AAS PROVENCAL V. SUPERIOR COURT OF SAN DIEGO COUNTY: AN APPRAISAL EXPERT'S VIEW

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The opinion in this case resulted from consolidated proceedings relative to two separate construction defect cases filed against The William Lyon Company and Lyon Communities, Inc., one involving a single-family subdivision (*Aas*) and the other a condominium project (*Provencal*).[1] Among the plaintiff's allegations were building code violations, failure to meet a reasonable and workmanlike standard of care, and deviation from approved plans and specifications.

The trial court granted motions in limine brought by the defendant Lyon and related subcontractors excluding evidence of construction defects which allegedly caused economic loss, but without personal injury or physical damage to other property, and also excluding evidence of post-repair stigma damages. Three issues were considered by the court:

- whether developers, general contractors and subcontractors owe a duty of care to individual homeowners and community associations with respect to mass-produced housing;
- whether homeowners and associations can recover damages based on negligence in construction defect actions for economic losses; and
- whether homeowners and associations may recover post-repair stigma damages.

Duty of Care

While recognizing that the primary issues in the case related to damage rather than duty, the court nonetheless addressed this issue, ostensibly for the purpose of clarifying duty of care as it relates to the concept of a "special relationship" necessary to establish liability for negligence in the absence of contractual privity. The defendant (Lyon) contended that a "special relationship" as defined in *J'Aire*[2] did not exist, a concept based on several

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1. Aas v. The Superior Court of San Diego County, 64 Cal.AppAth 916, 75 Cal.Rptr.2d 581 (1998).

2. J'Aire Corporation v. Gregory, 24 Cal.3d 799, 598 P.2d 60, 157 Cal.Rptr. 407 (1979).

factors outlined in the earlier *Biakana*[3] case for establishing liability to a third party plaintiff. Among these are the following *"Biakanja* factors" which were considered in *Aas/Provencal:*

- extent to which a transaction is intended to affect the plaintiff, • foreseeability of harm,
- certainty of injury to plaintiff,
- connection between defendant's conduct and alleged injury to plaintiff, • moral blame attributed to defendant's conduct, and
- policy of preventing future harm.

While the trial court ruled there was no "special relationship" between plaintiff and defendant which would allow recovery of economic damages, the appellate court disagreed, ruling that the *Biakanja* test did result in a special relationship, and moreover equated the existence of such a special relationship with a duty of care. The same factors were considered in *Sabella,*[4] a construction defect case discussed post, where the court ruled that a builder/ contractor owes a "duty of care in construction" to "the class of prospective homebuyers for which [the defendant] admittedly built the dwelling."

Analysis of the *Biakanja* factors is acknowledged to be a matter of judgment, though it is interesting, within the context of the *Aas/Provencal* case, that the court ruled the plaintiffs' "allegations ... are sufficient to show the requisite certainty… that petitioners have suffered latent harm," while subsequently denying recovery of economic damages.

Recovery of Damages for Construction Defects

At issue is whether owners of mass-produced housing and/or homeowner associations can recover economic losses in negligence against developers, general contractors and subcontractors for construction defects, when the alleged defects have not resulted in personal injury or physical damage to other property.'

While seemingly acknowledging some difficulty in distinguishing "economic loss" from "property damage," the court applies the "economic loss doctrine" outlined in *Seely,*[6] which draws a clear distinction between tort recovery for physical injury and warranty recovery for economic loss. In doing so, the court effectively denies recovery of economic damages in negligence, following the reasoning that a manufacturer (i.e., a developer of mass-

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Biakanja v. Irving, 49 Cal.2d 647, 320 P.2d 16, 65 A.LR.2d 1358 (1958).

4. Sabella v. Wisler, 59 Cal.2d 21, 377 P.2d 889, 27 Cal.Rptr. 689 (1963).

5. Defined as "property other than the defectively constructed portion of the real property itself' (Aas, 64 Cal.AppAth at 925).

