INITIAL OVERVIEW OF CALIFORNIA CONSTRUCTION DEFECT LAW

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I. WARRANTY RECOVERY FOR DEFECTS WITHOUT DAMAGE:

Prior to the Supreme Court's decision in *Aas v. Superior Court* (2000) 24 Cal. 4th 627, construction attorneys were recovering for defects without damages under the "economic loss" doctrine by establishing a "special relationship" with the 6 *Biakanja* factors. *(Biakanja v. Irving,* (1958) 49 Cal.2d.47). As a result, the use of express and implied warranty causes of action were all but forgotten. The post *Aas* state of construction defect litigation reveals that warranty claims are alive and well in California for recovery on defects that have not yet resulted in property damage.

II. IMPLIED WARRANTY

A. FIVE MOST COMMON IMPLIED WARRANTIES: The five most common implied warranties imposed by California Courts are:

1) Implied warranty of reasonable workmanship
2) Implied warranty of habitability
3) Implied warranty of fitness
4) Implied warranty of merchantability
5) Implied warranty of quality

B. IMPLIED WARRANTY DOES NOT REQUIRE PROPERTY DAMAGE: In *Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal. App. 4th 908, the Plaintiff - Homeowners had purchased homes with "inherently defective" concrete slabs made with *Fibermesh* reinforcement. Many of the slabs had not yet cracked and plaintiffs sued the developer for cost of repair or replacement of the slabs and did not allege property damage.

1) The *Hicks* Court allowed the claims for both express and implied warranty.
2) The court held that proof of breach of warranty does not require proof the product has malfunctioned but only that it **contains an inherent defect which is substantially certain to result in malfunction during the useful life of the product**.
3) *Hicks* cites *Aas* as supporting a recovery in implied warranty for repair costs for defects that have not resulted in property damage.

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4) Rationale: Plaintiffs' warranty right was to a defect-free product, the defect itself is the injury, and the remedy is the cost of replacement.

C. IMPLIED WARRANTY APPLIES TO COMMERCIAL APARTMENT BUILDING: *Pollard v. Saxe & Yolles Development Co.*, 12 Cal. 3d 374;115 Cal.Rptr. 648 (1974) was the first California case to apply the Uniform Commercial Code doctrine of implied warranties of quality and fitness to commercially owned property.

1) In *Pollard*, the developer constructed 5 commercial apartment buildings in San Jose. After Pollard took possession of the apartment units certain buildings began exhibiting physical damage such as buckling ceilings, sliding glass doors were sticking and water was ponding on the outside decks after rainfall, resulting in the loss of rental in two apartments.

2) It was found that the defects resulted from the contractor's removal of center support posts and the installation of undersized headers and inadequate support beams. The undersized framing members were inadequate to support the floor loads of the second story patio decks. *Concrete was substituted,* at defendant's order, *for lighter weight magnesium called for in the plans, increasing the stress*. Plaintiff did not give defendant notice until four years after taking possession. (*Pollard* 377) Note imposition of liability for substitution of light weight magnesium with concrete. See *"Equal or Better"* section IV (1-7) below).

3) The Pollard court held that;

> "a contract to build an entire building is essentially a contract for **material and labor, and there is an implied warranty** protecting the owner from defective construction." *Pollard* at 378; *Green v. Superior Court*, 10 Cal. 3d 616; 111 Cal.Rptr. 704 (1974); *Kuitems v. Covell*, 104 Cal. App. 2d 482; 231 P.2d 552 (1951).

Pollard however, was not allowed to recover because timely notice was not provided. *Pollard* at 380.

D. NO PRIVITY REQUIRED: Although the general rule is that a cause of action for breach of implied warranty requires privity of contract, *Civil Code* §1559 and the cases interpreting it permit a third party beneficiary of a contract to bring a cause of action for breach of implied warranty. *Gilbert Financial Corp. v. Steelform Contracting Co.* (1978) 82 Cal. App. 3d 65.

E. NOTICE REQUIREMENT: The Supreme Court has imposed that notice be given to a defendant before an implied warranty claim will lie. Notice is required because it gives one the opportunity to repair the defective item, reducing damages,

avoiding defective products in the future, and negotiating settlements. *Pollard v. Saxe & Yolles Development Co.* (1974) 12 Cal. 3d 374.

F. DOES NOT APPLY TO DESIGN PROFESSIONALS: In the absence of an express warranty, warranty claims do not apply to services performed by design professionals (i.e. architects, engineers). *Gagne v. Bertran* (1954) 43 Cal. 2d 481. Courts view design professionals as providers of services and the general rule is that those who sell their services for the guidance of others are not liable in the absence of negligence or intentional misconduct. *Allied Properties v. John A. Blume & Assoc.* (1972) 25 Cal. App. 3d 848.

