plaintiff while working no injustice upon the lessor; the latter can recover the cost of protection as an incident of his business expense. The court in *McClaflin*, as in *Price*,[42] emphasized that the case involved a full-time marketing enterprise, not an isolated or casual transaction.

The Iowa supreme court does not impose strict liability upon a bailor for a defective bailment. If *McClaflin* arose in Iowa, the basis for an argument to impose strict liability would lie in the Uniform Commercial Code whose provisions Iowa has adopted by statute. Of particular interest in this regard is a comment to a section of the Uniform Commercial Code.[43] This comment provides:

> Although this section is limited in its scope and direct purpose to warranties made by the seller to the buyer as part of a contract for sale, the warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract. They may arise in other appropriate circumstances such as in the case of bailments for hire . . . .[44]

The Iowa supreme court abandoned the privity of contract requirement in order to permit recovery from a manufacturer for a breach of warranty.[45] This appears to be in accord with the comment's suggestion that warranties need not be confined to the direct parties of sales contracts.[46] Perhaps, the second part of the comment should not go unheeded: "They [warranties] may arise in other appropriate circumstances such as in the case of bailments for hire . . . ."[47]

The courts have extended strict liability in tort to manufacturers,[48] vendor-builders,[49] retailers,[50] and middlemen.[51] These persons are all vital links in the production and marketing chain which serves the public. It seems only logical, as the *McClaflin* court stated, that the doctrine be extended to commercial lessors. The commercial lessor is a key link in the commercial chain. The volume of rental companies grows every year. Rental companies lease to the public such potentially dangerous articles as cars, boats, planes, trailers, and power tools. To place the doctrine of strict liability in tort upon the commercial lessor would insure that maximum safety precautions will be taken in order to prevent defects. This, in turn, would raise to an even higher level the reliance and trust which the public can feel when using a product. If the number of injuries due

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42 Price v. Shell Oil Co., 79 Cal. Rptr. 342 (Cal. App. 1969).

43 UNIFORM COMMERCIAL CODE § 2-313, Comment 2 (this section has been incorporated by IOWA CODE § 554.2313 (1966)).

44 *Id.*

45 State Farm Mut. Auto. Ins. Co. v. Anderson-Weber, Inc., 252 Iowa 1289, 110 N.W.2d 449 (1961).

46 UNIFORM COMMERCIAL CODE § 2-313, Comment 2.

47 *Id.*

48 Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 65, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

49 Schipper v. Levitt & Sons Inc., 44 N.J. 70, 207 A.2d 314 (1965).

50 Alvarez v. Felker Mfg. Co., 230 Cal. App. 2d 987, 41 Cal. Rptr. 514 (1964).

51 Canifex v. Hercules Powder Co., 46 Cal. Rptr. 552 (1965); Piercefield v. Remington Arms Co., Inc., 375 Mich. 85, 133 N.W.2d 129 (1965).

to defects in a product can be reduced even a fraction, if yet one more safety check is encouraged by the imposition of the doctrine, then the extension of strict liability to a commercial lessor is certainly a logical one.

JACK C. WILLIAMSON

Torts—THE DOCTRINE OF STRICT LIABILITY IN TORT CAN BE APPLIED TO HOME BUILDERS.—*Kriegler v. Eichler Homes, Inc.* (Cal. Ct. App. 1969).

Plaintiff homeowner brought an action for damages sustained as a result of the failure of his home's radiant heating system. Defendant had constructed the home and supervised the installation of the heating system by a contractor. In 1952 the completed house was sold to plaintiff's predecessor, who sold it to plaintiff in 1957. Failure of the heating system due to corrosion of improperly installed metal tubing occurred in 1959. The trial court found that as a result of defendant's negligence the value of plaintiff's home was diminished by $5,073.18, but that regardless of negligence, defendant was liable to plaintiff in the above amount on the theory of strict liability in tort because the radiant heating system, as installed, was defective. On appeal to the California Court of Appeals, *Held*, affirmed, the doctrine of strict liability in tort can be applied to home builders. *Kriegler v. Eichler Homes, Inc.*, 74 Cal. Rptr. 749 (Cal. Ct. App. 1969).

Although the doctrine of *caveat emptor*[1] has long been abolished with respect to manufacturers and sellers of chattels, it remained a viable doctrine in sales of real estate until more recently.[2] Under that rule, the buyer could not recover from the builder for defects in construction unless he had obtained an express warranty or could prove fraud or misrepresentation.[3] Since the end of World War II there has been a tremendous increase in the number of low-cost, mass-produced homes built by developers who specialize in this type of construction. Because of this fact, and because of the unfair treatment the buyer receives under the doctrine of *caveat emptor*, the courts of many jurisdictions have attacked the doctrine. The attack has centered around both contract and tort law.