6. Seely v. White Motor Company, 63 Cal.2d 9,403 P.2d 145,45 Cal.Rptr. 17 (1965).

produced housing) can only be held strictly liable for physical injuries caused by defects, not for economic losses associated with failure to meet expectations.[7] It is noteworthy that *Seely* involved the purchase of a commercial truck, while the subject involves residential housing, a product not generally purchased for economic purposes unique to the buyer, who would not properly be considered a "merchant" under the Uniform Commercial Code. *Seely* ostensibly involved potential liability for the plaintiff's ordinary business risk, while the economic expectations for residential housing are appropriately measured against the market, a much less subjective standard and a critical distinction between *Seely* and *Aas/Provencal.*[8]

Another interesting aspect of the *Seely* case is the application of the economic loss doctrine to actions in negligence, since negligence was not even an issue in the case. *Seely* rejected in dicta direct and indirect economic losses based on strict liability, but stated that strict liability should apply to physical damage to plaintiff s property, holding that "physical injury to property is so akin to personal injury that there is no reason to distinguish them,"[9] but impliedly creating a distinction between physical damage and economic losses.

Despite the dictum extension of the economic loss doctrine to negligence actions, the *AaslProvencal* opinion properly notes that California courts have nonetheless applied *Seely's* limitation on a manufacturer's liability to negligence actions. In *Sacramento Regional Transit District,*[10] for example, the cost to repair broken fuel tank supports in municipal buses was considered an economic loss, not recoverable in a tort action for negligence against a manufacturer, although *Sacramento Regional Transit District* again points out the application of the Uniform Commercial Code to commercial transactions, which are arguably different from the ordinary purchase of consumer products, including residential housing.[11] In applying the *Seely* "economic loss doctrine," a number of real estate-related cases are discussed in *Aas/Provencal,* most involving damages for negligence related to defective construction.

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7. A separate opinion by Justice Peters in Seely concurred with the judgment, but dissented with respect to the rationale used. Justice Peters specifically took issue with the contention that economic losses to a plaintiff injured by a defective product would be compensable, while economic losses sustained under similar circumstances absent personal injury could not be recovered.

8. In his dissent, Justice Peters distinguished between strict liability and implied warranty of fitness for a particular purpose, recognizing that strict liability should reasonably apply to products purchased by "ordinary consumers," which need conform only to what the product is ordinarily expected to do, rather than to their suitability for a particular business purpose.

9. Seely v. White Motor Company, 63 Cal.2d at 19, 403 P.2d at 152.

10. Sacramento Regional Transit District v. Grumman Flexible, 158 Cal.App.3d 289, 204 Cal.Rptr. 736 (1984).

11. This distinction is also apparent in the extension of strict liability, a consumer remedy separate and apart from commercial remedies under the UCC, to real estate.

Sabella involved an allegation of negligence due to improperly compacted soil beneath a dwelling, resulting in settlement and extensive damage to a single-family home when a sewer pipe broke. Both the trial and appellate courts ruled in favor of the homeowner, specifically distinguishing between standards applied to building contractors as opposed to "conventional manufacturers of goods."[12] Although prior to the *Seely* decision, this distinction is critical as it relates to application of the "economic loss doctrine" to construction vs. manufacturing-related defects, and was utilized by the court in distinguishing Stewart, is a case involving recovery for negligent construction of a swimming pool, from *Wyatt*[14] which involved negligent manufacture of an automobile, where the manufacturer was held exempt from liability. Also referenced in *Sabella* (but not in *Aas/Provencanl) is Bause,*[15] another case involving recovery for negligent construction of a swimming pool. The *Aas/Provencal* court rationalizes *Sabella* (and *Stewart)* by separating the defective component (soil) from other property (the house) which suffered "resultant damage," but does not address *Bause,* which clearly involved only damage to the defective product.

In *Connor,*[16] homeowners in a residential tract sued for defects caused by negligent construction of homes on expansive soil, which resulted in cracked foundations and other "resultant" damage. Although the case was primarily concerned with the liability of a construction lender for negligence,[17] the Supreme Court's decision to impose liability for negligence noted the importance of the home as a "major investment" and "the only shelter" for a, typical buyer." The court believed that it was "doubly important" to protect a homeowner from construction defects "that could prove beyond his capacity to remedy."[19] This decision reaffirmed Sabella, and is particularly significant because it came three years after *Seely.* As in *Sabella,* however, the *Aas/Provencal* opinion distinguishes between the defective soil and resultant damage to the house, also indicating that *Connor* "did not involve a claim of negligence for recovery of purely economic damages," although distinguishing property damage from economic loss is often difficult, as noted in the decision.