G. IMPLIED WARRANTY FOR NEW CONSTRUCTION: Since *Pollard*, California courts have applied implied warranty concepts to the construction and sale of residential and commercial real property. An important limitation is that the implied warranties may only apply to *new construction*. *East Hilton Drive Homeowners' Ass'n v. Western Real Estate Exchange* 136 Cal. App. 3d 630; 186 Cal.Rptr. 267 (1982).

III. EXPRESS WARRANTY

A. CONTRACT DOCUMENTS: Contract documents often warrant how the work will be performed. A.I.A. General Conditions, Art. 4.5.1 (1976 edition) is an example of a generally-accepted provision:

> The Contractor warrants to the Owner and the Architect that all materials and equipment furnished under this Contract will be new unless otherwise specified, and that all Work will be of good quality, free from faults and defects and in conformance with the Contract Documents. All Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective.
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> An Illinois appellate court held that a contractor's warranty that the repairs would result in a leak-proof roof was breached when the roof leaked. *Miller v. Racine Trust* 65 Ill.App.3d 207, 214-215; 382 N.E. 2d 41 (1978).

B. MANUFACTURERS EXPRESS WARRANTIES: Liability on a theory of express warranty may be based upon brochures supplied by the manufacturer.

> In *Herman v. Bonanza Buildings, Inc*. 223 Neb. 474; 390 N.W.2d 536 (1986), a manufacturer had prepared a brochure given to the owner extolling the virtues of the steel building and expressly promising that the manufacturer "*would replace or repair defects resulting from poor workmanship*." The brochure created an express warranty, such that the statements became part of the basis of the bargain. *Id*. at 483-484.
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> In *Little Rock School District of Pulaski County v. Celotex* 264 Ark. 757; 574 S.W.2d 669 (1979), an architect prepared the plans and specifications based upon information supplied to the architect by the manufacturer that the two-ply system was the equivalent of a four-ply conventional roof, would

be bonded for up to 20 years, and would provide excellent weather protection. *Id*. at 763. The roof began leaking almost immediately. The Court held that these representations were sufficient to submit the issue of breach of express warranty to a jury. *Id*. at 766-767.

IV. RECOVERY FOR DEFECTS WITHOUT DAMAGES UNDER CONTRACT

A. TYPES OF BREACHES: The language of a construction contract may impose liability on a general contractor for substituting materials that are not equal to or better than materials called for in the plans or specifications. Thus, breach of contract liability may exist on the basis that inferior materials were substituted.

1) EQUAL OR BETTER SUBSTITUTIONS: See *Pollard v. Saxe & Yolles, Supra*, Section I (C). Additionally, Washington and Oregon courts have held that substitutions that were not equal to or better than the materials specified in the contract constituted a material breach of contract.

   In *Beik, et al. v. American Plaza Co., et al.*, 280 Or. 547; 572 P.2d 305 (1977), there was liability where the sales agreement provided that the condominiums would be built according to the plans and specifications and the developer substituted sliding glass doors and air conditioning units, and the windows leaked. *Id*. at 559.

2) SUBSTITUTION OF SPECIFIED MATERIALS: The following are cases where substitution of specified materials constituted a breach of contract:

   a) In a Washington case, liability was imposed where the contractor substituted Perlite light-weight aggregate in place of the specified sand. In *City of Seattle v. Kuney, et al.*, 50 Wash.2d 299; 311 P.2d 420 (1957), the court held that although the architect approved the substitution, the material was nevertheless improper, because the *contractor guaranteed that the substitute material was equal or better in all respects than the material specified and it was not*. *Id.* at 302-303.

   b) INSULATION AND DRAINS: In a New York case, a contractor was ordered to pay the cost of installing styrofoam insulation and footing drains called for by the contract but which the contractor thought were unnecessary and did not install. *Roudis v. Hubbard* 176 A.D. 2d 388, 389; 574 N.Y.S. 2d 95 (1991).

   c) CAST IRON SEWER LINE: In *Midland Motels, Inc. v. Central Plumbing & Heating Company* 252 So.2d 729 (La. App. 3d Cir. 1971), the Louisiana Court of Appeal held that the evidence supported liability where the plans and specifications had called for the outside sewer piping to be cast iron and the contractor had installed a clay pipe that sagged and collapsed in the area of a motel driveway. *Id*. at 731.

   d) ROOFS AND FLOORS: In Colorado, the court held that the contractor's construction of a roof and floor failed to comply

with plans and specifications, where the contractor installed a 15 year roof instead of the specified 20 year roof; roof joists were not constructed as shown on the plans; the floor was not constructed to the thickness specified in the plans; the contractor had not installed stone or gravel under the floor; and the wire mesh was not properly imbedded in the concrete. *Summit Construction Co. v. Yeager Garden Acres, Inc*. 28 Colo. App. 110, 118-119; 470 P.2d 870 (1970).

