or builders’ strict liability and implied warranty as pertaining to defective construction to the sellers of new construction. It specifically held that builders and sellers of new construction should be held to what is impliedly represented – that the completed structure was designed and constructed in a reasonably workmanlike manner. (*East Hilton* at 632; citing *Pollard*.)

East Hilton is sometimes cited for the proposition that implied warranty can only be extended to first time buyers, even though *East Hilton* simply states that Western, was not a seller or builder of new construction. The relevant questions for application of *East Hilton* are:

1. Is the defendant a builder of new construction?
2. Is the defendant a seller of new construction?
3. Is the project “new construction,” even though new construction is not defined?

This author has been successful on appeal (Non-Published Opinions) in showing that condominium conversions are in fact *new construction*³ subject to implied warranty and products liability because the “new condominium conversions” simply had not existed in the past. Moreover, the capacity of the defendant is critical. In *East Hilton* the builder of the “new condominium” units was not the seller since his interest was lost through foreclosure. Query, if Western had been the builder of *East Hilton*, would the appellate court have imposed implied warranty, provided notice was adequate (note that *East Hilton* does not define new construction)?

³ New construction may be successfully equated to “new products” because an apartment complex has been converted into new individual condominium units and placed into the stream of commerce. *Vandermark v. Ford* (1964) 61 Cal.2d 256, 262; *Kasel v. Remington Arms Co.* (1972) 2 Cal.App.3d 711, 725

Design Limitation: Implied Warranty Does Not Apply To Design Professionals

Another limitation is that an implied warranty theory does not apply to design professionals. In *Gagne v. Bertran* (1954) 43 Cal.2d 481, plaintiffs contended that defendant impliedly undertook to guarantee the accuracy of his soil testing. The Supreme Court held that in the absence of an express warranty agreement, the evidence does not justify the imposition of strict liability of a warranty. In addition, the Supreme Court noted that the defendant was selling a service and the general rule is that those who sell their services for the guidance of others in their economic, financial, and personal affairs are not liable in the absence of negligence or intentional misconduct. *Allied Properties v. John A. Blume & Associates* (1972) 25 Cal.App.3d 848.

Common Law Liability Based on Breach of Express Warranty

Express warranty is an alternate theory to hold liable the developer, design professional, contractor, subcontractor, and manufacturer in the chain of design or construction of the home. Thus, a representation made about the quality of a product or of a design inures to the benefit of the owner even though the representation was not made directly to the owner.

Express Warranty Made by Manufacturer to Contractor Enforceable by Owner

In *Presiding Bishop v. Cavanaugh* (1963) 217 Cal.App.2d 492, the court recognized that an express warranty made by a manufacturer to a contractor inured to the benefit of the plaintiff building owner. In that case, the plaintiff church retained Cavanaugh to install a radiant heating system in the church. Cavanaugh purchased the plastic tubing and pipe from the manufacturer Plastic Process Company. The issue in the case was whether the manufacturer's representation that the plastic tubing and pipe were suitable for the radiant heating system inured to the benefit of the building owner/church. The court of appeal held that it did inure to the benefit of the plaintiff church:

A realistic view must be taken of the purpose of the defendant manufacturer in

making its representations to persons engaged in designing and installing radiant heating systems. That purpose was to influence persons in the position of Mr. Craig to specify the use of the product in the course of the design of such systems and to cause persons in the position of Mr. Cavanaugh to be ready and willing to undertake such installations. The person whose ultimate action was sought to be induced was the one for whom the construction would be done. . . . That being the case, the concept of privity should not be so narrowly construed that that defendant is thereby insulated from responsibility for damage caused to the plaintiff by the inaccuracy of any representation made by it which was in the nature of a warranty." *Presiding Bishop*. at 513-514.

Express Warranty for Concrete Slab, Other Products

The *Presiding Bishop* case relied upon *Odell v. Frueh* (1956) 146 Cal.App.2d 504 in which the manufacturer had represented both to the school district and the district's architects that the "Ashford Formula" could be used on the concrete floor to prevent the formation of alkali beneath the floor and as a cure for the concrete. The court held that the fact that the warranty representations were not made immediately to the purchasers but to the agencies which directed them to buy the product is immaterial, because the law recognizes that a communication by indirection may be just as effective as a direct communication. *Odell* at 508.