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12. Sabella v. Wisler, 59 Cal.2d at 30, 377 P.2d at 894.
13. Stewart v. Cox, 55 Cal.2d 857,362 P.2d 345,13 Cal.Rptr. 521 (1961).
14. Wyatt v. Cadillac Motor Car Division, 145 Cal.App.2d 423, 302 P.2d 665 (1956).
15. Bause v. Anthony Pools, Inc., 205 Cal.App.2d 606,23 Cal.Rptr. 265 (1962).
16.. Connor v. Great Western Savings and Loan Association, 69 Cal.2d 850, 447 P.2d 609, 73 Cal.Rptr. 369 (1968).
17. Where the lender was ruled to be an "active participant in a home construction enterprise."
18. Connor v. Great Western Savings and Loan Association, 69 Cal.2d at 867, 447 P.2d at 618.
19. Id.

The *Kriegler*[20] case involved 0a defective radiant heating system in a single-family home, which ultimately required replacement of the entire heating system. There was no indication that failure of the heating system resulted in damage to other property, with the court relying on the New Jersey *Schipper*[21] decision in ruling for the plaintiff homeowner on strict liability,[22] stating in part that certain home construction defects endanger well-being, and may result in serious injury, although there was no personal injury in *Kriegler*. The court noted that "the public interest dictates that if such injury does result from the defective construction, its cost should be borne by the responsible developer who created the danger and who is in the better economic position to bear the loss rather than the injured party who justifiably relied on the developer's skill and implied representation."[23]

Cooper[24] involved individual condominium owners, and an action against the architect for negligence in design and construction supervision, resulting in alleged poor workmanship, code violations, and deviation from approved plans and specifications. Although the trial court had entered a judgment of dismissal in favor of the defendant, the Court of Appeal disagreed. The fact distinguishing Cooper from *Aas/Provencal* was the fact that the issue in *Cooper* was the malpractice liability of a professional rather than the liability of a manufacturer for a defective product.

J'Aire is the only one of the seven cases considered by the court which did not involve an allegation of defective construction. At issue was the negligence of a general contractor for delays in completion of a construction project contracted by the property owner, resulting in economic losses to the tenant. Whether the contractor, who was not in privity with the tenant, owned a duty of care was one issue in the case, giving rise to the "special relationship" concept via application of the six Biakanja factors. The Supreme Court reversed the trial court's judgment of dismissal, reasoning that "where the risk of harm is foreseeable.... an injury to the plaintiffs economic interests should not go uncompensated merely because it was unaccompanied by any injury to his person or property."[25] Recoverability, it was noted, also required that damages not be "wholly speculative," "nor the injury part of the plaintiff's ordinary business risk,"[26] as was the case in *Seely. J'Aire* goes furthest in allowing recovery for purely economic loss in a negligence action involving

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20. Kriegler v. Eichler Homes, Inc., 269 Cal.App.2d 224,74 Cal.Rptr 749 (1969).
21. Schipper v. Levitt & Sons, Inc., 44 N.J. 70,207 A.2d 314 (1965).
22. A ruling by the trial court in favor of the plaintiff on a negligence cause of action was reversed due to lack of evidence, as the plaintiff did not file an appellate brief; this question is largely moot, however, since Kriegler was able to recover damages in strict liability.
23. Kriegler, 269 Cal.App.2d at 228.
24. Cooper v. Jevne, 56 Cal.App.3d 860,128 Cal.Rptr. 724 (1976). 25.
25. J'Aire, 24 Cal.3d at 805.
26. J'Aiie, 24 Cal.3d at 808.

real property, and while *Aas/Provencal* emphasizes *J'Aire* in its analysis of duty, the court distinguishes *J'Aire* from the standpoint of damages because the case did not involve defective construction.

In *Huang*,[27] plaintiffs purchased an apartment building, and subsequently sought recovery against the builder/developer, architect and civil engineer for alleged negligence in design and construction which resulted in extensive structural damage, along with other structural and design defects which had not caused actual physical damage. The trial court ruled against recovery in negligence for purely economic losses, i.e., cost to repair defects which had not yet resulted in actual damage, while allowing recovery for repair of physical damage, which was not considered to be an "economic loss." The Court of Appeal disagreed as to non-recovery of economic losses, citing *J'Aire*, where the court "allowed recovery of economic loss to extend beyond the area of professional negligence in the rendition of services ."[28] The court also put a somewhat different spin on *Seely*, observing that the *Seely* court "limited recovery in negligence and strict liability tort actions to damages for personal injuries and to physical damages *to plaintiff's property* [emphasis added]."[29] Because of its reliance on *J'Aire*, *Aas/Provencal* declines to follow the *Huang* decision, again citing the primary difference between the cases, the fact that *J'Aire* did not involve an action for construction defects, and is thus inapplicable.

