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Becker v. IRM Corporation: Strict Liability in Tort for Landlords

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BECKER v. IRM CORPORATION: STRICT LIABILITY IN TORT FOR RESIDENTIAL LANDLORDS

I. INTRODUCTION

In *Becker v. IRM Corporation*,[1] the California Supreme Court extended strict liability in tort to landlords who are in the business of leasing residential units.[2] As a result, strict liability now applies to latent defects, in dwellings, which cause injury to tenants, if the defects exist at the time the premises are first let to the tenants.[3]

IRM Corporation owned and managed a thirty-six unit building which was constructed in 1962 and purchased by IRM in 1974.[4] In 1978, a tenant in the building slipped in the shower and fell against the glass shower door which broke injuring his arm.[5] The shower door was made of untempered glass.[6]

The majority of the *Becker* court decided to apply a "stream of commerce approach" to strict liability in tort.[7] The court reasoned that landlords are an integral part of the enterprise of producing and marketing rental housing because they have a continuing relationship to the property following the renting.[8] According to the court, this new rule for landlord liability should be applied because the untempered shower glass door

1. 38 Cal. 3d 454, 698 P.2d 116, 213 Cal. Rptr. 213 (1985).
2. *Id.* at 467, 698 P.2d at 124, 213 Cal. Rptr. at 221.
3. *Id.*
4. *Id.* at 457-58, 698 P.2d at 117, 213 Cal. Rptr. at 214.
5. *Id.* at 457, 698 P.2d at 117, 213 Cal. Rptr. at 214.
6. *Id.*
7. *Id.* at 459, 698 P.2d at 119, 213 Cal. Rptr. at 216. The majority opinion was written by Justice Broussard. Justice Bird concurred and adopted most of Justice Newsom's opinion as set forth in the Court of Appeal. *Id.* at 470, 698 P.2d at 126, 213 Cal. Rptr. at 223 (Bird, C.J., concurring). Justice Lucas dissented as to the question of strict liability and concurred as to liability for negligence. *Id.* at 479, 698 P.2d at 133 (Lucas, J., concurring and dissenting). Justice Mosk concurred with Justice Lucas. *Id.* at 487, 698 P.2d at 139, 213 Cal. Rptr. at 236 (Mosk, J., concurring and dissenting).
8. *Id.* at 466, 698 P.2d at 124, 213 Cal. Rptr. at 221.

was a latently defective product existing at the time the dwelling was let.[9]

This Note will address several questions which are both old and new in tort law. How does the court apply a stream of commerce approach to strict products liability? What does it mean for a landlord to be in the business of leasing so that strict liability may be imposed for injuries caused by latent defects in residential units? What is a latent defect so that landlords may take necessary preventative steps before renting a unit?[10]

In addition, this Note will examine the policies for extending strict liability which have developed in California case law. This Note will show that the *Becker* decision has created a new definition of stream of commerce and in so doing has greatly increased the potential for the imposition of strict liability in other areas of the residential housing market.[11]

II. BACKGROUND

Commentators[12] and courts[13] have been concerned with the

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9. *Id.* at 457, 698 P.2d at 117, 213 Cal. Rptr. at 214. The court made no inquiry into this question but appears to have adopted a finding of the door's defectiveness from the pleadings.

10. Underlying this question is another that will probably remain unanswered pending further litigation: Is there any physical harm caused to a tenant by a fixture in the premises which will not result in landlord liability?

11. *Becker* also addressed the important subject of negligence, and found that IRM was negligent in leasing the unit with an untempered glass shower door. 38 Cal. 3d at 467-69, 698 P.2d at 124-26, 213 Cal. Rptr. at 221-23. The dissenting opinion (as to strict liability) concurred in the finding of negligence. *Id.* at 487, 698 P.2d 116, 139, 213 Cal. Rptr. 213, 236 (Lucas, J., concurring and dissenting).

12. *See, e.g.*, Browder, *The Taming of a Duty—The Tort Liability of Landlords*, 81 MICH. L. REV. 99 (1982) (a review of the doctrinal tensions which have arisen as a result of the changes in modern landlord/tenant law accompanying an argument against the imposition of strict liability for landlords); Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability?*, 19 WIS. L. REV. 19 (1975) (a thorough review of past and existing law of landlord liability, advocating strict liability for those in the business of residential leasing); Rheingold, *Proof of Defect in Product Liability Cases*, 38 TENN. L. REV. 325 (1971) (a discussion of the plaintiff's burden in establishing defect); Traynor, *The Ways and Meanings Of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965) (a review of the problems facing the courts in trying to define defect); Note, *Landlord Tort Liability in California: Are the Restrictive Common Law Doctrines on Their Way Out?*, 12 SAN DIEGO L. REV. 401 (1975) (advocating development of strict liability for landlords along the same lines as for lessors of used personalty); Note, *Sales of Defective Used Products: Should Strict Liability Ap-*

question of strict liability in tort for landlords since the 1963 *Greenman v. Yuba Power Products, Inc.*[14] decision. In California, strict liability in tort for landlords has developed in a logical progression which has paralleled in reasoning, if not in time, the earlier extensions of strict liability for manufacturers, retailers, and lessors of products.[15] Mass producers of residential properties, as well as builders and sellers of new housing, came to be held strictly liable in tort for defects in the units which they built.[16] During this same period, the courts moved persuasively and purposefully to extend rights and recourse to tenants if a dwelling itself does not provide reasonable habitation.[17] Thus, the courts have recognized that tenants can expect landlords to provide and maintain their rental properties according to a standard of habitability.[18]

Therefore, although it is significant, it is not surprising that the reasoning and policy considerations of these decisions should coalesce and be extended by the California Supreme Court in the *Becker* decision.[19] In order to impose strict liability on landlords, the court had only to find that a leased residential unit is a product in the stream of commerce.[20] With this established, a

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ply?, 52 S. CAL. L. REV. 805 (1979) (advocating imposition of strict liability on sellers of used products).