3) MATERIAL DEVIATIONS: In *Shell v. Schmidt* 164 Cal.App.2d 350; 330 P.2d 817 (1958), the general contractor was found to have made "*material" deviations from the plans and specifications* by substituting lath paper and chicken wire for wood sheathing on the exterior walls, by substituting one 35,000 B.T.U. capacity furnace for two 30,000 B.T.U. unit furnaces, and by substituting sheet rock with tape joints on interior walls for gypsum lath and plaster. *Id*. at 358.

4) FAILURE TO CONFORM WITH CONTRACT DOCUMENTS: In *Idaho State University v. Mitchell*, 97 Idaho 724, 552 P.2d 776 (1976), the Supreme Court reviewed A.I.A. Document 201. Noting that Article 13.2.2 deals with work *not in accordance with the contract documents*, the court held that the contract "appears to impose liability without fault in claims arising under this provision." *Id*. at 728. Thus, the owner needs not prove negligence of the contractor. *The contractor is liable for damages incurred because of work that does not conform to the contract documents*.

5) DEVIATIONS IMPAIR STRUCTURAL INTEGRITY: California decisions have long recognized that a contractor cannot recover at all when deviations from the plans and specifications and defective workmanship impair the safety or structural integrity of a building. *Tolstoy Construction v. Minter* (1978) 78 Cal.App.3d 665, 672-673; *Shell v. Schmidt* (1958) 164 Cal.App.2d 350, 355. In addition, in *S & Q Construction Co. v. Palma Ceia Development* (1960) 179 Cal.App.2d 364, the court held that a contractor could withhold payment from a subcontractor who performed defective work.

6) DEVIATIONS FROM PLANS & SPECS, DEFECTS IN WORKMANSHIP: In *Famous Builders Inc. v. Bolin* (1968) 264 Cal.App.2d. 37, the court found that substantial failure to comply with the plans and specifications defeated the entire purpose of the contract.

7) BAD CONCRETE AS DEVIATION, DEFECT AND DAMAGE: Some states have held that defective concrete work is damage supporting liability awards. In *Cook v. Jacklitch & Sons, Inc.* (S.Ct. N.Dakota 1982) 315 N.W.2d 660, the court held that concrete work was not of good quality, because one or

more walls bowed so that the sill plate extended over the foundation or wall extended out from the plate, the tops of the foundation walls were not level resulting in the sill plate not resting evenly on the walls, the floors not being level, and improper placement of basement walls narrowed the size of the kitchen. Also see *Anahuac, Inc. v. Larry Wilkes* (Ct.App. Texas 1981) 622 S.W.2d 634, where the concrete work was "just horrible," the floor was not level, joist pockets were incorrectly placed, failure to chamfer wall panels, and the reveals did not meet on the outside walls.

V. TORT RECOVERY: CONSTRUCTION DEFECTS WITH PROPERTY DAMAGE

INTRODUCTION: "Economic Loss" is the lessened value of a defective product which does not meet the consumer's need or expectation. Parties may not recover economic damages without physical property damage. *Aas v. Superior Court* 23 Cal.4th, 627; *Seely v. White Motor Co*. 63 Cal.2d 9 (1965).

A. NO NEGLIGENCE RECOVERY FOR ECONOMIC LOSS:

1) In *Aas v. Superior Court* (2000), the California Supreme Court upheld the economic loss rule for negligence claims and maintained the line between tort and contract/warranty claims by rejecting a negligence cause of action for defects that had not yet caused appreciable physical damage.

    a) Plaintiffs sought tort and contract remedies for defects that had not yet caused damage, including inadequate shear walls, and building code violations.

    b) Held: Until and unless defect sustains actual damage, there is no tort cause of action.

    c) *Aas* Appellate Court held that *Biakanja* special relationship factors had been met. Supreme Court held two *Biakanja* factors not met. Does this mean recovery of economic loss is still possible if all *Biakanja* factors exist?

2) CCP § 28 DEFINES INJURY TO PROPERTY: Note that *Aas* did not define property damage, so attorneys must be vigilant in their damage definitions. One of the oldest and least litigated definitions of injury to property (property damage) is CCP §28, enacted in 1872. "An injury to property consists in depriving its owner of the benefit of it, which is done by taking, withholding, deteriorating or destroying it." CCP §28 (1872)

PRODUCTS LIABILITY

A. DEFECT DEFINITION: Although California courts separate manufacturing defects from design defects, they have refused to limit the definition of a defect. *Barker v. Lull Eng'g Co*. 20 Cal.3d 413; 143 Cal.Rptr. 225 (1978).