Sumitomo Bank[30] involved the acquisition of a condominium project by the secured construction lender at a trustee sale, after the developer defaulted on the loan. The bank subsequently sued the builder for latent defects, including structural retaining walls, drainage, waterproofing, roofing, and cracking of concrete slabs and pavement. On appeal, the court reversed the trial court's judgment of dismissal relative to the negligence cause of action. The decision cited *Sabella* in noting that "a builder must exercise reasonable care toward those who purchase a housing structure,"[31] and *Connor*, stating that "negligent construction principles rest on a policy determination that purchasers of homes should not be harmed by defective housing caused by the breach of a duty to construct properly."[32] The *Aas/Provencal* decision factually distinguishes *Sumitomo Bank* as involving resultant damage, similar to findings in *Sabella* and *Connor*, although the facts of the *Sumitomo* case provide no evidence that the damage was "resultant."

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27. Huang v. Garner, 157 Cal.App.3d 404, 203 Cal.Rptr. 800 (1984).
28. Huang, 157 Ca1.App.3d at 422, 203 Cal.Rptr. 811.
29. Huang, 157 Ca1.App.3d at 420,203 Cal.Rptr. 810.
30. Sumitomo Bank of California v. Taurus Developers, Inc., 185 Ca1.App.3d 211, 229 Cal.Rptr. 719 (1986).
31. Sumitomo Bank of California, 185 Ca1.App.3d at 223, 229 Cal.Rptr. 726.
32. Sumitomo Bank of California, 185 Cal.App.3d at 223, 225 Cal.Rptr. 727.

Application of the *Seely* economic loss doctrine to tract housing is interesting. *Seely* involved purchase of a manufactured product for a business purpose, and effectively made the buyer bear the responsibility for his or her ordinary business risk. Residential housing is unquestionably different in several respects, notably in terms of economic expectations which are less unique and more market-driven, and the nature of the construction process itself, which is much less standardized than most manufacturing processes. This distinction was clearly recognized in the pre-*Seely Sabella* case, distinguishing between standards applied to building contractors vs. "conventional manufacturers of goods," The issue was also addressed in the *Sacramento Regional Transit District* case, which notes that "transactions involving the construction or modification of structures ... are generally not governed by the Uniform Commercial Code," and that "judicial creation of a tort remedy for economic loss caused by the negligence of a builder of a structure poses no conflict with the law of sales as set forth in the Uniform Commercial Code."[33] Moreover, Connor recognized the importance of protecting a homeowner's major investment .and primary shelter from construction defects which may be beyond the typical owner's ability to remedy.[34]

Also troublesome is the concept of "resultant damage" to other property, which is used to rationalize the *Sabella*, *Connor* and *Sumitomo Bank* decisions in light of the economic loss doctrine. The *Seely* application of different substantive rules to different kinds of injury requires differentiating among these types of injury, which has led to a preoccupation with "resultant" damage vs. damage to the defective product. If residential housing is considered a product, and has suffered damage, is it reasonable to separate component parts of the product (e.g., soil) for purposes of judging whether or not a plaintiff can recover damages under a negligence theory? This issue was squarely addressed in *Fieldstone*,[35] which presented the question of whether defective bathroom sinks installed in tract homes merely damaged themselves, or whether specific defects caused damage to other, non-defective portions of the sinks. The *Fieldstone* court acknowledged that jurisdictions differ as to the availability of tort recovery where the sole physical injury is to the product itself, ultimately following the *Seely* economic loss doctrine in ruling against recovery for economic damages under a negligence theory.[36]

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33. Sacramento Regional Transit District, 158 Cal.App.3d at 299, 204 Cal.Rptr. 743.

34. Only in Eichler did the court specifically deny a meaningful distinction between the mass production and sale of homes, as opposed to automobiles and/or other consumer products.