13. *See* Fakhoury v. Magner, 25 Cal. App. 3d 58, 101 Cal. Rptr. 473 (1972) (a lessor of a furnished residential unit was strictly liable for defects in rented furnishings which injured a tenant); Golden v. Conway, 55 Cal. App. 3d 948, 128 Cal. Rptr. 69 (1976) (a landlord was strictly liable for fire damage caused by a wall heater improperly installed in a rental unit by an independent contractor); Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974) (imposing an implied warranty of habitability standard in residential rental agreements, redefining the landlord/tenant relationship in California).

14. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963) (establishing the policy bases for imposing strict liability for those retailers and manufacturers in the stream of commerce).

15. *See, e.g., id.*; Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964) (retailer held strictly liable for defective product assembled by manufacturer); Price v. Shell Oil Co., 2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970) (lessor of personalty strictly liable for defects).

16. Pollard v. Saxe & Yolles Dev. Co., 12 Cal. 3d 374, 525 P.2d 88, 115 Cal. Rptr. 648 (1974); Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969).

17. *See* Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974).

18. *Id.* at 639-40, 517 P.2d at 1184, 111 Cal. Rptr. at 720.

19. Becker v. IRM Corp., 38 Cal. 3d 454, 459-67, 698 P.2d 116, 117-24, 213 Cal. Rptr. 213, 215-21 (1985).

20. *Id.* at 459, 698 P.2d at 119, 213 Cal. Rptr. at 216.

defective fixture, installed in a unit by the builder or owner, and existing at the commencement of the lease, can lead to strict liability in tort for landlords.[21] Strict liability will be imposed in accordance with a strict products liability standard—a plaintiff need only show that there was a defect and that the defect was the proximate cause of his injury.[22]

A. Policy Reasons for Imposition of Strict Liability on Landlords

The policy reasons cited in *Becker* for application of strict products liability to lessors of residential units are those derived and articulated in two lines of cases: those which impute liability on the basis of an implied warranty of fitness,[23] and those which follow the strict products rationale for fixing liability.[24]

1. *Implied Warranty*

In finding liability based upon implied warranty of fitness, the court in *Pollard v. Saxe & Yolles Development Company*,[25] made the analogy that in the marketplace, a builder or seller of new units, is similar to a manufacturer of personalty who makes an implied representation that his product was produced with reasonable care and skill. A purchaser, on the other hand, lacks the knowledge and skill of a builder and is generally unable to fully inspect a completed house.[26] Therefore, a purchaser must rely on those who produce and sell, and who purport to have used skill and judgment in producing a product.[27] Similarly, in

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21. *Id.* at 459, 698 P.2d at 117, 213 Cal. Rptr. at 215. It was already well established that a landlord was liable if he had a fixture installed and it proved to be defective. Golden v. Conway, 55 Cal. App. 3d 948, 128 Cal. Rptr. 69 (1976). A landlord was also liable if he leased defective furniture to a tenant which caused the tenant injury. Fakhoury v. Magner, 25 Cal. App. 3d 58, 101 Cal. Rptr. 473 (1972).

22. *Greenman*, 59 Cal. 2d at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.

23. *See, e.g.*, Pollard v. Saxe & Yolles Dev. Co., 12 Cal. 3d 374, 525 P.2d 88, 115 Cal. Rptr. 648 (1974), and Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974).

24. *See, e.g., Greenman*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697; Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944).

25. *Pollard*, 12 Cal. 3d at 379, 525 P.2d at 91, 115 Cal. Rptr. at 651.

26. *Id.*

27. *Id.*

Green v. Superior Court,[28] the court decided that for the modern urban tenant, adequate inspection of the premises is virtually impossible; a landlord is in a better position to discover and cure any problems which may arise in a building. Further, the modern urban tenant probably does not have the skills, tools, or financial resources to repair defects in a building or unit.[29]

In both *Pollard* and *Green*, the court applied the implied warranty theory, in large part, because of the superior knowledge possessed by the builder/seller in *Pollard*, and the landlord in *Green*. *Becker* is a continuation of this reasoning; a tenant who rents a dwelling is compelled to rely upon the implied assurance of safety made by a landlord.[30] The *Becker* court contended that a landlord possesses superior knowledge of the building and "is in a much better position to inspect for and repair latent defects."[31]

Becker addressed only that situation in which a defect exists at the time a unit is leased, and reserved for a later date the determination of liability for defects which may develop after the property is leased.[32] This portion of the *Becker* decision is in full accord with stream of commerce strict products liability which imputes liability to a seller or manufacturer if a product is defective at the time it is transferred to a buyer.[33] The landlord is viewed as selling housing;[34] this gives the landlord both the opportunity to inspect and makes the landlord a seller to a buyer—the tenant.

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28. *Green*, 10 Cal. 3d at 624, 517 P.2d at 1173, 111 Cal. Rptr. at 709.

29. *Id.*

30. *Becker*, 38 Cal. 3d at 465, 698 P.2d at 123, 213 Cal. Rptr. at 220.

