COMMENTS

California’s Approach to Landlord Liability for Tenant Injuries: Strict Liability Reexamined

INTRODUCTION

In 1985, the California Supreme Court announced that landlords in the business of leasing residential property are strictly liable\(^1\) when latent defects,\(^2\) existing at the lease’s inception, injure tenants.\(^3\) The court adopted strict landlord liability to ensure that landlords provide tenants with safe rental property\(^4\)

\(^{1}\) Strict liability is liability without fault. W. Page Keeton et al., Prosser and Keeton on The Law of Torts § 75, at 534 (5th ed. 1984); see infra note 29 (discussing strict products liability in California).

\(^{2}\) The court distinguished latent defects from patent defects and noted that it did not determine whether strict liability would apply to the latter. Becker v. IRM Corp., 698 P.2d 116, 122 n.4 (Cal. 1985). The court determined that strict landlord liability is appropriate in cases involving latent defects because tenants cannot detect and guard against such defects. Id. at 122. Thus, stated the court, tenants are entitled to rely on landlords’ implied representations that the leased premises are safe. Id. at 122-23.

\(^{3}\) Id. at 122; see infra notes 126-65 and accompanying text (discussing Becker).

\(^{4}\) Becker, 698 P.2d at 124. Courts and commentators argue that because landlords know more than tenants about the property’s condition, landlords should have the duty to ensure that it is free of dangerous defects. Id. at 122-23 (discussing reasons for adopting strict landlord liability); Green v. Superior Court, 517 P.2d 1168, 1173 (Cal. 1974) (discussing reasons for adopting implied warranty of habitability); Jean C. Love, Landlord’s Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability?, 1975 Wis. L. Rev. 19, 98-100 (1975) (discussing rationale behind implied warranty of habitability); Virginia E. Nolan & Edmund Ursin, Strict Tort Liability of
and compensate injured tenants. In cases decided since 1985,

Landlords: Becker v. IRM Corp. in Context, 23 San Diego L. Rev. 125, 146 (1986) (discussing reasons for adopting strict landlord liability); see infra notes 263-75 and accompanying text (discussing encouraging safety as justification for strict landlord liability). This assignment of duty assumes particular importance in the residential setting because the scarcity of housing often places tenants in a weak bargaining position. Green, 517 P.2d at 1173; Love, supra, at 99. As the American Law Institute observed, "[t]he harshness of the caveat emptor approach is magnified many times in the case of the urban residential tenant, who . . . is [often] faced with the choice of substandard housing or none at all." Restatement (Second) of Property (Landlord and Tenant) § 5.1 cmt. b (1977); see also Green, 517 P.2d at 1173-74 (discussing reasons for adopting implied warranty of habitability). Because the market may not provide sufficient incentive for landlords to supply safe, habitable housing, the law must. See id. (discussing reasons for implied warranty of habitability); Love, supra, at 99 (discussing justifications for implied warranty of habitability).

5 Becker, 698 P.2d at 124. Courts and commentators argue that because landlords profit from their relationship with tenants, they are better able to bear the loss in the event of tenant injury. See id. at 123 (discussing reasons for adopting strict landlord liability); Gary J. Highland, Sales of Defective Used Products: Should Strict Liability Apply?, 52 S. Cal. L. Rev. 805, 811-12 (1979) (discussing enterprise liability); infra notes 245-62 and accompanying text (discussing enterprise liability as justification for strict landlord liability).

The Becker court stated: "[S]trict liability in tort . . . must be applied to insure that the landlord who markets the product bears the costs of injuries resulting from the defects 'rather than the injured persons who are powerless to protect themselves.'" Becker, 698 P.2d at 123 (quoting Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 901 (Cal. 1962)). The rationale is that landlords can spread the loss by purchasing insurance and adjusting rents, whereas tenants can protect themselves only to the extent of their medical insurance, if any. See id. (discussing reasons for adopting strict landlord liability); Olin L. Browder, The Taming of a Duty — The Tort Liability of Landlords, 81 Mich. L. Rev. 99, 138-39 (1982) (discussing strict landlord liability); Love, supra note 4, at 100 (arguing for strict landlord liability); Nolan & Ursin, supra note 4, at 146-47 (discussing reasons for adopting strict landlord liability); infra notes 210-44 and accompanying text (discussing loss-spreading as justification for strict landlord liability).

Courts and commentators also cite tenant expectations of safety as an additional justification for holding landlords accountable for tenant injuries. See Becker, 698 P.2d at 123 (discussing reasons for adopting strict landlord liability); Green, 517 P.2d at 1175 (discussing reasons for adopting implied warranty of habitability); Love, supra note 4, at 100 (discussing justifications for implied warranty of habitability); Nolan & Ursin, supra note 4, at 134-35 (discussing reasons for adopting strict landlord liability). In Green v. Superior Court, the California Supreme Court stated that a tenant may reasonably expect that the product she is purchasing is fit for its intended use as a dwelling. Green, 517 P.2d at 1175; see infra notes 276-84 and accompanying text (discussing protecting tenant expectations as justification for strict
however, appellate courts have refused to apply strict landlord liability to commercial landlords or to cases in which the injurious defects are patent. California thus imposes "limited" strict liability on landlords.

The appellate courts' reluctance to adopt a general rule of strict landlord liability perhaps reflects the courts' recognition of the problems inherent in holding landlords strictly liable for tenant injuries. Consider the following hypothetical. Landlord, a


Finally, courts and commentators argue that strict landlord liability is necessary to ensure that deserving tenants recover for their injuries because tenants may have difficulty proving landlord negligence. See Love, supra note 4, at 136 (arguing for strict landlord liability); infra notes 285-96 and accompanying text (discussing easing tenants' proof problems as justification for strict landlord liability); cf. Cronin v. J.B.E. Olson Corp., 501 P.2d 1153, 1162 (Cal. 1972) (en banc) (stating that strict products liability eases plaintiffs' proof problems); Escola v. Coca Cola Bottling Co., 150 P.2d 436, 443 (Cal. 1944) (Traynor, J., concurring) (discussing justifications for strict products liability).