Express warranties made to agents which inure to the benefit of the principal are not limited to the construction context. In *Grinnell v. Charles Pfizer & Co., Inc.* (1969) 274 Cal.App.2d 424, the court held that a package insert for the polio vaccine made by Pfizer which was read by six San Francisco Bay Area Medical Societies ("BAMAC") inured to the benefit of BAMAC's patients, since BAMAC was acting as plaintiffs' agent in administering the vaccine. In *Toole v. Richardson-Merrell, Inc.* (1967) 251 Cal.App.2d 689, defendant argued that there was no testimony that the plaintiff's doctor had relied on any specific statements or identified any specific advertising or promotional materials. The court rejected the argument, holding that the doctor had testified that he had talked with defendant's salesperson more than once about the medication and that the promotional materials had come to his attention. *Id.* at 707.

Thus, the courts have the power to impose common-law warranty liability based on breach of express warranty. The representation does not have to be made directly to

the plaintiff but can be made to the plaintiff's agent or representative.

Statutory Warranties

The best known statutory warranties potentially applicable are codified in the California Uniform Commercial Code. They are:

- Implied warranty of merchantability under § 2314 and
- Implied warranty of fitness for a particular purpose under § 2315.
- Express warranty under § 2313.

Less well known are the warranties codified by the Civil Code. They are:

- Implied warranty of merchantability Civil Code §1792.
- Implied warranty of fitness for a particular purpose Civil Code §1792.1, 1792.2.
- Express warranty Civil Code §1793.

The warranty of merchantability states that the goods must be "*fit for the ordinary purposes for which such goods are used.*" The leading appellate decision applying §2314 to personal injury is *Hauter v. Zogarts* (1975) 14 Cal.3d 104, in which the court held that the defendants' golf practice device was not merchantable as a matter of law. See also, *Cavallaro v. Michelin Tire Corp.* (1979) 96 Cal.App.3d 95; (tire disintegrated after manufacturer warranted it to speeds up to 115 miles per hour); *Eichler Homes, Inc. v. Anderson* (1970) 9 Cal.App.3d 224 (corrosion of pipes in radiant heating system); *Moore v. Hubbard & Johnson Lumber Co.* (1957) 149 Cal.App.2d 236 (latent defect in lumber for building). A warranty of fitness for a particular purpose also may be implied in a contract under Commercial Code §2315.

In addition to the implied warranties in the Commercial Code, the Commercial Code also has an express warranty. Commercial Code §2313. That section defines the circumstances under which an express warranty arises in the sale of goods. It provides that:

- an affirmation of fact,
- promise,
- description,
- sample or model

may constitute an express warranty to which the subject goods must conform.

(Commercial Code § 2313(1).)

In 1970, the legislature enacted the *Song-Beverly Consumer Warranty Act* (Civil Code § 1790 et seq.). Although there are no decisions that involve consumer goods that are components of a home, the act applies to the retail sale of consumer goods (as defined in Civil Code § 1791(a)). *Song-Beverly* defines “consumer goods” as “any new product or part thereof that is used, bought or leased for use primarily for . . . household purposes. *Song-Beverly* also defines “consumables” as “any product that is intended for . . . use by individuals for purposes of. . . services rendered within the household.”

Civil Code §1792; adopted as part of the *Song-Beverly Act*, provides for an implied warranty of merchantability which is very similar to that of the Commercial Code’s implied warranty. (Cf. Civil Code § 1791.1(a) with Commercial Code § 2314(1) and (2).) The Civil Code, implied warranty of merchantability, however, is more difficult to disclaim than its Commercial Code counterpart. (Cf. Civil Code §§1792.3, 1792.4, and 1793 with Commercial Code § 2316(2) and (3).

Song-Beverly also can be used to recover for personal injury. Subdivision (d) of Civil Code § 1791.1 provides that “[a]ny buyer of consumer goods injured ... where applicable by a breach of the [§ 1792.1 or 1792.2] implied warranty of fitness has the remedies provided in ... Chapter 7 (commencing with § 2701) of Division 2 of the Commercial Code” The remedies include consequential damages for personal injury. (Commercial Code § 2715(2)(6)).

Song-Beverly also has an implied warranty of fitness for a particular purpose. See Civil Code §1792.1 and §1792.2. The Civil Code, implied warranty of fitness for a particular purpose is more difficult to disclaim than the claims under the *Song-Beverly Act*. (Cf. Civil Code §§ 1792.3, 1792.4, 1793, and 1793.02(f) with Commercial Code § 2316(2) and (3). Similarly, the *Song-Beverly Act* allows recovery based on an express warranty. Civil Code §1793.