31. *Id.* at 464, 698 P.2d at 122, 213 Cal. Rptr. at 219 (citing *Green*, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704). *Contra* Dwyer v. Skyline Apartments, Inc., 123 N.J. Super. Ct. 48, 301 A.2d 463, *aff'd mem.*, 63 N.J. 577, 311 A.2d 1 (1973) in which the court concluded that the tenant and not the landlord is in a better position to inspect for any possible defects. 123 N.J. Super. Ct. at 51, 301 A.2d at 466. Further, the *Dwyer* court found that a landlord "does not have the expertise to know and correct the condition, so as to be saddled with responsibility for a defect regardless of negligence." *Id.* at 52, 301 A.2d at 467. A tenant may expect all known defects to be cured but "he does not expect that all will be perfect . . . for all the years of his occupancy with the result that his landlord will be strictly liable for all consequences of any deficiency regardless of fault." *Id.*

32. *Becker*, 38 Cal. 3d at 467 n.5, 698 P.2d at 124 n.5, 213 Cal. Rptr. at 221 n.5.

33. *See generally* Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964).

34. *Green*, 10 Cal. 3d at 627, 517 P.2d at 1175, 111 Cal. Rptr. at 711.

2. *Strict Products Liability*

One policy reason for imputing liability in strict products liability cases was articulated in *Greenman* by the California Supreme Court, which reasoned that the purpose of such liability is to ensure that the cost of injuries is borne by manufacturers rather than the injured person who is powerless to protect himself from defective products.[35] In the case of residential rental units, the *Becker* court suggested that a landlord may finance the increased costs of liability by adjusting the purchase price of a building to reflect additional anticipated costs of repair, or by charging more rent to absorb costs of repair or increases in the cost of insurance.[36]

C. Defect Defined

Justice Traynor, whose seminal decision in *Greenman* permitted plaintiffs to recover for injuries caused by defective products,[37] commented only two years later that, "No single definition of defect has proved adequate to define the scope of the manufacturer's strict liability in tort for physical injuries."[38] Nonetheless, at least two distinct lines of theoretical inquiry have been defined: manufacturing defects and design defects.

1. *Manufacturing Defects*

A product may be defined as defectively manufactured if it fails to match the average quality of similar products.[39] In *Van-*

35. *Greenman*, 59 Cal. 2d at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.

36. 38 Cal. 3d at 465, 698 P.2d at 123, 213 Cal. Rptr. at 220. Whereas, in New York, the court refused to impose strict liability on a landlord when a cabinet fell off a wall causing injury to a tenant. Segal v. Justice Ct. Mutual Housing Cooperative, Inc., 105 Misc. 2d 453, 457-58, 432 N.Y.S.2d 463, 466 (N.Y. Civ. Ct., 1980). The court was fearful that increased liability would lead to higher rents, forced sales of buildings or their complete abandonment, and that increased costs would be borne by the tenant. *Id.* at 458, 432 N.Y.S.2d at 467. In Kaplan v. Coulston, the court disapproved of an earlier decision with a similar fact pattern which found a landlord strictly liable and which relied on policy reasons similar to those cited in *Becker*. 85 Misc. 2d 745, 750, 381 N.Y.S.2d 634, 638 (1976).

37. 59 Cal. 2d at 57, 377 P.2d at 897, 27 Cal. Rptr. at 697.

38. *See* Traynor, *supra* note 12, at 373.

39. *Id.* at 367.

dermark v. Ford Motor Co.,[40] the court applied this definition of defect to an automobile whose brakes failed. Exploding soft drink bottles[41] and power tools lacking adequate set screws[42] are other products that courts have found defective because they varied from the norm or were manufactured with substandard parts.

2. *Design Defects*

If injuries are caused by a product that was not defectively manufactured, a plaintiff may, nonetheless, recover for those injuries if he can show a design defect. This issue was addressed and elucidated by a unanimous court in *Cronin v. J.B.E. Olson Corp.*[43] In *Cronin*, a hasp, installed to hold a bread tray in place in a delivery truck, broke in a collision. The tray struck the driver in the head causing him severe injury.[44] Although the hasp did not cause the injury, the court found that it was a defective condition that substantially contributed to the driver's injuries.[45] Further, the court rejected the Restatement's definition of defectiveness by eliminating the requirement that a plaintiff must prove that a defect was unreasonably dangerous.[46] Accordingly, after *Cronin*, a plaintiff need only show that a product was defective and that it was the proximate cause of his

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40. 61 Cal. 2d 256, 260-61, 391 P.2d 168, 170, 37 Cal. Rptr. 896, 898-99 (1964). The *Vandermark* court, citing *Greenman*, also reasoned that since the product would be purchased and used without inspection, dealers, as well as manufacturers, could be held liable for injuries caused by defects in component parts which other manufacturers produced. *Id.*

In order to analyze the *Becker* decision, it is important to note that a residential unit is comprised of many parts or components. This may be analogous to the automobile in *Vandermark* in which the court decided, "Since the liability is strict it encompasses defects regardless of their source, and therefore a manufacturer of a completed product cannot escape liability by tracing the defect to a component part supplied by another." *Id.* at 261, 391 P.2d at 170, 37 Cal. Rptr. at 898.

41. Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944).

42. *Greenman*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697.

43. 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).

44. *Id.*

45. *Id.* at 127, 501 P.2d at 1157, 104 Cal. Rptr. at 437.

46. *Id.* at 133, 501 P.2d at 1162, 104 Cal. Rptr. at 442. The *Cronin* court feared that adoption of the definition of defect in the Restatement (Second) of Torts § 402A would "require the finder of fact to conclude that the product is, first defective and, second, unreasonably dangerous," placing an undue burden, not contemplated by earlier decisions upon a plaintiff. *Id.*

injury.[47] The standard to be used, however, in determining what would constitute a design defect was not established until six years later in the *Barker v. Lull Engineering Company Inc.*[48] decision.