See Muro v. Superior Court, 229 Cal. Rptr. 383, 384 (Ct. App. 1986); infra notes 169-78 and accompanying text (discussing Muro).

7 See Vaerst v. Tanzman, 272 Cal. Rptr. 503, 505 (Ct. App. 1990); infra notes 179-91 and accompanying text (discussing Vaerst). Patent defects are those defects that are obvious and therefore known to both landlords and tenants. Becker, 698 P.2d at 122; Nolan & Ursin, supra note 4, at 162. Because tenants can more easily guard against patent defects than latent defects, the case for strict liability is weaker when the injurious defect is patent. Id. On the other hand, landlords should not be able to callously ignore dangerous defects simply because tenants are aware of them. Id. The California Supreme Court has, in the context of products liability, resolved this issue in favor of plaintiffs, holding that a defect's patency does not bar a strict liability claim. Luque v. McLean, 501 P.2d 1163, 1165 (Cal. 1972).

8 This Comment refers to the current California approach to landlord liability for tenant injuries as "limited strict landlord liability."

9 See Vaerst, 272 Cal. Rptr. at 505 (declining to impose strict landlord liability when patent defects injure tenants); Muro, 229 Cal. Rptr. at 384 (declining to impose strict landlord liability on commercial landlords); infra notes 301-08 and accompanying text (discussing problematic distinctions of limited strict landlord liability).

10 See infra note 194 and accompanying text (discussing Vaerst court's criticism of Becker).
realtor, owned three duplexes, which she routinely inspected and maintained in good condition. Despite Landlord's thorough inspections, she failed to discover that the attic's flooring was weakly built. Landlord leased one of the units to Tenant, who was somewhat overweight. As Tenant was moving a heavy desk into the attic, the floor gave way, and he fell through. Tenant sued Landlord in strict liability\textsuperscript{12} and won a large judgment.\textsuperscript{13} Because the builder of the duplexes had gone out of business, Landlord could not seek indemnity\textsuperscript{14} or contribution,\textsuperscript{15} and thus she was liable for the entire amount. Landlord had liability insur-

\textsuperscript{11} This hypothetical resembles \textit{Becker} in that the landlord is in the residential leasing business and the injurious defect is latent. \textit{See} Becker \textit{v.} IRM Corp., 698 P.2d 116, 117-18 (Cal. 1985); \textit{infra} notes 138-41 and accompanying text (discussing \textit{Becker} facts). The hypothetical landlord, however, is more like the landlord in \textit{Vaerst v. Tanzman}, who leased one unit, than the landlord in \textit{Becker}, who leased thirty-six. \textit{Compare Becker}, 698 P.2d at 117-18 \textit{with Vaerst}, 272 Cal. Rptr. at 504. \textit{See infra} notes 188-90 and accompanying text (discussing \textit{Vaerst} facts). The facts of this hypothetical are thus a hybrid of \textit{Becker}, in which the court imposed strict landlord liability, and \textit{Vaerst}, in which the court found strict landlord liability unwarranted. \textit{See Becker}, 698 P.2d at 122; \textit{Vaerst}, 272 Cal. Rptr. at 506.

\textsuperscript{12} Tenant could allege that the weak flooring constituted a "design" defect. \textit{See} Barker \textit{v.} Lull Eng'g Co., 573 P.2d 443, 453 (Cal. 1978) (discussing product defects). \textit{Barker} identified three types of product defects, any one of which could establish a strict products liability claim. \textit{Id.} A product that fails to conform to the manufacturer's specifications has a manufacturing defect. \textit{Id.} A product that is unsafe, though "perfectly" manufactured, may have a design defect. \textit{Id.} Finally, a product that lacks adequate warnings of potential danger may be defective because of a failure to warn. \textit{Id.}

\textsuperscript{13} The \textit{Becker} court, analogizing to strict products liability, held that strict liability applies to landlords who are engaged in the business of leasing dwellings. \textit{Becker}, 698 P.2d at 122. Because the opinion did not define the degree of participation in the business of leasing that triggers strict landlord liability, a court might find the hypothetical landlord's small-scale leasing insufficient to expose her to strict liability. \textit{See id.; e.g., Vaerst}, 272 Cal. Rptr. at 505 (declining to hold landlord who leased one house strictly liable). The \textit{Becker} language, however, suggests that strict liability applies regardless of whether a landlord owns a thirty-six-unit apartment building or several duplexes. \textit{See Becker}, 698 P.2d at 122.

\textsuperscript{14} "Indemnity" refers to shifting liability for loss from the party held legally responsible to another culpable party. \textit{Black's Law Dictionary} 769 (6th ed. 1990).

\textsuperscript{15} The principle of "contribution" applies when two or more parties are jointly liable to a plaintiff. \textit{Id.} at 328. A party who pays the entire judgment may recover from the other responsible parties. \textit{Id.} Each must contribute in proportion to her fault. \textit{Id.}
ance; however, the judgment exceeded her coverage. After selling her duplexes and her home to make up the difference, Landlord swore never again to engage in the risky business of leasing residential property in California.

This hypothetical illustrates two problems that arise when courts hold landlords strictly liable for tenant injuries. The first problem is the potential for harsh results.\(^{16}\) When latent defects injure tenants, both landlords and tenants are innocent of any wrongdoing.\(^{17}\) The primary justification for shifting accident costs from innocent tenants to equally innocent landlords is "loss-spreading."\(^{18}\) The landlord has access to liability insurance,\(^{19}\) and thus, in theory, can spread the costs of injuries that would financially devastate an individual.\(^{20}\) In reality, however, insurance policies have limits, and, as in the hypothetical, holding landlords strictly liable sometimes substitutes one innocent victim for another.\(^{21}\)

The second problem is that holding landlords strictly liable will decrease the availability of already scarce affordable housing.\(^{22}\)

\(^{16}\) See infra notes 17-21, 252-62 and accompanying text (discussing potential for harsh results under strict landlord liability).

\(^{17}\) Browder, supra note 5, at 137-38.


\(^{19}\) Becker, 698 P.2d at 123; Browder, supra note 5, at 138-39; Love, supra note 4, at 134-35; Nolan & Ursin, supra note 4, at 146-47.