1) MANUFACTURING DEFECTS: Manufacturing defects are those defects which deviate from the manufacturer's intended result. For example, a broken gear tooth constituted a manufacturing defect in *Montez v. Ford Motor Co*., 101 Cal.App.3d 315; 161 Cal.Rptr. 578 (1980).

2) DESIGN DEFECTS: Design defects involve either products that fail to perform as safely as the ordinary consumer would expect (consumer expectation test) *Campbell v. General Motors,* 32 Cal.3d 112; 184 Cal.Rptr. 891 (1982) or products as to which the *risk of danger inherent in the design outweighs the benefits of the design* (risk - benefit test). *Barker v. Lull Eng.'g Co., supra,* 20 Cal.3d 413.

3) CONSUMER EXPECTATION TEST: If a product is something that an ordinary consumer would use, the consumer expectation test is the proper test to determine whether a design defect exists. For example, an ordinary consumer would not expect air bag inflation in a low speed collision to break the driver's arm. *Bresnahan v. Chrysler Corp*. 32 Cal.App.4th 1559; 38 Cal.Rptr. 2d 446 (1995); *Campbell v. General Motors* 32 Cal.3d 112; 184 Cal.Rptr. 891 (1982)

4) RISK BENEFIT TEST - NO CONSUMER EXPECTATION: Not all products are subject to ordinary consumer expectations.. Some products are so complex that a consumer may not have any minimum assumptions about its safe performance. In such a case, the risk benefit test applies. *Soule v. General Motors Corp.* 8 Cal. 4th 548; 34 Cal.Rptr. 2d 607 (1994).

B. CONSTRUCTION DEFECTS : Defects in construction cases are not merely deviations from plans and specifications, but can be established in a variety of ways including but not limited to:

1) INADEQUATE INSTALLATION: A developer can be strictly liable for poor materials selection and faulty construction techniques, for example where the defect was an incorrectly installed radiant heating system in the building's cement floor. *Kriegler v. Eichler Homes, Inc.* 269 Cal.App.2d 224; 74 Cal.Rptr. 749 (1969).

2) CONSTRUCTION OF BUILDING PADS IN WRONG LOCATION: A developer can be strictly liable for placing a nondefective product in the wrong place. In a California case, neither the condominiums nor their component parts were defective, however, they were built on unstable soils and the court found the improper location to constitute a "defect." *Del Mar Beach*

Club Owners Association v. Imperial Contracting Co. 123 Cal.App.3d 898; 176 Cal.Rptr. 886 (1991)

3) NON DEFECTIVE COMPONENT PLACED IN WRONG LOCATION: A product may function safely in one location or use but the product, though faultlessly made, may not function safely in another location or use and therefore be defective. *Hyman v. Gordon* 35 Cal.App.3d 769; 111 Cal.Rptr. 262 (1973).

4) DEVIATIONS FROM THE PLANS AND SPECIFICATIONS: Even if a product is not inherently defective, the manner of installation can be defective. Where the *drainage and irrigation system installed varied from the plans and specifications* the court found the deviation from the plans and specifications constituted a defect and awarded the association cost of repairs. *Raven's Cove Townhomes, Inc. v. Knuppe Development Co*. 114 Cal.App.3d 783; 171 Cal.Rptr. 334, (1981).

5) NO RECOVERY FOR STRUCTURAL DEFECTS IN STRICT LIABILITY, ONLY NEGLIGENCE WITH 6 BIAKANJA FACTORS: *Huang v. Garner* (1984) 157 Cal.App.3d 404. In *Huang*, Plaintiff sued the developer and original owner on a negligence and products liability theory. The court of appeal held that economic loss precluded recovery in strict liability where the defects in the building did not cause actual physical damage. The court agreed that costs for the repair of firewalls, shear walls, firestops and other defects that had not caused physical damage and could only be recovered in negligence with special relationship under 6 *Biakanja* factors. *Aas* decision impacts *Huang*.

6) INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE ALLOWED RECOVERY OF ECONOMIC LOSS: *J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799. Plaintiff, a tenant, sued a general contractor for the delay in the completion of his tenant space. *J'Aire* alleged negligent interference with prospective economic advantage and that the delay caused him to suffer loss of business and resulting loss of profits. The Supreme Court held that plaintiff could recover economic loss based on the "special relationship" established by meeting the 6 *Biakanja* factors below:

    1. Extent to which the transaction was intended to affect the plaintiff.
    2. The foreseeabilty of harm to the plaintiff.
    3. The degree of certainty that the plaintiff suffered injury.
    4. The closeness of the connection between the defendant's conduct and the injury suffered.
    5. The moral blame attached to the defendant's conduct.
    6. The policy of preventing future harm.