35. Fieldstone Company v. Briggs Plumbing Products, Inc., 54 Cal.App.4th 357,62 Cal.Rptr.2d 701 (1997).

36. The concept of resultant damage appears to be a post-Seely phenomenon; Seely did not explicitly distinguish between physical damage to the defective product vs. other property, stating instead that strict liability (and by extension, negligence) should apply to physical damage to plaintiff's property.

Differences in the ability to recover from a design professional vs. a developer, builder or contractor presents yet another apparent inconsistency for homeowners seeking damages in negligence for defective construction. The court effectively holds builders to a different standard from architects and engineers, notwithstanding the fact that negligence by any party involved in the construction process can have the same result. In discussing strict liability, the court in *Sacramento Regional Transit District* cites another case in stating that "the standard of strict liability has been held to apply to a defect in design as well as a defect in manufacture . . ."[37] The essential question is whether recovery should reasonably depend on whose negligence results in failure of a structure.

Distinguishing construction defects from other types of economic losses, as the court did in its analysis of *J'Aire,* is also questionable. Quoting from the court's opinion in *J'Aire,* which is based on CIVIL CODE SECTION 1714, is the principle that "every person is responsible for injuries caused by his or her lack of ordinary care . . . [without distinguishing] among injuries to one's person, one's property or one's financial interests.... recovery for injury to one's economic interests, where it is the foreseeable result of another's want of ordinary care, should not be foreclosed simply because it is the only injury that occurs."[38]

Recovery of Stigma Damages

The *Aas/Provencal* opinion notes two distinct measures of damages used to compensate for injury to property - diminution in value and cost to repair.[39] In general, the measure of damages for injury to property caused by negligence is the lesser of the two,[40] although courts have noted that the "lesser of rule is not a fixed, inflexible measure of property damage, and "whatever formula is most appropriate to compensate the injured party for the loss sustained ... will be adopted."[41] Two cases specifically allowed recovery of repair costs in excess of value diminution,[42] establishing what has become known as the "personal reason exception."

Post-remediation "stigma" damage is generally considered to represent the residual loss of market value after completion of repairs, although the court

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37. Silverhart v. Mount Zion Hospital, 20 Ca1.App.3d 1022, 98 Cal.Rptr. 187 (1971). 38. J'Aire, 24 Ca1.3d at 806.

39. The cost to repair standard entails the cost of restoring a damaged property to its condition immediately preceding the injury, plus loss of use. It might reasonably be argued that cost of restoration to pre-damaged condition should include any residual "stigma" or market resistance after completion of physical repairs.

40. Mozzetti v. City of Brisbane, 67 Cal.App.3d 565,136 Cal.Rptr. 751 (1977).

41. Basin Oil Co. v. Baash-Ross Tool Company, 125 Cal.App.2d 578,606 (1954).

42. Heninger v. Dunn,101 Cal.App.3d 858,162 Cal.Rptr.104 (1980); and Omdorff v. Christiana Community Builders, 217 Cal.App.3d 683,266 Cal.Rptr. 193 (1990).

notes no existing case law authority in California specifically permitting recovery of stigma damage in a case involving damage to real property. Because of a lack of guidance from California courts on this issue, a number of treatises have been written, arguing both for and against recovery of damages for residual stigma. One commentator, addressing the apparent difficulty in recovering stigma damages for construction defects under Mozzetti, suggests modifying the general rule to allow recovery of the lesser of diminution in value or repair costs *plus residual depreciation.*[43] Another treatise on the subject of stigma in environmental cases characterizes such damages as invariably conjectural and speculative, and argues strongly against recovery of stigma damages, unless stigma actually results in an injury, as in a lower price realized upon subsequent sale.[44]

Aas/Provencal affirms the trial court's judgment excluding evidence of post-repair stigma damages, suggesting that such damages are remote and/or speculative. The court takes this position despite citing two out-of-state cases which clearly support the concept of stigma damages, where such damage was corroborated by market evidence.