\(^{20}\) Becker, 698 P.2d at 123; Browder, supra note 5, at 138-39; Love, supra note 4, at 134-35; Nolan & Ursin, supra note 4, at 147.

\(^{21}\) See Browder, supra note 5, at 137-38 (noting that personal injury costs "can be so large as to constitute a financial disaster for any party who must bear them").

\(^{22}\) Becker, 698 P.2d at 139 n.6 (Lucas, J., concurring in part and dissenting in part) (arguing that imposing strict landlord liability will increase cost of...
Insurance costs will be higher under a strict liability regime than under one based on fault because landlords will be automatically liable whenever defective premises injure tenants.\footnote{Becker, 698 P.2d at 139 n.6 (Lucas, J., concurring in part and dissenting in part); Browder, supra note 5, at 138-39; see Comment, supra note 22, at 296-97 (stating that increasing landlords' responsibility for tenant security will increase liability insurance costs). Professor Love briefly considered the effect of strict liability on liability insurance rates. See Love, supra note 4, at 134-36. Professor Love compared 1974 insurance rates for landlords in Louisiana (which has imposed strict liability on landlords since the early 1800's) with those in several other states. Id. at 135 n.662. She found little difference between rates in Louisiana and rates in states that have not adopted strict landlord liability. Id. Professor Browder repeated this exercise in 1982. See Browder, supra note 5, at 138-39 & n.210. He found that in 1981, rates were higher in Louisiana than in neighboring states. Id. The significance of such limited studies is difficult to assess, especially because many factors affect insurance rates. Id. at 138-39. But because strict liability increases the probability that the insurer will have to pay on a given claim, imposing strict landlord liability will likely increase insurance costs.) Landlords...
will pass these costs on to tenants by raising rents.\textsuperscript{24} In rent-controlled urban areas, some landlords, unable to raise rents, will be forced out of business.\textsuperscript{25} Additionally, the risk that insurance may be insufficient to cover the cost of tenant injuries will discourage some prospective landlords from even entering the residential rental business.\textsuperscript{26} In short, landlords may not be able to bear the premiums. \textit{Id.}; cf. \textit{Brown}, 751 P.2d at 479 (explaining that litigation drives up drug manufacturers' liability insurance costs).

\textsuperscript{24} \textit{Becker}, 698 P.2d at 139 n.6 (Lucas, J., concurring in part and dissenting in part); Browder, supra note 5, at 138-39; see Comment, supra note 22, at 296 (stating that increasing landlords' responsibility for tenant security will force landlords to raise rents); \textit{cf. Brown}, 751 P.2d at 479 (noting that drug manufacturers pass on increased liability insurance costs to consumers). The \textit{Brown} court cited several examples of the adverse impact of increases in drug manufacturers' liability insurance costs on drug availability and affordability. \textit{Id.} In the case of diphtheria-tetanus-pertussis vaccine, the court observed that one vaccine producer withdrew from the market because of “extreme liability exposure, cost of litigation and the difficulty of continuing to obtain adequate insurance.” \textit{Id.} (quoting \textit{Vaccine Injury Compensation: Hearings Before Subcomm. on Health and the Environment of House Comm. on Energy and Commerce, 98th Cong., 2d Sess. 295 (1984)}). The \textit{Brown} court went on to note:

There are only two manufacturers of the vaccine remaining in the market, and the cost of each dose rose a hundredfold from 11 cents in 1982 to $11.40 in 1986, $8 of which was for an insurance reserve. The price increase roughly paralleled an increase in the number of lawsuits from one in 1978 to 219 in 1985. \textit{Brown}, 751 P.2d at 479 (citation omitted).

\textsuperscript{25} \textit{See Comment, supra} note 22, at 296 (arguing that increasing landlords' responsibility for tenant security will drive some landlords out of business); \textit{cf. Brown}, 751 P.2d at 478–79 (observing that drug manufacturers have withdrawn drugs from market because of high insurance costs). The \textit{Brown} court noted that the manufacturer of the only antinauseant drug available for pregnant women withdrew it from the market because “the cost of insurance almost equalled the entire income from the sale of the drug.” \textit{Id.} at 479. The court also observed that before the manufacturer withdrew the drug, its price increased by over 300%. \textit{Id.}

\textsuperscript{26} \textit{Cf. Brown}, 751 P.2d at 479–80 (pointing out that drug manufacturers have decided not to market new drugs because of high liability insurance costs). The \textit{Brown} court noted that drug manufacturers refused to supply a new vaccine for influenza until the government assumed the risk of liability when the vaccine caused injuries. \textit{Id.} at 479; Marc A. Franklin & Joseph E. Mais, \textit{Tort Law and Mass Immunization Programs: Lessons from the Polio and Flu Episodes}, 65 CAL. L. REV. 754, 769 (1977).
costs of tenant injuries and still provide reasonably priced housing.\textsuperscript{27}  
This Comment evaluates California law governing landlord liability when preexisting defects in the leased premises injure tenants and concludes that the current approach is unworkable.\textsuperscript{28} Part I shows how the development of landlord responsibility for leased premises and the expansion of strict products liability\textsuperscript{29} laid the analytical groundwork for imposing strict landlord liability.\textsuperscript{30} Part II discusses the California Supreme Court decision that adopted strict landlord liability, \textit{Becker v. IRM Corp.},\textsuperscript{31} and the cases that limited \textit{Becker}.\textsuperscript{32} Part III first examines whether the policies that justified strict products liability also support strict landlord liability.\textsuperscript{33} After concluding that these policies do not support strict landlord liability, Part III analyzes the problems with the current law's application of limited strict landlord liability.\textsuperscript{34} Part IV proposes, as an alternative, a form of modified negligence that will promote the policies discussed in Part III without unduly burdening landlords.\textsuperscript{35}

I. The Development of Strict Landlord Liability

California's adoption of strict landlord liability for tenant injuries resulted from the convergence of two legal trends: the devel-