In *Barker*, the court recognized that the "defectiveness concept defies a simple, uniform definition applicable to all sectors of the diverse product liability domain."[49] Nevertheless, the court established that a product may be defective in design if a plaintiff demonstrates either (1) the failure of the product to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner,[50] or (2) the product's design proximately caused the plaintiff's injury and the defendant fails to prove, in light of any relevant factors, that the benefits of the product's design outweigh the risk of danger inherent in that design.[51] Thus, design defect, one of the theoretical bases for imputing strict liability, may be invoked for products which fall below ordinary consumer expectations of safety, or are not as safely designed as they should be.[52] Further, a jury may determine through hindsight that the design of a product embodies excessive preventable danger.[53]

The traditional strict products liability approach allowed recovery for an injured plaintiff who could prove that a defective product, placed in the stream of commerce, caused his injury.[54] Policy considerations of risk distribution and protection for the innocent or uninformed consumer serve as the foundation for imposition of strict liability.[55] The *Becker* decision modified and expanded the definitions of stream of commerce and defectiveness, and it challenged the established policy consideration of risk distribution.

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47. *Cronin*, 8 Cal. 3d at 134-35, 501 P.2d at 1163, 104 Cal. Rptr. at 443. The hasps which released the trays upon impact, were defective, although it was not determined whether the problem occurred in the manufacturing process or in the choice of materials used in the product's design. *Id.*

48. Barker v. Lull Engineering Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

49. *Id.* at 417, 573 P.2d at 446, 143 Cal. Rptr. at 228.

50. *Id.* at 435, 573 P.2d at 457, 143 Cal. Rptr. at 239.

51. *Id.* at 435, 573 P.2d at 457-58, 143 Cal. Rptr. at 239-40.

52. *Id.* at 418, 573 P.2d at 446-47, 143 Cal. Rptr. at 228-29.

53. *Id.* at 430, 573 P.2d at 454, 143 Cal. Rptr. at 236.

54. *Vandermark*, 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896.

55. *Greenman*, 59 Cal. 2d at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.

III. ANALYSIS

A. Stream of Commerce Approach to Strict Liability

By placing a residential unit in the stream of commerce, the *Becker* court announced that landlords are part of the overall producing and marketing enterprise that should bear the cost of injuries from defective products.[56] Additionally, a series of recent cases has imposed strict liability on mass producers of residential units,[57] on lessors of personal property,[58] and on lessors of personal property leased with a residential unit.[59] These decisions, together with the California Supreme Court's recognition that the modern urban tenant is a consumer of a product—the rental unit,[60] laid the foundation and marked the direction which culminated in the *Becker* decision. Thus, once the court determined that lessors of personal property are part of an overall marketing scheme, that dwellings are consumer products for sale and purchase, and that residential tenants are "consumers" of the units that they rent, it was a logical step to find that landlords who place their units in the stream of commerce can be held strictly liable for defects found therein.[61]

The *Becker* court declared that there need not be any remaining link between the original manufacturer of a building and the subsequent owner/landlord[62] because, "[t]he doctrine of strict liability in tort has been applied not only to manufacturers but to the various links in the commercial marketing chain."[63] The court concluded that landlords are an integral part of the rental enterprise, and they, rather than injured persons who are

56. *Becker*, 38 Cal. 3d at 459, 698 P.2d at 119, 213 Cal. Rptr. at 216.

57. *See, e.g.*, Pollard v. Saxe & Yolles Dev. Co., 12 Cal. 3d 374, 525 P.2d 88, 115 Cal. Rptr. 648 (1974); Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 272, 93 P.2d 799 (1969).

58. *See, e.g.*, Price v. Shell Oil Co., 2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970). The court held that lessors of personal property could be held strictly liable because "[i]n some cases the lessor may be the only member of that enterprise reasonably available to the injured plaintiff." *Id.* at 252, 466 P.2d at 726-27, 85 Cal. Rptr. at 182-83.

59. *See, e.g.*, Fakhoury v. Magner, 25 Cal. App. 3d 58, 101 Cal. Rptr. 473 (1972).

60. *See, e.g.*, Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974).

61. *Becker*, 38 Cal. 3d at 467, 698 P.2d at 124, 213 Cal. Rptr. at 221.

62. *Id.* IRM Corporation bought the building 12 years after construction. *Id.* at 458, 698 P.2d at 117, 213 Cal. Rptr. at 214.

63. *Id.* at 459, 698 P.2d at 119, 213 Cal. Rptr. at 216.

powerless to protect themselves, should bear the cost of injuries resulting from defects in their buildings.[64]

It appears, however, that the court has redefined stream of commerce in strict products liability in order to find landlords strictly liable for latent defects in residential units.[65] In the past, a seller or manufacturer of a new product was held strictly liable in tort for a defective product which was placed in the stream of commerce.[66] The cost of compensating otherwise defenseless victims of manufacturing defects could be spread throughout society by allowing manufacturers and retailers to adjust the price per unit.[67] In prior stream of commerce cases, strict liability was imposed on manufacturers and retailers who were part of the overall manufacturing and marketing of the product.[68] The policy of risk distribution provided a remedy, for an injured plaintiff, from one of the links along the chain in the stream of commerce.[69]

Significantly, a seller of used, but substantially unaltered or unrepaired goods, is not held strictly liable.[70] The rationale for this position is that a seller of used goods has no continuing relationship with the manufacturer, thereby precluding indemnity, cost adjustment, or otherwise dispersing the costs of protection throughout society.[71] Further, a seller of used goods neither makes a representation as to the safety of the product nor maintains a continuing relationship with the item once it is sold.[72] Therefore, for sellers of used products, as for new products, the

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64. *Id.* at 467, 698 P.2d at 124, 213 Cal. Rptr. at 221 (citing Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963)).