Analyzing these factors, the *J'Aire* court held that the contractor owed a duty of care to the tenant undergoing construction.

7) DEFECTIVE MATERIALS FOR IMPROPER APPLICATION: A manufacturer was held liable where a defective 'aluminum 380' gearbox contributed to an auto accident. The gearbox material was held defective *for that purpose* because of high engine heat and because malleable iron which could have been used, was stronger and less likely to fail. Plaintiff successfully introduced evidence that three years after the accident defendant substituted malleable iron for aluminum 380. The court held that the evidence of the substitution was admissible. *Ault v. International Harvester Co.* 13 Cal. 3d 113; 117 Cal.Rptr. 812 (1974).

C. PRODUCTS LIABILITY FOR "MARKETING ACTIVITIES": While numerous cases have applied strict liability to the developer or owner of a building, the first California case to apply strict liability to a manufacturer of a *non-defective* building component was based on the manufacturer's marketing activities and involvement in creating a market for a new product.

1) In *Bay Summit Community Association v. Shell Oil Co., et al*. 51 Cal.App.4th 762; 59 Cal.Rptr. 2d 322 (1996) after installation of polybutylene plumbing in a condominium project, the homeowners began to experience leaks in the plumbing systems. The polybutylene resin for the pipes was supplied in pellet form by Shell and was not defective. The homeowners association sued the developer, the two manufacturers of the plumbing system and Shell. Although *there was no evidence of a defect in the resin pellets* manufactured by Shell, the Court of Appeal held that Shell could be strictly liable if:

"(1) the defendant received a direct financial benefit from its activities and from the sale of the product,

(2) the defendant's role was integral to the business enterprise such that defendant's conduct was a necessary factor in bringing the product to the initial consumer, and

(3) the defendant had control over, or a substantial ability to influence, the manufacturing or distribution process." Id. at 776.

D. TYPES OF DEFENDANTS FOR TYPICAL APPLICATION OF PRODUCTS LIABILITY:

1) MANUFACTURER'S PRODUCTS LIABILITY: Under traditional tort law, a manufacturer may be strictly liable if it places a defective product into the stream of commerce. *Greenman v. Yuba Power Products, Inc.* 59 Cal.2d 57, 62; 27 Cal.Rptr. 697(1963).

2) RETAILERS PRODUCTS LIABILITY: The California Supreme Court also extended the products liability doctrine to retailers, because retailers

are an integral part of the overall commercial enterprise and are in a position to enhance product safety. *Vandermark v. Ford Motor Co*. 61 Cal.2d 256, 262-263; 37 Cal.Rptr. 896 (1964).

3) VERTICAL DISTRIBUTION LIABILITY: The California courts have since applied strict liability to others in the vertical distribution of consumer goods, although these defendants were not necessarily involved in the manufacture or design of the product. *Price v. Shell Oil Co*. 2 Cal.3d 245; 85 Cal.Rptr. 178 (1970).

4) NO PRODUCTS LIABILITY FOR SUBCONTRACTORS: *La Jolla Village Homeowners' Association v. Superior Court* (1989) 212 Cal.App.3d 1131. Plaintiff association sued the developer and contractors for construction defects and land subsidence. The trial court granted judgment on the pleadings on the strict products liability cause of action against the subcontractors. The court of appeal held that plaintiff association could not recover against the subcontractors on a theory of products liability on the following grounds:

   a) Subcontractors do not have any ownership interest or control over the project.

   b) Subcontractors do not construct a finished product.

   c) Conventional theories of liability such as breach of contract, warranty and negligence still exist.

   d) Developers are strictly liable for the negligence of their subcontractors and can proceed against the subcontractors.

E. APPLICATION OF PRODUCTS LIABILITY IN RESIDENTIAL VERSUS COMMERCIAL PROPERTIES:

1) SINGLE FAMILY HOMES AND PLANNED DEVELOPMENTS: In *Kriegler v. Eichler Homes, Inc.*, *supra*, 269 Cal.App.2d 224, the court extended the doctrine of strict liability to builders and developers of mass-produced single family residences. In *Del Mar Beach Club Owners Ass'n v. Imperial Contracting Co.*, *supra*, 123 Cal.App.3d 898 the court further extended the doctrine to multi-unit , residential, planned development complexes.

2) PRODUCTS LIABILITY ALLOWED IN COMMERCIAL SETTING: *Southern California Edison v. Harnischfeger (1981) 120 Cal.App.3rd 842*. Southern California Edison ordered a gantry crane from Harnischfeger, held to be the designer of the crane because Edison had only submitted a generic "standard" set of functional guidelines for the crane. Because

Harnischfeger did not install a removable cover plate, inspection ramp and stainless steel cable for the El Segundo ocean environment, the crane cable broke and dropped a 90 ton turbine rotor into a steam turbine below. Harnischfeger asserted that Edison was not an ordinary consumer entitled to strict liability. The court disagreed and imposed products liability because Edison did not bargain for the design specifications which remained the defendant's responsibility. Edison proceeded with it's design defect and failure to warn claims.