\textsuperscript{27} See supra notes 22-26 and accompanying text.
\textsuperscript{28} See infra notes 196-341 and accompanying text. This Comment discusses the appropriate standard of liability when the injurious defect is patent as well as when it is latent. See infra notes 322-31 and accompanying text. This Comment also considers whether different standards should apply to commercial and residential landlords. See infra notes 309-21 and accompanying text.
\textsuperscript{29} The California Supreme Court adopted strict products liability in the 1963 decision Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 900-01 (Cal. 1963). The supreme court announced that "[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." Id. Thus, a plaintiff can establish a claim in strict products liability by demonstrating that a product was defective and that the defect caused her injuries. Id.
\textsuperscript{30} See infra notes 36-126 and accompanying text.
\textsuperscript{31} 698 P.2d 116, 122 (Cal. 1985); see infra notes 138-65 and accompanying text (discussing \textit{Becker}).
\textsuperscript{32} See infra notes 166-95 and accompanying text.
\textsuperscript{33} See infra notes 210-300 and accompanying text.
\textsuperscript{34} See infra notes 301-41 and accompanying text.
\textsuperscript{35} See infra notes 342-98 and accompanying text.
opment of landlord responsibility for leased premises and the dramatic expansion of strict products liability. The traditional approach to landlord liability afforded tenants minimal protection against unscrupulous or negligent landlords. As courts and legislatures gradually recognized that the traditional approach was unsatisfactory, they began to increase landlord accountability for the condition of the property they leased to tenants. At the same time, courts were also increasing supplier accountability for the condition of the products they provided to consumers. When the California Supreme Court articulated the similarity between tenants and consumers, the court introduced the modern view of the landlord as a supplier of goods and services. This modern view represented a dramatic departure from the

36 See infra notes 44-98 and accompanying text (discussing development of landlord liability for defective premises).

37 Nolan & Ursin, supra note 4, at 129-54; see infra notes 99-126 and accompanying text (discussing expansion of strict products liability).

38 See infra notes 44-74 and accompanying text (discussing landlord immunity at common law).


41 See Green, 517 P.2d at 1175.

42 See Becker v. IRM Corp., 698 P.2d 116, 124 (Cal. 1985) (analogizing tenants to consumers); Love, supra note 4, at 100; Nolan & Ursin, supra note 4, at 133-35; infra notes 86-89 and accompanying text (discussing analogy between tenants and consumers).
traditional view of the landlord as one who relinquished all rights and all obligations associated with the leased premises.\footnote{See Brennan v. Cockrell Invs., Inc., 111 Cal. Rptr. 122, 124-25 (Ct. App. 1973) (discussing traditional view of landlord); Keeton et al., supra note 1, § 63, at 434-35; Browder, supra note 5, at 101; see infra notes 44-51 and accompanying text (discussing common-law rule of landlord immunity).}

A. The Development of Landlord Liability for Defective Premises

1. The Common-Law Rule: No Duty

At common law, landlords owed tenants no duty to ensure that the leased property was safe or suitable for its intended use.\footnote{Becker, 698 P.2d at 120; Green, 517 P.2d at 1171-72; Browder, supra note 5, at 101; Love, supra note 4, at 27-28; Nolan & Ursin, supra note 4, at 133; see, e.g., Brewster v. Defremery, 33 Cal. 341, 345 (1867) (holding that landlords owed no duty to tenants), overruled by Green, 517 P.2d 1168 (Cal. 1974).}

Early courts viewed the lease as a conveyance of property.\footnote{Brennan, 111 Cal. Rptr. at 124-25; Browder, supra note 5, at 101-02. Because tenants received all of the rights and obligations associated with possession and control, they assumed responsibility for any defective conditions. Keeton et al., supra note 1, § 63, at 434; Browder, supra note 5, at 101. Thus, tenants not only bore the burden of their own injuries, but they could also be liable to others who entered onto the land. Keeton et al., supra note 1, § 63, at 434-35.}

By lease, landlords transferred to tenants an unlimited right to possess and control the leased property.\footnote{Becker, 698 P.2d at 120; Green, 517 P.2d at 1171-72; Love, supra note 4, at 27-28; Nolan & Ursin, supra note 4, at 133.}

Because this transaction was analogous to a sale,\footnote{Becker, 698 P.2d at 120; Browder, supra note 5, at 101; Love, supra note 4, at 27-28; Nolan & Ursin, supra note 4, at 133.} courts applied the sales doctrine of "caveat emptor" to leases.\footnote{Becker, 698 P.2d at 120; Browder, supra note 5, at 101; Love, supra note 4, at 27-28; Nolan & Ursin, supra note 4, at 133. Professor Love used the term "caveat lessee" to refer to the traditional rule of landlord immunity and to reflect its derivation from the doctrine of caveat emptor. See Love, supra note 4, at 27-28.}

It was up to tenants to inspect the property for defects before...
accepting the lease.\textsuperscript{50} Caveat emptor thus immunized landlords from liability.\textsuperscript{51}

From a modern perspective, landlord immunity seems grossly unfair to tenants; however, the rule may have been appropriate for the pre-industrial, agrarian society in which it developed.\textsuperscript{52} While modern tenants purchase the right to occupy a complex building, agrarian tenants generally purchased an interest in land, improvements to which were relatively simple.\textsuperscript{53} Unlike modern tenants, agrarian tenants needed no special expertise to evaluate the property's condition.\textsuperscript{54} Agrarian tenants were thus better equipped than modern tenants to detect and repair preexisting defects.\textsuperscript{55} Further, agrarian tenants could detect and repair defects that arose after the lease's inception.\textsuperscript{56} Because agrarian tenants were usually as capable as landlords of ensuring that the leased property was safe,\textsuperscript{57} requiring tenants to bear the costs of their injuries was probably not unduly harsh.\textsuperscript{58}

The industrial revolution, however, dramatically changed the relationship between landlords and tenants.\textsuperscript{59} Instead of unimproved land, urban tenants leased portions of complex, multi-dwelling buildings.\textsuperscript{60} Landlords were more familiar with the buildings' workings than tenants, and landlords retained control over equipment that supplied common services, such as heat and water.\textsuperscript{61} Urban tenants thus could not inspect the leased prem-