65. *Becker*, 38 Cal. 3d at 467, 698 P.2d at 124, 213 Cal. Rptr. at 221.

66. *See, e.g.*, Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964).

67. *Id.* at 262-63, 391 P.2d at 172, 37 Cal. Rptr. at 900.

68. *Id.* at 262, 391 P.2d at 171, 37 Cal. Rptr. at 899.

69. *Id. See generally* Note, *Sales of Defective Used Products: Should Strict Liability Apply?*, 52 S. CAL. L. REV. 805, 816 (1979).

70. La Rosa v. Superior Ct., 122 Cal. App. 3d 741, 748, 176 Cal. Rptr. 224, 228 (1981); Wilkinson v. Hicks, 126 Cal. App. 3d 515, 520, 179 Cal. Rptr. 5, 8 (1981).

71. *Becker*, 38 Cal. 3d at 466, 698 P.2d at 123, 213 Cal. Rptr. at 220.

72. *Id.* at 465-66, 698 P.2d at 123, 213 Cal. Rptr. at 220. As the court noted, "[U]sed machinery is often scrapped or discarded so that resale for use may be the exception rather than the rule." *Id.* The court seems to have recognized the inherent inequity in forcing a seller of used products to bear the cost of injury since the used product may have been altered or used improperly by a prior owner. *See supra* note 70 and accompanying text.

court looks at both the potential for distribution of risk and for representations of safety made to a buyer before imposing strict liability.[73]

In contrast, lessors of personal property are held strictly liable in tort for placing a product in the stream of commerce because the lessor stands in a position to find the retailer or manufacturer, and thus, the risk is spread along the chain in the stream of commerce.[74] It is further expected that a lessor of personalty makes certain warranties regarding the safety of a product leased.[75]

Becker established that a continuing business relationship between a manufacturer and a subsequent buyer/lessor is not essential to the imposition of strict liability on residential lessors. The unavailability of the manufacturer is not a factor militating against liability of others engaged in the enterprise.[76] Therefore, IRM Corporation, which may have had no continuing relationship with the original manufacturer, prior owner, or manager of the used apartment building, was held strictly liable for latent defects even though the potential for indemnification was remote.[77]

The notion of the continuing relationship in the stream of commerce between manufacturers, distributors, and retailers

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73. *Becker*, 38 Cal. 3d at 465-66, 698 P.2d at 123, 213 Cal. Rptr. at 220.

74. *Id.* at 446, 698 P.2d at 123, 213 Cal. Rptr. at 220. *See also* Price v. Shell Oil Co., 2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970).

75. *See, e.g., Price*, 2 Cal. 3d at 249-51, 466 P.2d at 724-26, 85 Cal. Rptr. at 180-82.

76. *Becker*, 38 Cal. 3d at 466, 698 P.2d at 123-24, 213 Cal. Rptr. at 220-21 (citing Ray v. Alad Corp., 19 Cal. 3d 22, 33-34, 560 P.2d 3, 10-11, 136 Cal. Rptr. 574, 581-82 (1977) (successor corporations could be held strictly liable when the successor continues to produce the same product, uses the same product name, and holds itself out to the public as the same enterprise); *Price*, 2 Cal. 3d at 251, 466 P.2d at 726-27, 85 Cal. Rptr. at 182-83 (1970) (equipment installed in a leased vehicle by a lessor proved defective; the lessor, in the business of buying and leasing trucks, was held strictly liable for injury caused by the defective part)).

77. There is also probably no potential for indemnification from agents or brokers who sell residential rental properties. In Easton v. Strassburger, 152 Cal. App. 3d 90, 199 Cal. Rptr. 383 (1984), the court limited its decision to agents and brokers who sell residential real estate, reserving for the future, situations in which brokers sell commercial real estate. *Id.* at 102 n.8, 199 Cal. Rptr. at 390 n.8. By residential real estate, the court seemed to indicate the typical owner/occupant purchaser. *Id.* at 100, 199 Cal. Rptr. at 388. The court found the agent negligent for failing to disclose and to warn prospective purchasers of potential defects in the property. *Id.*

was modified by the *Becker* decision. While the court reasoned that landlords are an integral part of the enterprise of producing and marketing rental housing, and that they have more than an accidental role in the marketing enterprise,[78] the vital relationship is that which a landlord has in his continuing relationship with the property following the renting.[79] Thus, absent the original builder or former owner, the current landlord stands in the position of manufacturer since he will probably not be able to find a prior party from whom to seek indemnity.[80] The stream of commerce begins and ends with the landlord who buys a building.

If the objective of the application of the stream of commerce approach is to distribute the risk of providing a product to society by allowing an injured plaintiff to find a remedy for injury along the chain of distribution, it will probably fail in the landlord/tenant situation. The cost of insuring risk will not be distributed along the chain of commerce but will probably be absorbed by tenants who will pay increased rents.[81] One could argue that this was not the effect sought by the court in earlier cases which anticipated that the cost of risk would be distributed vertically in the stream of commerce.[82] In many cases involving the leasing of residential units, the traditional policy consideration of risk distribution is merely a fiction because the cost of insuring against injury will be distributed to either the

78. *Becker*, 38 Cal. 3d at 466, 698 P.2d at 124, 213 Cal. Rptr. at 221. Justice Lucas stated, "It is illogical to conclude that the landlord here [in Becker] became part of the overall *marketing* scheme in shower doors merely by purchasing property in which they had long since been installed." *Id.* at 484, 698 P.2d at 137, 213 Cal. Rptr. at 234 (Lucas, J., concurring and dissenting) (emphasis in original).