3) PRODUCTS LIABILITY EXTENDED TO COMMERCIAL WINE BOTTLER: *International Knights of Wine v. Ball* (1980) 110 CAL.APP.3D. 1001. Plaintiff wine marketer sued the manufacturer of the metal cap and wine on theories of negligence, breach of implied warranty, and products liability. Corrosion of the caps caused the wine to be unmarketable. Judgment on the pleadings was reversed, because there was no evidence before the court as to the relative economic strength or ability to negotiate the risk of loss from a defective product.

4) NO PRODUCTS LIABILITY FOR MANUFACTURER OF COMMERCIAL TURBINE: *Kaiser Steel v. Westinghouse* (1976) 55 Cal.App.3rd 757 The motor was delivered to Kaiser unassembled and was then assembled and tested by an affiliate of Kaiser before it was placed in operation. Plaintiffs' showed a defect in the welding of rivets in the motor caused its destruction. Destruction of the motor caused a portion of Kaiser Steel's plant to shut down. Other evidence disclosed that the motor was designed by Westinghouse to Kaiser's specifications. The purchase order stated that "all merchandise hereby ordered is subject to inspection and testing by Kaiser."(742)

   Strict products liability does not apply between parties who:

   1. Deal in a commercial setting;
   2. Come from positions of relatively equal economic strength
   3. Bargain the specifications of the product
   4. Negotiate concerning the risk of loss from defects in it

5) NO PRODUCTS LIABILITY FOR "DAMAGE TO THE PRODUCT ITSELF:" *Sacramento RTD v. Grumman* (1984) 158 Cal.App.3d. 289 Sacramento Regional Transit District purchased buses from Grumman, the manufacturer. Once the buses were in service the RTD discovered broken fuel tank supports in 26 of its 103 new buses. There was only damage to the fuel tank supports. In the complaint, Sacramento RTD did not allege damage to any other part of the bus. All the buses were removed from service and all broken and unbroken supports were removed and

replaced. The *Sacramento* court held that "when the defect and the damage are one and the same, the defect may not be said to have caused physical injury."

Note that if Sacramento RTD had identified the cause of the fractures, such as defective metal or defective welding, the damage and the defect would not have been the same. There was no cause of action for implied warranty or breach of contract. It is dangerous practice to confuse the defect with the damage.

6) NO PRODUCTS LIABILITY FOR DAMAGE TO THE SINK ITSELF: *Fieldstone Co. v. Briggs Plumbing Products, Inc.,* (1997) 54 Cal.App.4th 357. Fieldstone as developer installed hundreds of inexpensive sinks manufactured by Briggs. Fieldstone sued to replace the sinks that had prematurely rusted and chipped. Instead of lasting 25 years or more as expected, the sinks developed unsightly rusting and porcelain chipping or popping within one to five years. Held: The developer cannot recover on a products liability theory because the defect had not caused injury to "other property" (only damage to the product itself). Fieldstone was a sophisticated purchaser (*Kaiser Steel; Sacramento RTD*) and could have purchased a longer lasting product. There is no justification for imposing tort liability on manufacturers that guaranteed their products for only one year.

   The doctrine of strict liability is not a substitute for contract and warranty where the purchaser's loss is the benefit of the bargain and unless the parties specifically agree the product will perform in a certain way, the manufacturer is not responsible for its failure. (Also see *Zamora v. Shell Oil Co*. 55 Cal.App.4th 203 (1997).

   Also held: Fieldstone not in privity with Briggs to recover on an implied warranty theory (*Cf. Gilbert Financial Corp. v. Steelform Contracting Co.* (1978) 82 Cal.App.3d 65, holding that you can recover in implied warranty without privity) Fieldstone failed to give notice and could not recover on a breach of express warranty claim.

7) BUILDERS AND DEVELOPERS OF COMMERCIAL BUILDINGS: California courts have not yet had occasion to apply strict liability to developers or builders of commercial structures. The same rationale however, applies, since the buyer relies on the builder's skill and expertise to insure that the building is built in a workmanlike manner and is reasonably fit for its intended use.