The first exception to the doctrine appeared as dictum in the English case of *Miller v. Cannon Hill Estates, Ltd.*[4] In that case, the court stated that where the sale of a dwelling takes place before construction is completed, the builder

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[1] "Let the buyer beware (or take care)." BLACK'S LAW DICTIONARY 281 (4th ed. 1968).

[2] Levy v. C. Young Constr. Co., 46 N.J. Super. 293, 134 A.2d 717 (1957).

[3] Bearman, *Caveat Emptor in Sales of Realty, Recent Assaults Upon the Rule*, 14 VAND. L. REV. 541 (1961).

[4] 2 K.B. 113 (1931) (house purchased in course of construction later found uninhabitable due to dampness).

impliedly warrants that the dwelling will be completed in a workmanlike manner, constructed of proper materials, and be fit for habitation when completed.[5] This dictum has been followed in several American cases, including one where the plaintiff's basement became flooded with sewage due to improper connection of the sewer line.[6] In that case, the court found that "the house, when sold, was still in the course of construction and incomplete; and the bargain implied in law between the sellers and the buyers was the completion of the entire house in such a way that it would be reasonably fit for its intended use, and that the work would be done in a reasonably efficient and workmanlike manner."[7] In a 1964 decision the Supreme Court of Colorado, using the implied warranty theory, found no reason for distinguishing between houses which were under construction at the time of sale and those which were completed.[8] The court said the proposition that "a different rule should apply to the purchaser of a house which is near completion than would apply to one who purchases a new house seems incongruous. To say that the former may rely on an implied warranty and the latter cannot is recognizing a distinction without a reasonable basis for it."[9] Rather than rely upon implied warranty, however, the courts of some jurisdictions have turned to tort law as a means of finding the builder liable. Thus in *Caporaletti v. A-F Corp.*,[10] where the plaintiff was injured in a fall on a defectively constructed stairway in her home, the court held the builder and vendor liable for negligence.

Although the implied warranty and negligence theories improved the buyer's position, he was still presented with some difficulties. Implied warranty often involved intricacies of the law of sales, and negligence required the pleading and proof of the builder's negligent acts. Recognizing these problems, the court in *Kriegler* has applied the theory of strict liability in tort to home builders. California has long been a leader in the rapidly developing law of products liability. The 1963 landmark case of *Greenman v. Yuba Power Products, Inc.*[11] is considered the leading case applying the doctrine of strict liability in tort where injuries result from defective products. In allowing the husband of the purchaser of a defective power tool to recover against the manufacturer, the court in *Greenman* held:

> A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. . . .
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> . . . .
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> . . . The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manu-

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5 *Id.* at 120.

6 Vanderschrier v. Aaron, 103 Ohio App. 340, 140 N.E.2d 819 (1957).

7 *Id.* at 342, 140 N.E.2d at 821.

8 Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1964) (basement walls of plaintiff's newly constructed home cracked).

9 *Id.* at 83, 388 P.2d at 402.

10 137 F. Supp. 14 (D.D.C. 1956), *rev'd* on other grounds, 240 F.2d 53 (D.C. Cir. 1957).

11 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr 697 (1962).

> facturers that put such products on the market rather than by the injured persons who are powerless to protect themselves. Sales warranties serve this purpose fitfully at best.[12]

The defendant in *Kriegler* conceded that strict liability in tort applied to physical harm to property, but contended that the doctrine should not be extended to homes or builders.[13] In rejecting this contention, the court of appeals stated:

> So far, it has been applied in this state only to manufacturers, retailers and suppliers of personal property and rejected as to sales of real estate . . . . [T]he reasoning behind the doctrine applies to any case of injury resulting from the risk-creating conduct of a seller in any stage of the production and distribution of goods.
>
> We think, in terms of today's society, there are no meaningful distinctions between Eichler's mass production and sale of homes and the mass production and sale of automobiles and that the pertinent overriding policy considerations are the same.[14]

The court in *Kriegler* went on to point out that the basis of the builder's liability is the buyer's reliance on the skill of the builder, the inability of the buyer to find latent defects through his own inspection, and the fact that the builder is better able to absorb the expense of correcting the defects. The imposition of strict liability principles on builders does not, however, make them insurers of the safety of all who thereafter come on the premises.[15] Further, in determining whether a defect exists, the test is one of reasonableness rather than perfection.[16]

The first holding that strict liability could be applied to home builders appeared in *Schipper v. Levitt & Sons, Inc.*[17] (cited with approval in *Kriegler*), where the infant child of the lessee of a house was burned while turning on the hot water in a bathroom sink. The builder had failed to install the recommended mixing valve on the heating system so that water went directly from the heating system boiler to the bathroom tap at extremely high temperature. The New Jersey supreme court recognized that because the average home buyer is unable to inspect a dwelling for defects, he must rely on the skill of the developer, and the public interest dictates that if injury results from defective construction, its cost should be borne by the developer who created the danger and who is in a better economic position than the injured party to bear the loss.[18] Although *Schipper* involves a personal injury rather than property damage, and although it suggests the use of either implied warranty or strict liability, the court, as in *Kriegler*, compared the builder of homes to the manufacturers of automobiles, airplanes, and other chattels. The court stated: "When their marketed products are defective and cause injury to either immediate or remote users, such manufacturers may be held accountable under