The statutory implied warranties permit recovery in many circumstances for property damage or personal injury caused by substandard products.

CONCLUSION

Practitioners who prosecute and defend claims involving defects that have not yet manifested property damage should consider using common law warranty theories, and if available, statutory warranties. Those choices may depend in part on answers to questions such as these:

1. Does the product contain a defect which is substantially certain to result in a malfunction during the useful life of the product?
2. Can the plaintiff recover even though he or she was not in privity of contract with the defendant?
3. Does the plaintiff have a duty to give notice to the actual manufacturer of the product?
4. Is notice to the developer or builder adequate?
5. Can the plaintiff recover even though he or she failed to give timely notice to the defendant prior to filing suit?
6. Did the product manufacturer make any express warranties?
7. Did the product manufacturer disclaim any warranties?
8. Is there a statute of limitations problem if the action is brought under a common law or statutory warranty theory?

The common-law warranties defy classification as tort or contract because, within constitutional limits, a court may combine tort characteristics and contract characteristics based on notions of fairness and public policy. For example, a court may impose common-law warranty liability in favor of all persons foreseeably threatened with personal injury or property damage as a result of its breach (a tort characteristic). It also may require those persons to give timely notice of breach to potential defendants as a condition of recovery (a contract characteristic). Perhaps the common-law warranty theories should be termed "hybrid" since they often exhibit both tort and contract characteristics. (See *North American Chemical v. Superior Court* (1997) 59 Cal.App.4th 764, and Appendix A)

Appendix A

LEGAL THEORIES / CAUSE OF ACTION	IMPUGNS DEFENDANT'S	SOUNDS IN
Negligence:		
(1) Garden-variety negligence	Conduct	Tort
(2) Negligent misrepresentation	Conduct and representation	Tort
Strict liability in tort:		
(3) Defective product	Product	Tort
(4) Innocent misrepresentation	Representation	Tort
Warranty Statutory:		
(5) Cal. U. Com. Code § 2313 (express warranty)	Representation	Contract
(6) Cal. U. Com. Code § 2314 (implied: merchantability)	Product	Contract
(7) Cal. U. Com. Code § 2315 (implied: fitness for a particular purpose)	Product	Contract
(8) Cal. Civ. Code § 1792 (implied: merchantability)	Product	Contract
(9) Cal. Civ. Code §§ 1792.1 1792.2 (implied: fitness for a particular purpose)	Product	Contract
(10) Cal.Civ. Code §1793 (express warranty)	Representation	Contract
Common-law:		
(11) Implied	Product	"Hybrid"
(12) Express	Representation	"Hybrid"

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WARRANTY RECOVERY PERMITTED, NOT PRODUCTS LIABILITY WHERE NO PHYSICAL INJURY. *Seely v. White Motor Co.* (1965) 63 Cal.2d. 9, was brought as a products liability and breach of warranty case. Seely bought a commercial truck manufactured by White Motor Company, which he used for heavy duty hauling. For 11 months after the purchase, bounced violently, an action known as "galloping." Thereafter, the truck overturned when the brakes did not work. Seely sustained property damage to his truck in the amount of \$5,466, but was fortunate and did not sustain personal injury. Seely gave notice that he was not making further payments and the truck was repossessed and resold. Seely was awarded damages for lost profits, repairs of the truck and for the money he paid towards the purchase price. The Supreme Court upheld the award: "The award was proper on the basis a breach of express warranty." (Seely , 13)

Seely, however, was not permit recovery for the accident under strict products liability because there was no physical damage

"Plaintiff contends that, even though the law of warranty governs the economic relations, the doctrine of economic relations between the parties, the doctrine of strict liability in tort should be extended to govern physical injury to plaintiffs' property, as well as personal injury. We agree with this contention." ... In this case however, the trial court found that there was no proof that the defect caused the physical damage to the truck. *Seely* at 19.

law on sales had been carefully articulated to govern the economic relations between suppliers and consumers of goods.

"the history of the doctrine of strict liability in tort indicates that it was designed, not to undermine the warranty provisions of the sales act or of the Uniform Commercial Code but, rather, to govern the distinct problem of physical injuries. *Seely* at 15)