F. COMPONENT PART DOCTRINE:

1) RECOVERY ALLOWED FOR SINGLE PURPOSE COMPONENT PART: In *Acosta v. Synthetic Industries, Inc.* (2001) 88 Cal. App. 4th 944 (Review granted

8/15/01), Plaintiff homeowners sued Synthetic Industries, the manufacturer of *Fibermesh*, used in slab foundations of the home. Synthetic represented that *Fibermesh* can be used as an adequate substitute for welded wire mesh. Synthetic also represented that *Fibermesh* was the substantial equivalent of welded wire mesh for slabs. In reality, *Fibermesh* causes more cracking than traditional wire mesh. The Court of Appeal held that the component part doctrine did not bar a strict liability claim.

a) The *Acosta* Court distinguished *Artiglio v. General Electric* (1998) 61 Cal. App. 4th 830 in the following ways:

i) *Fibermesh* is a single purpose product used only in the construction of concrete structures.

ii) Builders are sophisticated, but were unable to know the unsuitability of *Fibermesh* because of Synthetic's marketing involvement and materials.

iii) Contractors did not alter or change the *Fibermesh* or its intended function. Any change was intended by Synthetic.

2) NO RECOVERY WHERE COMPONENT PART IS "RAW MATERIAL" WITH MANY GENERAL PURPOSES: In *Artiglio v. General Electric Co.* (1998) 61 Cal. App. 4th 830, GE manufactured silicone pellets that McGhan Medical Corporation incorporated into *breast implants*. The court applied factors derived from the "raw material supplier defense" and "the bulk sales / sophisticated purchaser rule" to determine that GE is not liable to the ultimate consumer for the silicone pellets, which are only dangerous when used in breast implants.

a) GE expressly informed implant manufacturer of its responsibility to assess suitability of silicone for medical purposes.

b) Silicone pellets are significantly altered during the breast implant manufacturing process.

c) GE did not exert any control over design, testing, or labeling of implants.

3) RECOVERY WHERE DEFECTIVE COMPONENT PART CAUSES INJURY TO STRUCTURE: In *Stearman v. Centex Homes* (2000) 78 Cal. App. 4th 611, plaintiff homeowners sued the developer in strict liability for defective foundation construction, resulting in slab deformation that caused extensive cracks throughout interior and exterior of homes

a) Plaintiffs alleged defective component part caused injury to other parts of home, but not to property apart from the structure.

Defendant asserted this was only "injury to the product itself," thus prohibiting recovery under the economic injury rule.

b) Court found that if a component part in a home causes damage to other parts of the structure, this is not considered economic loss, allowing recovery in tort.

G. RESIDENTIAL VERSUS COMMERCIAL CONSTRUCTION:

1) SINGLE FAMILY HOMES AND PLANNED DEVELOPMENTS: In *Kriegler v. Eichler Homes, Inc.*, *supra*, 269 Cal.App.2d 224, the court extended the doctrine of strict liability to builders and developers of mass-produced single family residences. In *Del Mar Beach Club Owners Ass'n v. Imperial Contracting Co.*, *supra*, 123 Cal.App.3d 898 the court further extended the doctrine to multi-unit , residential, planned development complexes.

2) BUILDERS AND DEVELOPERS OF COMMERCIAL BUILDINGS: California courts have not yet had occasion to apply the doctrine of strict liability to developers or builders of commercial structures. The same rationale however, would appear to apply, since the buyer relies on the builder's skill and expertise to insure that the building is built in a workmanlike manner and is reasonably fit for its intended purpose, and the buyer did not participate in or observe the design and construction.

H. JURY INSTRUCTIONS: Strict liability attaches for an injury proximately caused by a design or manufacturing defect which existed when the article left possession of the seller, provided that the injury resulted from a use of the article that was reasonably foreseeable by the seller. *BAJI Jury Instruction No. 9.00* (7th ed., 1994).

I. JOINT & SEVERAL LIABILITY VERSUS COMPARATIVE FAULT:

1) JOINT LIABILITY FOR INDIVISIBLE INJURY: *Bobrow Thomas Associates v. Superior Ct.* (1996) 50 Cal.App.4th 1654. Owner hired architect, Bobrow Thomas, to design a hospital. Bobrow hired Otto to act as prime contractor and Otto hired Peninsula Floors to install the floors. The flooring failed partly due to a design defect and partly due to installation problems. Owner settled with all parties but Bobrow Thomas. The settling parties told the court that they were only settling "construction defects" and limiting the balance of the case to design defects for which Bobrow Thomas was solely liable. This was done to avoid contractual indemnity between Otto and Bobrow Thomas.

The court held that the owner could not divide its injury into a design and construction components because the injury was "indivisible" and Bobrow Thomas was jointly and severally liable with contractors that installed faulty floor system that failed and caused water damage to the floors.