McAlonan[45] involved a condominium project with construction defects, including damage to the foundation. The Colorado Court of Appeals affirmed the trial court's jury instruction relative to damages, noting that "plaintiff is entitled to such damages as necessary to make her whole,"[46] and that such damages were properly "measured as cost of repair plus any diminution in market value as repaired."[47]

In *Anderson*[48] negligence actions were brought against a developer and builder by homeowners alleging damage due to water intrusion into basements. The Wyoming Supreme Court held that for dwellings used for the personal purpose of the owner, in addition to repair cost, "diminished value ... because of a public awareness of a water problem, is also recoverable."[49]

Santa Fe Partnership[50] was a California case addressing the issue of stigma damages in an environmental context, noting that "courts which have entertained such claims appear to suggest stigma damages could be a proper element of damages in cases presenting substantial evidence the property

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43. Charles L Stott, Stigma Damages: The Cast for Recovery in Condominium Construction Defect Litigation, 25 CALIFORNIA WESTERN LAW REVIEW 367 (1989).

44. E. Jean Johnson, Environmental Stigma Damages. Speculative Damages in Environmental Tort Cases, 15 UCLA JOURNAL OF ENVIRONMENTAL LAW & POLICY 185 (1996-97).

45. McAlonan v. U.S. Home Corp., 724 P.2d 78 (Colo.App. 1986).

46. 46. McAlonan, at 79.

47. McAlonan, at 78.

Anderson v. Bauer, 681 P.2d 1316 (Wyo. 1984).

49. Anderson, at 1324.

50. Santa Fe Partnership v. ARCO Products Company, 46 Ca1.App.4th 967, 54 Cal.Rptr.2d 214 (1996).

suffers permanent physical injury despite remediation efforts."[51] This opinion suggests that recovery of stigma damages may be appropriate where the residual injury is "permanent," although the permanence of stigma or market resistance is often not known until many years after the fact, when claims for such damage would often be time barred.

CONCLUSION

On the surface, *Aas/Provencal* has the appearance of a reactionary decision, a response by the court to a plethora of construction defect litigation and recoveries which may not reflect economic damages. Construction litigation is often dominated by the alleged defects, together with repair procedures and associated costs offered by the plaintiff and defendant, with little consideration of whether the plaintiff has suffered economic damage. Damages are often a battle of plaintiff's vs. defendant's repair methodologies and associated costs, with little consideration to the issue of value diminution, which is arguably the best measure of true economic loss. An axiom often cited by real estate appraisers is that cost does not equal market value, and by extension, the same is true for measuring loss in value to real property.

Against this backdrop, the court has offered a solution which in most cases would deny plaintiffs a remedy in negligence for construction defects which do not result in personal injury or damage to other than the affected property. In analyzing duty of care, the court notes "that petitioners have suffered latent harm," acknowledging a wrong for which there is no apparent remedy. Pure economic loss under *Seely* is not recoverable under strict liability or negligence, and not recoverable in implied warranty without privity. The problem, as stated rather eloquently in a commentary on defective products, is that "the rules denying recovery in warranty without privity, and in tort without physical injury, thus leave the average family's largest investment unprotected."[52]

The question, it seems, should not be whether an injured party can recover economic losses in negligence, particularly where a defect has resulted in actual physical damage. It is generally the intent of the law to make the plaintiff whole, awarding as a measure of damages "the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."[53] Rather, the issue is one of proof; proving that a structure "as built" varies from plans and specifications, industry standards, or even building codes, does not necessarily translate into an economic loss.

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51. Santa Fe Partnership, at 224.

52. Edward H. Rabin and Jill Herman Grossman, Defective Products or Realty Causing Economic Loss. Toward a Unified Theory of Recovery, 12 SOUTHWESTERN UNIVERSITY LAW REVIEW 5, 21 (1980-81).

53. CALIFORNIA CIVIL Com, § 3333.

The issue in determining defective construction should be "one of reasonableness rather than perfection. "[54]

For real estate, economic losses are measured *by* the market, not necessarily by cost to repair alleged defects that the market may or may not consider consequential. On the other hand, plaintiffs should not be barred from recovery for economic losses when such losses actually diminish property value. The theory of recovery is probably less important to the average property owner than an assurance that some remedy is reasonably available. Rabin and Grossman argue for recovery of economic losses in warranty rather than tort, recommending changes in statutes of limitations and privity requirements which would make this cause of action more feasible. Either way, justice would seem to dictate that some remedy be available, though it must be incumbent upon the plaintiff to prove economic damages with some degree of certainty.

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54. Kriegler, 269 Cal.Appld at 228,74 Cal.Rptr. at 953.