\textsuperscript{50} See Love, supra note 4, at 28; Nolan & Ursin, supra note 4, at 133.
\textsuperscript{51} See supra notes 45-50 and accompanying text.
\textsuperscript{52} Green v. Superior Court, 517 P.2d 1168, 1172 (Cal. 1974); Nolan & Ursin, supra note 4, at 133; see Love, supra note 4, at 28 (stating that doctrine of caveat lessee probably of little concern to agrarian leaseholders).
\textsuperscript{53} Green, 517 P.2d at 1172; Love, supra note 4, at 28; Nolan & Ursin, supra note 4, at 133.
\textsuperscript{54} Green, 517 P.2d at 1172-73; Love, supra note 4, at 28, 98.
\textsuperscript{55} See Love, supra note 4, at 28.
\textsuperscript{56} Green, 517 P.2d at 1172; Love, supra note 4, at 28.
\textsuperscript{57} Love, supra note 4, at 28, 98. In fact, agrarian tenants were often in a better position to ensure safety than landlords because tenants had exclusive possession of the leased property and thus knew its condition first hand. See Brennan v. Cockrell Invs., Inc., 111 Cal. Rptr. 122, 125 (Ct. App. 1973) (discussing rationale for landlord immunity).
\textsuperscript{58} See Green, 517 P.2d at 1172-73; Nolan & Ursin, supra note 4, at 133; Love, supra note 4, at 28.
\textsuperscript{59} Green, 517 P.2d at 1172; Love, supra note 4, at 28, 98-100.
\textsuperscript{60} Green, 517 P.2d at 1172; Love, supra note 4, at 28, 98.
\textsuperscript{61} Green, 517 P.2d at 1173; Love, supra note 4, at 98; Nolan & Ursin, supra note 4, at 146.
ises as easily as agrarian tenants. Moreover, even if urban tenants discovered preexisting defects, they rarely had the bargaining power to compel landlords to lower rents or repair the defects. Finally, urban tenants had neither the skill nor the financial resources to repair defects that arose after the lease's inception.

As the urban population grew, and the urban tenant's plight worsened, courts recognized that landlords should bear a greater responsibility for ensuring the leased property's safety. Courts therefore carved out exceptions to landlord immunity. California imposed liability on landlords for breach of a covenant to repair, negligent repair, failure to disclose a latent defect,

62 Green, 517 P.2d at 1173; Restatement (Second) of Property (Landlord and Tenant) § 5.1 cmt. b (1977); Love, supra note 4, at 28, 98. The American Law Institute notes that because of the complexities of building construction and centralization of vital facilities, tenants are seldom able to conduct inspections of sufficient depth to discover even major defects. Restatement (Second) of Property (Landlord and Tenant) § 5.1 cmt. b (1977).

63 Green, 517 P.2d at 1173-74; Restatement (Second) of Property (Landlord and Tenant) § 5.1 cmt. b (1977); Love, supra note 4, at 99; see supra note 4 (discussing tenants' lack of bargaining power).

64 Green, 517 P.2d at 1173; Love, supra note 4, at 28, 98. Landlords, on the other hand, can spread the cost of such repairs by raising rents. Becker v. IRM Corp., 698 P.2d 116, 122-23 (Cal. 1985); Love, supra note 4, at 100. Moreover, when leases are short-term, landlords, not tenants, should pay for most repairs, because a repair's "life" is generally much longer than the tenancy's duration. See Green, 517 P.2d at 1173; Love, supra note 4, at 98.

65 Becker, 698 P.2d at 120; Love, supra note 4, at 49.

66 See generally Love, supra note 4, at 49-78 (describing exceptions to common-law rule of landlord immunity); infra notes 67-74 and accompanying text (listing exceptions).


69 The duty to disclose known defects is a limited one in California. See 4 Bernard E. Witkin, Summary of California Law, Real Property §§ 599-600, at 779-80 (9th ed. 1987). Landlords were only liable for tenant injuries if they had actual knowledge of a defect unknown to the tenant. Id.; see, e.g., Zavalney v. Donovan, 160 P.2d 558, 559 (Cal. Ct. App. 1945) (refusing to impose liability on landlord for injuries resulting from cracked faucet handle when tenant aware of defect). This exception to the general rule of landlord immunity thus only extended to latent defects. Witkin, supra, § 599, at 779.
violation of a safety law,\textsuperscript{70} nuisance,\textsuperscript{71} defect in premises retained for common use,\textsuperscript{72} and defect in premises open to the public.\textsuperscript{73} In each of these instances, the standard of liability was negligence: courts imposed a duty of ordinary care.\textsuperscript{74}

2. The Development of the Implied Warranty of Habitability

An additional exception to landlord immunity, which presaged strict landlord liability, was landlord liability for breach of an express or implied warranty of habitability in short-term leases of furnished dwellings.\textsuperscript{75} The rationale for this exception was that because landlords expected tenants to take immediate occupancy, they rarely allowed tenants sufficient time to inspect the property for defects.\textsuperscript{76} Therefore, tenants were forced to rely on landlords' express or implied representations of safety.\textsuperscript{77} This exception only covered furnished rental property because tenants could

\textsuperscript{70} See, e.g., Finnegan v. Royal Realty Co., 218 P.2d 17, 23-24 (Cal. 1950) (holding landlord liable when fire caused injuries because exit door opened inward, in violation of local building code).

\textsuperscript{71} If landlords lease property to tenants when landlords know or should know that the tenants' use will create a nuisance, landlords are liable for third party injuries. Witkin, supra note 69, § 604, at 784; see, e.g., Dennis v. City of Orange, 293 P. 865, 867 (Cal. Ct. App. 1930).


\textsuperscript{73} See, e.g., Hayes v. Richfield Oil Corp., 240 P.2d 580, 583 (Cal. 1952) (holding lessor of service station liable for customer's injuries), overruled by Li v. Yellow Cab Co., 532 P.2d 1226 (Cal. 1975).

\textsuperscript{74} See Witkin, supra note 69, § 599, at 779.

\textsuperscript{75} Id. § 609, at 790. California has limited the warranty exception to cases involving defective furniture or appliances. Id.; e.g., Shattuck v. St. Francis Hotel & Apartments, 60 P.2d 855, 857 (Cal. 1936) (holding landlord liable for breach of express warranty that wallbed was safe); Fisher v. Pennington, 2 P.2d 518, 520 (Cal. Ct. App. 1931) (holding landlord liable for breach of implied warranty that folding bed was fit for use); see Love, supra note 4, at 54-57 (discussing warranty exception).