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12 *Id.* at 62, 377 P.2d at 900-01.
13 Kriegler v. Eichler Homes, Inc., 74 Cal. Rptr. 749, 752 (Ct. App. 1969).
14 *Id.*
15 *Id.* at 753.
16 *Id.*
17 44 N.J. 70, 207 A.2d 314 (1965).
18 *Id.* at 91, 207 A.2d at 325.

ordinary negligence principles . . . as well as under expanding principles of warranty or strict liability."[19]

The application of strict liability in tort to home builders was rejected as recently as 1968[20] on the grounds that builders cannot limit their liability through disclaimers or express warranties, that it is easier for the buyer of a home to trace the source of a defect to the builder than it is for a consumer to trace the source of a defect in a chattel, and that the home buyer has the opportunity to make an adequate inspection of the premises before the sale is completed.[21] The decision in *Kriegler*, however, seems to be a logical extension of the doctrine of strict liability in tort, as well as a more accurate reflection of current trends in public policy. Originally applied to cases involving defective food and drink, then to other products intended for intimate bodily use, strict liability in tort has since been extended to a wide variety of products.[22] To most buyers, the purchase of a home is the largest investment they will ever make. That they should have the same protection in the purchase of a home as they do in the purchase of other products has been expressed by one writer in the following words:[23]

> Accustomed to buying items which, though relatively inexpensive and insignificant, cross the merchant's counter with an implied warranty of merchantability and fitness for a particular purpose attached, . . . the consumer, not without some justification, logically expects that the law will protect him with equal vigor in a purchase as significant (to his status, his every-day life, and his wallet) as a new home.

Although strict liability in tort precludes the sales law defenses[24] which were sometimes available to the builder under implied warranty, and frees the buyer from having to plead and prove negligence, the builder is not left completely defenseless. The plaintiff must plead and prove that there was a defect in design or manufacture of which he was not aware, that said defect did in fact cause the injury complained of, and that the instrumentality was used in a way it was intended to be used. In addition, assumption of the risk may be a valid defense.[25]

No Iowa cases dealing with the liability of home builders for construction defects have been found. In *State Farm Mutual Automobile Insurance Co. v. Anderson-Weber, Inc.*,[26] however, the Supreme Court of Iowa used implied warranty in holding the dealer and manufacturer of an automobile liable for injuries received when the automobile caught fire due to defective wiring. The court said: "Liability of a manufacturer for breach of an implied warranty is

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19 *Id.* at 82, 207 A.2d at 321, citing MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

20 Conolley v. Bull, 258 Cal. App. 2d 183, 65 Cal. Rptr. 689 (1968).

21 *Id.* at 196, 65 Cal. Rptr. at 696.

22 W. PROSSER, TORTS § 97 (3d ed. 1964).

23 Bearman, *Caveat Emptor in Sales of Realty, Recent Assaults Upon the Rule*, 14 VAND. L. REV. 541 (1961).

24 1 CCH PROD. LIAB. REP. ¶ 4300.

25 1 CCH PROD. LIAB. REP. ¶ 4360.

26 252 Iowa 1289, 110 N.W.2d 449 (1961).

not new in Iowa. While such liability is frequently applied in connection with food or drink products, it is not limited thereto. As subsequently noted, it has recently been applied in other jurisdictions in a much wider field such as automobiles."[27] This language would seem to indicate a willingness on the part of the Iowa supreme court to extend implied warranty even further, perhaps to include home builders. The differences between implied warranty and strict liability in tort are largely theoretical. The expression of the seller's liability in terms of warranty is simply a convenient legal device to accomplish the same result that is achieved through strict liability.[28] This has been recognized by the Iowa supreme court.[29] "Confusion has existed as to whether a products liability case should be pleaded in and governed by the law of tort or contract. . . . [W]e think the distinction is no longer very real as long as the plaintiff is in the distributive or consumer chain."[30] Since the Iowa supreme court recognizes the similarities between the contract and tort theories of recovery, and is apparently willing to allow recovery against the manufacturers and sellers of a wide variety of products, the application of strict liability in tort to home builders would be a logical step for the court to take.

MICHAEL JOYNT

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[27] *Id.* at 1295, 110 N.W.2d at 452.
[28] 1 CCH PROD. LIAB. REP. ¶4040.
[29] Wagner v. Larson, 257 Iowa 1202, 136 N.W.2d 312 (1965) (personal injury to operator of silo unloader).
[30] *Id.* at 1221, 136 N.W.2d at 323.