2) NO JOINT LIABILITY ON ASSIGNED INDEMNITY CLAIMS: *Expressions HOA v. Ahmanson* (2001) 86 Cal.App 4th 1135. The Association settled with the owner and the developer. The developer assigned its rights against the subcontractors to plaintiff and owner. The Association and owner went to trial against Monier, the roofing subcontractor. The trial court agreed with the Association and owner that Monier was jointly and severally liable for the roofing defects and applied a dollar for dollar offset.

   However, the court noted that Monier's liability (unlike HOA) was based on equitable indemnity principles based upon comparative fault. Thus Monier was not entitled to any offset for assigned indemnity claims.

J. INVESTIGATIVE COSTS TO FORMULATE REPAIR ARE RECOVERABLE AS DAMAGES: Because tort damages are designed to make the Plaintiff whole, expert costs incurred to investigate and formulate an appropriate repair plan are recoverable as part of the cost of repair. *Stearman v. Centex Homes* (2000) 78 Cal. App. 4th 611.

1) *Stearman* Court relies on language in *Regan Roofing Co. v. Superior Court* (1994) 21 Cal. App. 4th 1685: "It would be proper to view this $250,000 expert expense as damages due for a portion of the cost of repair which is an appropriate measure of damages in cases based on damage to real property.

2) Though *Regan Roofing* was a good faith settlement case, *Stearman* Court finds no distinction between settlement and trial cases.

3) Expert costs that are purely litigation related must be segregated from the recoverable expert costs per *Stearman*.

VI. INSURANCE

A. ECONOMIC LOSS CUSTOMARILY EXCLUDED BY INSURANCE POLICIES: Economic damages may be excluded from third party insurance coverage under standard CGL policies as "*economic losses*." This is because the definition of property damage requires "*physical injury to or destruction of tangible property*." *Maryland Casualty Co. v. Reeder*, 221 Cal.App.3d 961, 968-971; 270 Cal.Rptr. 719 (1990).

B. PHYSICAL DAMAGE CAUSED PHYSICAL INCORPORATION OF DEFECTIVE PRODUCT: In *Armstrong v. Aetna* (1996) 45 Cal.App.4th. 1, an asbestos manufacturer sued his insurance company to determine insurance coverage for claims involving asbestos contamination. The claims alleged the mere presence of "asbestos containing building materials" (ACBM) in the structures posed a health hazard and threat of harm based on the ACBM's potential for releasing asbestos fibers into the building's air supply. The underlying claims went beyond allegations of defective workmanship or defective materials and alleged injury to "other property." The Armstrong court held that even with no release of asbestos fibers, if the

manufacturer is ultimately liable for the mere presence of asbestos, then the injury to the subject building should be considered a physical injury to other property.

> "Because the material was physically incorporated into the building and because it had to be removed to avoid the threatened harm, it therefore was **injurious to the building and qualified as a physical injury to "other" tangible property** under insurance policies." (*Armstrong* at 7)

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C. CONTINUOUS OR PROGRESSIVELY DETERIORATING PROPERTY DAMAGE OR PHYSICAL INJURY: California cases have taken different positions under "occurrence" policies as to what event "triggers" the insurer's duties to indemnify and/or defend the insured. The issue is largely one of timing--what must take place within the policy's effective dates for the potential of coverage to be 'triggered'?" In *Montrose Chemical v. Admiral Insurance* (1995) 10 Cal. 4th 645, the Supreme Court held that where losses are of a progressive and continuing nature and successive policies are on the risk, each policy in effect when the loss or damage occurred has the duty to provide a defense (and presumably indemnity) to the insured. *Montrose* at 666.

D. RECOVERING FOR CONTINUOUS PROPERTY DAMAGE WITH MULTIPLE CARRIERS : In *Insurance Company of North America v. National American Insurance Company of California* (1995) 37 Cal. App.4th 195, a dispute arose between two insurance carriers that insured a single insured. The insured was the roofing contractor on a condominium project where the roofing had failed. NAICC provided coverage for the first two years and INA provided coverage for the next two years. INA sought reimbursement because part of the property damage was manifested during NAICC's policy periods. Under these cases, all "on risk" insurers, from the first exposure until the time the property damage ceases, is liable, with the loss equitably allocated among all liable insurance carriers. This is a significant case because it will support an election that one carrier fund the entire award, judgment or settlement. The carriers on the risk can then equitably distribute the loss between themselves, without further damaging plaintiff.

> The *INA* court noted that the condominium project was built in nine phases. The first three phases were completed during NAICC's policy periods. NAICC argued that only its first policy was implicated based on the manifestation rule. Relying on *Montrose,* 10 Cal.4th 645, the court held that the key issue is **whether property damage occurred during the policy period**. Since none of the buildings in phases 4 through 6 showed

any actual damage until the second of NAICC's policies, the court held that both policies were implicated. (*INA* at 204-206).