\textsuperscript{76} See Love, supra note 4, at 29; Joan L. Neisser, The Tenant as Consumer: Applying Strict Liability Principles to Landlords, 64 St. John's L. Rev. 527, 530 (1990). This exception originated from unlawful detainer actions in which courts allowed tenants to assert the leased premises' uninhabitable condition as a defense. Love, supra note 4, at 54. If the leased premises were uninhabitable, tenants were entitled to withhold rent. See id. When landlords sued for nonpayment, tenants could raise the landlords' breach of an implied warranty of habitability as an affirmative defense. Id.

\textsuperscript{77} Love, supra note 4, at 29.
more easily inspect unfurnished property for defects.\textsuperscript{78} Early courts construed this warranty exception narrowly, applying it only to cases involving defects present at the lease's inception.\textsuperscript{79}

Gradually, however, courts expanded the warranty exception to include all dwellings, furnished or unfurnished, regardless of length of term.\textsuperscript{80} In the 1974 decision \textit{Green v. Superior Court},\textsuperscript{81} the California Supreme Court held that residential landlords warrant that the leased premises will be safe and habitable for the duration of the lease.\textsuperscript{82} Citing changes in the landlord-tenant relationship\textsuperscript{83} and the enactment of housing codes,\textsuperscript{84} the court announced that public policy demanded that residential landlords be responsible for the condition of the property they lease.\textsuperscript{85}

The \textit{Green} court drew an analogy between tenants and consumers, pointing out that tenants seek to purchase a package of goods and services for a period of time.\textsuperscript{86} Observing that the landlords who supply this package control its safety, the court found that landlords are similar to suppliers of consumer products.\textsuperscript{87} The court stated that tenants, like consumers, are entitled to expect that the products they purchase are fit for use.\textsuperscript{88} Thus, the court concluded that imposing an implied warranty of habitability was

\begin{itemize}
\item \textsuperscript{78} Id. at 29, 54; Neisser, supra note 76, at 530.
\item \textsuperscript{79} See Love, supra note 4, at 29 (discussing warranty exception); \textit{e.g.}, Forrester \textit{v. Hoover Hotel & Inv. Co.}, 196 P.2d 825, 828-29 (Cal. Ct. App. 1948).
\item \textsuperscript{80} See \textit{Green v. Superior Court}, 517 P.2d 1168, 1174-75 & n.11 (Cal. 1974); \textit{Javins v. First Nat'l Realty Corp.}, 428 F.2d 1071, 1082 (D.C. Cir. 1970), \textit{cert. denied}, 400 U.S. 925 (1970). The District of Columbia Circuit Court of Appeals was the first court to recognize a generally applicable implied warranty of habitability. Nolan \& Ursin, supra note 4, at 134.
\item \textsuperscript{81} 517 P.2d 1168 (Cal. 1974).
\item \textsuperscript{82} Id. at 1182. The tenant in \textit{Green} refused to pay rent because of the landlord's numerous housing code violations. \textit{Id.} at 1170. When the landlord sued for unlawful detainer, the tenant asserted as a defense that the landlord breached an implied warranty of habitability. \textit{Id.} The lower courts refused to recognize the defense, \textit{id.} at 1171, but the supreme court reversed, \textit{id.} at 1178.
\item \textsuperscript{83} Id. at 1171-74; see supra notes 59-64 and accompanying text (discussing changes in landlord-tenant relationship).
\item \textsuperscript{84} \textit{Green}, 517 P.2d at 1175.
\item \textsuperscript{85} Id.
\item \textsuperscript{86} Id.
\item \textsuperscript{87} Id. The court noted that the landlord has "a much greater opportunity, incentive and capacity than [the] tenant to inspect and maintain the condition of his apartment building." \textit{Id.}
\item \textsuperscript{88} Id.
\end{itemize}
necessary to protect tenants' reasonable expectations as well as their safety.  

3. The Adoption of a Duty of Ordinary Care

The Green decision, arguably anticipating strict landlord liability, came only a year after a California Court of Appeal abandoned the traditional no-duty rule in Brennan v. Cockrell Investments, Inc. The Brennan court rejected landlord immunity and announced that landlords owe tenants a duty of ordinary care. The court noted that landowners must use reasonable care in managing their property so as to avoid injuring others.

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89 Id. at 1176.

90 Although Green involved an unlawful detainer action rather than a tort claim, the court, by analogizing tenants to consumers, set the stage for strict landlord liability. Nolan & Ursin, supra note 4, at 135-36. Furthermore, the court recognized that if landlords breach an implied warranty of habitability, landlords may be strictly liable for any resulting tenant injuries. See Green, 517 P.2d at 1174 (citing Peterson v. Lamb Rubber Co., 353 P.2d 575, 577-81 (Cal. 1960); Klein v. Duchess Sandwich Co., 93 P.2d 799, 801-04 (Cal. 1939)). In Klein and Peterson, the courts allowed injured consumers to recover on a breach of an implied warranty theory. See Peterson, 353 P.2d at 577-81; Klein, 93 P.2d at 801-04.

91 111 Cal. Rptr. 122, 125 (Ct. App. 1973). The tenant in Brennan was injured when a stairway handrail broke. Id. at 123. The tenant sued the landlord for negligence, and the jury found for the landlord. Id. The tenant appealed on the ground that the court had erred in refusing to instruct the jury that landowners have a duty to exercise ordinary care in managing their property. Id. The appellate court reversed. Id. at 126.

92 Id. at 125. The court rejected the proposition that landowners' relinquishment of their right to possess and control the leased premises justified landlord immunity. Id.