79. *Id.* at 466, 698 P.2d at 124, 213 Cal. Rptr. at 221. In his dissent, Justice Lucas questioned the application of the stream of commerce approach to strict liability in which the landlord has "no direct or continuing relationships with the *manufacturers or marketers* of the particular defective products found on the premises . . . [and] where the relevant relationship is that of landlord to his property and tenants." *Id.* at 483, 698 P.2d at 136, 213 Cal. Rptr. at 233 (Lucas, J., concurring and dissenting) (emphasis in original).

80. A reason favored by the majority for imposition of strict liability is that there may be no manufacturer available from whom an injured party may seek recovery, and the court is primarily interested in an injured party finding adequate recovery for his injury. *Id.* at 466, 698 P.2d at 123, 213 Cal. Rptr. at 220.

81. *See supra* text accompanying note 36. It would seem that builders and purchasers of new buildings will be able to insure at a lower cost than will owners of used buildings. Thus, tenants in older buildings will probably pay disproportionately higher rents for the same or similar product—a rental unit.

82. Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 262-63, 391 P.2d 168, 172, 37 Cal. Rptr. 896, 900 (1964).

landlord or to the tenants.[83]

Determining which landlords may be held strictly liable is an issue related to the policies of risk distribution and implied warranty. For a landlord to be held liable for defective premises, he must be in the business and place a unit in the stream of commerce.[84]

B. Only Those Landlords in the Business Will Be Held Strictly Liable in Tort

The *Becker* court limited liability to those landlords who are engaged in the business of leasing dwellings.[85] Addressing the IRM Corporation's activities, the court stated, "A landlord, . . . owning numerous units, is not engaged in isolated acts within the enterprise but plays a substantial role."[86] However, this statement does not reveal what it means to be in the business, it does not specifically exclude certain lessors of residential property from potential liability, nor does it define "substantial."

Unfortunately, the *Becker* decision provides little guidance for future courts to look to in determining whether a landowner is in the business of leasing dwellings. According to the court's dicta, one who is in the business does not engage in single acts within the rental market, but is a lessor who plays a substantial

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83. The majority found the distribution in adjustment of purchase price, rent, or insurance. *Becker*, 38 Cal. 3d at 465, 698 P.2d at 123, 213 Cal. Rptr. at 221. Justice Lucas found no adjustment potential up the chain, only down to the tenants. *Id.* at 485, 698 P.2d at 137, 213 Cal. Rptr. at 234 (Lucas, J., concurring and dissenting).

The possibility also exists that insurance will not be available to landlords. In a recent decision, the California Supreme Court found an agent negligent for failure to visually inspect property and to disclose a potential defect to prospective buyers. Easton v. Strassburger, 152 Cal. App. 3d 90, 199 Cal. Rptr. 383 (1984). It appears that one of the ramifications of the decision is that real estate brokers are finding it increasingly difficult to purchase liability insurance. It is estimated that in the San Francisco Bay Area there are now only three or four insurance carriers willing to insure brokerage houses for agent negligence. Interview with a licensed real estate broker member of the California Association of Realtors (CAR) and member of the legislative committee of CAR (October 19, 1985). Insurance companies may refuse to write policies for landlords in the future if they see the *Becker* holding as an extension of liability which will result in more frequent plaintiff recovery.

84. *Becker*, 38 Cal. 3d at 464, 698 P.2d at 122, 213 Cal. Rptr. at 219.

85. *Id.*

86. *Id.*

role in the enterprise.[87] Earlier decisions have established that a lessor is in the business of leasing if his activities are analogous to those of the manufacturers or the retailers.[88] Thus, an isolated transaction will exclude a landlord from being in the business.[89] For lessors of real property, it seems that a single transaction of leasing one's own home or a single property is analogous to one who, on a single occasion, resells a product to a neighbor. Such a person is not considered to be in the manufacturing and marketing enterprise and is not strictly liable for defects.[90] Therefore, an unstated requirement for a landlord to be in the business of leasing dwellings appears to be that he earns his living, or a portion of it, through the leasing of properties. The *Becker* court, nonetheless, has left open several critical questions regarding who may be potential defendant landlords.

It remains unclear whether the meaning of "isolated transaction" excludes lessors of a single rental unit, those who rent rooms out of their homes, or those leasing their own homes.[91] The nature of the real estate lease transaction also leads to uncertainty as to the meaning of isolated transaction. For example, if one rents a room in one's home for income and the lease ex-

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87. *Id.* A fear expressed by the dissent was that "Any landlord, even one renting the family home for a year, will now be insurer for defects in any wire, screw, latch, cabinet door, pipe or other article on and in his premises at the time they are let despite the fact that he neither installed the item nor had any knowledge or reason to know of the defect." *Id.* at 479, 698 P.2d at 133, 213 Cal Rptr. at 230.

88. *See, e.g.*, Price v. Shell Oil Co., 2 Cal. 3d 245, 254, 466 P.2d 722, 728, 85 Cal. Rptr. 178, 184 (1970).