93 Id.

94 Id. The court cited the landmark 1968 case, Rowland v. Christian, in which the California Supreme Court abolished the traditional common-law scheme of limited landowner liability based on the plaintiff's status. Brennan, 111 Cal. Rptr. at 125 (citing Rowland v. Christian, 443 P.2d 561, 568 (Cal. 1968)). Before Rowland, courts classified plaintiffs who were injured on defendants' land as either invitees (employees, customers), licensees (social guests), or trespassers. Rowland, 443 P.2d at 565. Defendant landowners only owed a duty of ordinary care to invitees. Id. Thus, even if a defendant maintained her land negligently, she was generally immune from liability if the injured plaintiff was a licensee or trespasser. Keeton et al., supra note 1, at 393, 412. The Rowland court held that owners and occupiers of land are liable for their negligence, regardless of whether the plaintiff is an invitee, licensee, or trespasser. Rowland, 443 P.2d at 568. The court stated that the proper test for landowner liability was
The court observed that landlord immunity serves no legitimate public interest and therefore held that landlords, like all other landowners, must use reasonable care to ensure that the leased premises are safe.\textsuperscript{95} Green and Brennan were judicial responses to increased societal concern for the plight of residential tenants, who have neither the expertise nor the financial resources to protect themselves from defective leased premises.\textsuperscript{96} Approximately ten years earlier, the area of products liability underwent a similar evolution.\textsuperscript{97} Courts recognized that consumers need protection from defective products and responded by developing strict products liability.\textsuperscript{98}

\textbf{B. The Expansion of Strict Products Liability}

In 1963, a unanimous California Supreme Court adopted strict products liability in \textit{Greenman v. Yuba Power Products, Inc.}\textsuperscript{99} The court announced that a manufacturer is strictly liable if it markets a product, which it knows consumers will use without inspection, and a defect in the product causes injury.\textsuperscript{100} The court justified its decision on the grounds that strict liability promotes loss-

\textsuperscript{95} Brennan, 111 Cal. Rptr. at 125.

\textsuperscript{96} See Green v. Superior Court, 517 P.2d 1168, 1173-76 (Cal. 1974) (adopting implied warranty of habitability); Love, supra note 4, at 98 (discussing reasons for adopting implied warranty of habitability); Nolan & Ursin, supra note 4, at 134-36, 140-44 (discussing Green and Brennan).


\textsuperscript{98} See Vandermark, 391 P.2d at 170-71 (expanding strict products liability); Greenman, 377 P.2d at 900-01 (adopting strict products liability).

\textsuperscript{99} 377 P.2d 897, 900-01.

\textsuperscript{100} Id. at 900; see supra note 29 (stating elements of strict products liability claim). Justice Traynor first proposed strict products liability in a 1944 concurrence. See Escola, 150 P.2d at 440 (Traynor, J., concurring).
spreading\textsuperscript{101} and ensures that manufacturers compensate innocent victims of defective products.\textsuperscript{102}

In subsequent decisions, courts rapidly extended strict products liability to all who participate in the stream of commerce\textsuperscript{103} that supplies products to consumers.\textsuperscript{104} Thus, courts held retailers\textsuperscript{105} and distributors\textsuperscript{106} strictly liable when products they carried injured consumers. In 1970, the California Supreme Court

\textsuperscript{101} See Greenman, 377 P.2d at 901. In Greenman, Justice Traynor cited his Escola concurrence, which set forth the policy justifications for strict products liability. Id. Foremost among them was the policy of loss-spreading. Escola, 150 P.2d at 440; see Becker v. IRM Corp., 698 P.2d 116, 123 (Cal. 1985) (citing loss-spreading as paramount policy of strict liability). Justice Traynor argued that manufacturers should be strictly liable because they can insure against the risk of injury and thus distribute injury costs among consumers. Escola, 150 P.2d at 441; see infra notes 210-18 and accompanying text (discussing loss-spreading as justification for strict products liability).

\textsuperscript{102} Greenman, 377 P.2d at 901. In Escola, Justice Traynor noted that injured consumers may often have difficulty proving manufacturer negligence. Escola, 150 P.2d at 443 (Traynor, J., concurring). Strict products liability removes this obstacle to recovery, ensuring that when defective products injure consumers, the victims will recover. Id. at 443-44; see infra notes 285-87 and accompanying text (discussing easing plaintiffs' proof problems as justification for strict products liability).

\textsuperscript{103} Becker, 698 P.2d at 119.


\textsuperscript{105} In the 1964 decision Vandermark v. Ford Motor Co., 391 P.2d 168 (Cal. 1964), the California Supreme Court justified holding a retailer strictly liable on the ground that retailers can and should take steps to ensure that the products they choose to sell are safe. Id. at 171-72 (noting also that retailer's strict liability serves as added incentive to safety). The court reasoned that retailers can pressure manufacturers to produce safe products, presumably by refusing to carry products that injure consumers. See id. The court noted that in some cases, retailers may be able to inspect the product before sale and thus ensure its safety. Id. at 172. Finally, the court observed that retailers' continuing business relationship with manufacturers enable them to protect against losses resulting from consumer injuries. Id. The court concluded that strict liability applies to all others who participate in the "overall producing and marketing enterprise that should bear the costs of injuries from defective products." Id. at 171. Based on this "stream of commerce" application of strict products liability, Becker, 698 P.2d at 119, the California Court of Appeal extended the doctrine to a wholesale-retail distributor. See Barth, 71 Cal. Rptr. at 320-21.

\textsuperscript{106} Barth, 71 Cal. Rptr. at 320-21.
extended strict products liability to bailors. The court announced in *Price v. Shell Oil Co.* that a bailor who supplies a consumer via a lease does not differ significantly from a retailer who supplies a consumer via a sale. The court stated that in both contexts, imposing strict liability spreads the costs of injuries, encourages safety, and protects consumer expectations.

As the group of suppliers subject to strict products liability expanded, so did the courts' view of what constituted a product. The early strict products liability cases all involved defective personal property, but in 1969, two appellate courts held that strict products liability could also apply to real property.