89. *Id.*

90. This definition follows the RESTATEMENT (SECOND) OF TORTS § 402A (1965) (limiting strict liability for sellers of defective products to the seller who is engaged in the business of selling such a product). *Id.* Comment f attempts to define what it means to be in the business of selling, and provides that the rule of strict liability does not apply,

> to the occasional seller . . . who is not engaged in the activity as part of his business. Thus it does not apply to the housewife who, on one occasion, sells to her neighbor a jar of jam . . . . The basis for the rule is the ancient one of the special responsibility for the safety of the public undertaken by one who enters into the business of supplying human beings with products which may endanger the safety of their persons and property, and the forced reliance upon that undertaking on the part of those who purchase such goods.

Id. at comment f.

91. *See supra* note 87 and accompanying text. The court has determined that owning and renting five units constitutes being in the business. Fakhoury v. Magner, 25 Cal. App. 3d 58, 64, 101 Cal. Rptr. 473, 476-77 (1972).

tends over several rental periods, the lessor/owner may qualify as being in the business either because he has earned income or because there are several transactions. Similarly, one who rents one's own home for an extended period of time may be strictly liable for injuries if the rental periods are construed as multiple transactions. Also, the potential for imputing liability to anyone who earns income from the renting of dwellings appears to be great because the question of income has never been addressed by the court. Therefore, the court needs to clarify several questions. Does liability exist because one earns income from renting? Will the nature of the unit rented and the status of the lessor mitigate against liability? Is the potential for strict liability limitless in residential lease situations?

If the basis of the *Becker* court's decision to impute liability rests on the policies underlying the stream of commerce approach, then potential liability for a lessor of a room or of his home may actually be remote. In order to satisfy the policies of spreading the risk of doing business throughout society, and dispersing added costs to the community at large, there needs to be a substantial pool of tenants who can absorb, along with the lessor/owner, the costs of providing the product. Thus, because IRM owned and leased numerous units, the cost of the risk could be spread among a large number of tenants.[92] To extend strict liability to an owner of a single unit, without numerous tenants among whom to disperse added costs, would be very harsh.[93]

The untempered glass shower door which broke and injured the tenant in *Becker* was held to be a latent defect in the premises.[94] The question of what is a defect and what kinds of defects in the premises may lead to strict liability is another issue left unsettled by the *Becker* decision.

C. An Untempered Glass Shower Door is Defective

It appears that the *Becker* court has assumed that an un-

92. *Becker*, 38 Cal. 3d at 457, 698 P.2d at 117, 213 Cal. Rptr. at 214.

93. Another issue not addressed by the *Becker* court is the status of lessors of commercial real property who are as much "in the business" as are lessors of residential real estate involving numerous units like IRM Corporation.

94. *Becker*, 38 Cal. 3d at 457, 698 P.2d at 117, 213 Cal. Rptr. at 214.

tempered glass shower door is a latent defect.[95] According to the first prong of *Barker*, the trier of fact would look at the intended or reasonably foreseeable use of the shower door.[96] Since a shower door is a fixture whose primary purpose is to keep water in and thereby prevent damage to the floor and substructure, it seems that an ordinary consumer would find the door performed safely as to its intended use. In applying the second prong of *Barker*,[97] the jury would balance the added cost of tempered glass against the risk of the common occurrence of the slip-and-fall in a shower.[98] The *Becker* court's conclusion that "[i]t is undisputed that the risk of serious injury would have been substantially reduced if the shower door had been made of tempered glass rather than untempered glass,"[99] appears to support application of *Barker's* second prong.

The court is, therefore, expecting landlords to provide the least dangerous or best possible alternative for fixtures in their rental units. This is an expansion of the *Barker* standards.[100] The court in *Becker* is inadvertantly setting building or housing standards that are retroactive in their reach.[101] The decision forces landlords, in at least this limited situation, to replace all untempered glass shower doors with those of tempered glass, or risk strict liability. Thus, the defectiveness standard for residential units is a broadening of the second prong of *Barker* which, after *Becker*, requires a landlord to provide the safest alternative throughout the entire rental unit, rather than to merely balance the risk of injury against the cost of prevention.[102]

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95. *Id.* at 467, 698 P.2d at 124, 213 Cal. Rptr. at 221. *See supra* note 9.

96. *See supra* text accompanying note 52.

97. *See supra* text accompanying note 53.

98. Factors which a jury may consider in applying the balancing standard are:

> the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design.

Barker v. Lull Engineering Co., 20 Cal. 3d at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237 (1978).

99. *Becker*, 38 Cal. 3d at 457, 698 P.2d at 117, 213 Cal. Rptr. at 214.

100. *Barker*, 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225.

101. *See generally* Brannigan, *Record of Appellate Courts on Retrospective Firesafety Codes*, 1 FIRE JOURNAL (Nov. 1981) (discussing retrospective code enactments and constitutional requirements).

102. *Barker*, 20 Cal. 3d at 434, 573 P.2d at 457, 143 Cal. Rptr. at 239. "[W]eighing

If the standard for defectiveness is the best possible alternative, there appears to be no limit to the scope of landlord liability for an injury sustained by a tenant. Must a landlord also take into account the age and ability of a tenant? If, for example, an untempered glass shower door is defective, would not a sliding patio door of untempered glass be defective particularly if small children, who may run into the door, are present? Should a glass door be considered defective if a tenant has poor eyesight and cannot distinguish between a closed and an open door?

As a consequence, the *Becker* decision imposes a heavy burden on landlords to inspect residential units. A prospective buyer of realty will have to inspect each unit in a building in order to adjust the purchase price to reflect any existing defects.[103] Apparently, a seller (who was not also the original builder) will not be liable for indemnity absent any warranties.[104] The fact that in *Becker*, the landlord's maintenance man asserted that "there was no way that a layman could tell any difference between tempered and untempered glass by simply looking at the shower doors,"[105] indicates that a landlord must have knowledge beyond that of a layman in order to effectively inspect a unit.[106]

The ramifications of such a standard may be especially detrimental to purchasers of older buildings who will be forced to perform considerable renovation prior to leasing to tenants. In order to avoid liability, landlords may be inclined to lease units completely stripped of normal fixtures, as they would otherwise incur substantial costs in replacement and in upgrade. It is rea-

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the extent of the risks and the advantages posed by alternative designs is inevitable in many design defect cases." *Id.*

103. *See supra* text accompanying note 36.

104. *Becker*, 38 Cal. 3d at 465, 698 P.2d at 123, 213 Cal. Rptr. at 220. The case of a seller of a used building will probably be seen as analogous to a seller of used personalty who is not held strictly liable if he did not perform substantial alteration or repair.

105. *Id.* at 458, 698 P.2d at 118, 213 Cal. Rptr. at 215. It is surprising that in its discussion of IRM's alleged negligence, the court ignored IRM's violation of the California Health & Safety Code which requires tempered glass in shower and tub enclosures. CAL. HEALTH & SAFETY CODE § 25997 (West 1984).

106. *Becker*, 38 Cal. 3d at 458, 698 P.2d at 118, 213 Cal. Rptr. at 215. *Becker* did not determine the extent of liability for those defects known to the landlord and disclosed to the tenant at the time of the lease. *Id.* at 464 n.4, 698 P.2d at 122 n.4, 213 Cal. Rptr. at 219 n.4. It can be expected that tenants will not be allowed to waive their rights to safe and habitable dwellings.

sonable to assume that any additional renovation costs will be passed on to the tenants.[107]

IV. CONCLUSION

The *Becker* decision eliminates one of the last remaining commercial markets in California to be free of potential strict tort liability. In imputing strict liability to landlords, the California Supreme Court has recognized that lessees have the status of consumer in what is fundamentally a commercial transaction. This outcome was predicted and encouraged by commentators for many years, and the movement of the court toward this decision was not surprising considering the court's increasing concern for the unfavorable position of urban tenants.[108]

The *Becker* court, in attempting to follow a stream of commerce approach to strict liability, has redefined stream of commerce so as to place a landlord in the position of a manufacturer with potentially no other links remaining. Therefore, the policy

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107. Other jurisdictions have refused to extend strict liability to landlords. It appears that these courts are troubled by the potential costs to tenants and by the assumption that landlords have expert knowledge of their complex buildings. *See, e.g.*, Segal v. Justice Ct. Mutual Housing Cooperative, Inc., 105 Misc. 2d 453, 458, 432 N.Y.S.2d 463, 467 (1980) (the court refused to extend strict liability to landlords for fear that strict liability would lead to higher rents after a cabinet fell from the wall injuring the tenant); Dwyer v. Skyline Apartments, Inc., 123 N.J. Super. 48, 56, 301 A.2d 463, 467 (1973) (the court refused to apply strict liability to a landlord in a case in which a faucet came out of the wall scalding the tenant; the landlord's duty extended only to defects of which he had knowledge); George Washington University v. Weintraub, 458 A.2d 43, 48 (D.C. 1983) (the court denied strict liability and decided that it was unreasonable for a landlord to be the insurer of his tenant's flood damaged property); Livingston v. Begay, 98 N.M. 712, 717, 652 P.2d 734, 739 (1982) (the court held that an innkeeper who made a single purchase of a fixture did not have expertise in the operation of the fixture and was not strictly liable for injuries to a tenant/lessee of the unit after the tenant/lessee died of asphixiation caused by a defective heating unit).

It should be anticipated that the California Legislature will act in this area if it appears that substantial damage to the rental housing market will result from the *Becker* decision. The legislature has acted in response to similar situations where the court has extended liability which in turn has created unforeseen effects. For example, the legislature refused to extend liability to lenders who finance construction or repairs of personal or real property when injury or loss occurred to a third party, CAL. CIV. CODE § 3434 (West 1970), shortly after a financial institution was held liable for defective construction of tract homes which it financed. Connor v. Great Western Sav. & Loan Assn., 69 Cal. 2d 850, 447 P.2d 609, 73 Cal. Rptr. 369 (1968).

108. *See supra* text accompanying notes 12-22.

reasons relied upon by the court are somewhat inapplicable to landlord liability. The stated desire to spread the cost of the risk by allowing a tenant to recover from a number of parties in the chain of commerce and by allowing indemnity between the parties will be, in many cases, unattainable in the landlord/tenant situation. Landlords will become the only insurers for tenants and the cost of that insurance will, in all likelihood, be passed along to the tenants.

The court's conclusion that an untempered glass shower door is a latent defect is troubling because it further unsettles the standards for defectiveness set forth in prior design and manufacturing defect cases. *Becker* seems to require that a landlord supply the best possible alternative at the time a tenant leases a unit. Additionally, the *Becker* court determined that landlords who are in the business of renting residential property will be held liable for injuries caused by defects in the premises. The court did not define what it means to be in the business beyond noting that IRM Corporation owned a thirty-six unit building.

The *Becker* decision is far-reaching and important for its protection of tenants. It also established that lessors of residential properties are providers of consumer products. It is unfortunate that the court, in choosing to impose strict liability for a latent defect, refused either to define defect or to use the standards provided by existing case law.

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