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107 *Price*, 466 P.2d at 726-27.
109 *Id.* at 727.
110 *Id.* The court stated that bailors can spread the costs of injuries resulting from defects by adjusting the rental price and purchasing insurance. *Id.* at 725-26; see infra notes 210-18 and accompanying text (discussing loss-spreading as justification for strict products liability).
111 *Price*, 466 P.2d at 725-27; see infra notes 263-64 and accompanying text (discussing encouraging safety as justification for strict products liability).
112 *Price*, 466 P.2d at 725-27; see infra notes 277-78 and accompanying text (discussing protecting consumer expectations as justification for strict products liability).
113 See infra notes 114-17 and accompanying text (discussing application of strict products liability to real property).
114 Avner v. Longridge Estates, 77 Cal. Rptr. 633, 639 (Ct. App. 1969); Kriegler v. Eichler Homes, Inc., 74 Cal. Rptr. 749, 752 (Ct. App. 1969). In *Kriegler*, the court imposed strict liability on a mass-producer of homes when a defective home heating system damaged the owner's property. *Kriegler*, 74 Cal. Rptr. at 752. Similarly, in *Avner*, the court held a developer strictly liable when a residential lot subsided. *Avner*, 77 Cal. Rptr. at 639. *Kriegler* and *Avner* both involved mass "producers." *Avner*, 77 Cal. Rptr. at 635; *Kriegler*, 74 Cal. Rptr. at 753. But a subsequent court of appeal decision extended strict liability to a home builder who was not a mass producer. See *Hyman v. Gordon*, 111 Cal. Rptr. 262, 264-65 (Ct. App. 1973). A year later, the Supreme Court of California affirmed the appellate courts' extension of strict liability to new realty in *Pollard v. Saxe & Yolles Dev. Co.*, 525 P.2d 88, 91 (Cal. 1974). The court held that sellers of newly constructed homes impliedly warrant that the homes are designed and constructed in a workmanlike manner. *Id.*
These courts based their decisions on loss-spreading, enterprise liability, and protecting tenant expectations.

Thus, courts that initially limited strict products liability to sales of new products extended it to leases of used ones. Similarly, courts developed strict products liability in the context of personal property but eventually applied it to new real property. These expansions of strict products liability formed the analytical basis for the courts’ extension of strict liability to leases of used real property.

In 1976, a California Court of Appeal imposed strict liability on a landlord in *Golden v. Conway*. In *Golden*, a tenant was injured when a wall heater that the landlord had installed caught fire.  

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115 *Avner*, 77 Cal. Rptr. at 636 (stating developer is in better position than homebuyer to bear loss); *Kriegler*, 74 Cal. Rptr. at 752-53 (stating that developer should bear loss).

116 *Avner*, 77 Cal. Rptr. at 636; *Kriegler*, 74 Cal. Rptr. at 752-53. The doctrine of enterprise liability places the burden of consumer injuries from defective products on the products’ suppliers. Highland, *supra* note 5, at 811-12; see *infra* notes 245-62 and accompanying text (discussing enterprise liability). The *Kriegler* court stated that public policy dictates that developers bear the costs when defective premises cause losses because the developers created the risk and can effectively spread such costs. *Kriegler*, 74 Cal. Rptr. at 752-53.

117 *Avner*, 77 Cal. Rptr. at 636; *Kriegler*, 74 Cal. Rptr. at 752-53 (citing Schipper v. Levitt & Sons, Inc., 207 A.2d 314, 325-26 (N.J. 1965)). The *Kriegler* court noted that when homebuyers purchase mass-produced houses, they rely on the developers’ implied representations that the houses are reasonably fit for habitation. *Kriegler*, 74 Cal. Rptr. at 752-53.

118 See *supra* notes 107-12 and accompanying text.

119 See *supra* notes 113-17 and accompanying text.

120 Nolan & Ursin, *supra* note 4, at 148-50. The California Court of Appeal took the first step in the direction of strict landlord liability with the 1972 decision *Fakhoury v. Magner*, 101 Cal. Rptr. 473, 476 (Ct. App. 1972). In *Fakhoury*, the lessee of a furnished apartment was injured when a couch collapsed under her. *Id.* at 475. Because the landlord had purchased several such couches and placed them in five of his apartments, the court found that the landlord was a lessor of furniture, in addition to a lessor of real property. *Id.* at 476. *Price* had established that lessors of personal property were subject to strict liability. See *Price v. Shell Oil Co.*, 466 P.2d 722, 727 (Cal. 1970). Therefore, the *Fakhoury* court held the landlord strictly liable for leasing defective furniture. *Fakhoury*, 101 Cal. Rptr. at 476. The court emphasized that it was applying strict bailor liability, not strict landlord liability. *Id.*

121 128 Cal. Rptr. 69, 78 (Ct. App. 1976).

122 *Id.* at 71. The landlord had employed a contractor to install the heater approximately a year before the fire. *Id.*
The court held the landlord strictly liable on the ground that he equipped the premises with a defective appliance.\footnote{129}

Thus, only three years after \emph{Brennan} adopted negligence liability for landlords, \emph{Golden} established that landlords could be subject to strict liability.\footnote{124} A landlord who selected, installed, or constructed a component of residential rental property could be strictly liable if that component proved defective.\footnote{125} The remaining step in the evolution of strict landlord liability was to hold landlords strictly liable even when the landlord neither created nor knew about the defect. In 1985, the California Supreme Court took this step in \emph{Becker v. IRM Corp.}\footnote{126}

\section{California's Current Approach to Landlord Liability}

In a split decision, the \emph{Becker} court imposed strict liability on a landlord “in the business of leasing”\footnote{127} a multi-unit apartment complex when a latent defect injured a tenant.\footnote{128} Although the majority was confident that precedent and policy supported holding the \emph{Becker} landlord strictly liable,\footnote{129} its holding did not go beyond the \emph{Becker} facts.\footnote{130} The majority opinion thus left several important issues unresolved.\footnote{131} First, the \emph{Becker} majority failed to indicate whether strict landlord liability should apply to commercial landlords.\footnote{132} Second, the majority refused to determine whether strict landlord liability should apply when patent defects

\begin{footnotes}
\footnote{123} \emph{Id.} at 78. The \emph{Golden} court noted that \emph{Fakhoury} had distinguished between defective furniture and defective fixtures or realty, but rejected \emph{Fakhoury}'s view that strict liability should only apply to the former. \emph{Golden}, 128 Cal. Rptr. at 77-78; \textit{see} \emph{Fakhoury}, 101 Cal. Rptr. at 476.
\footnote{124} \emph{Golden}, 128 Cal. Rptr. at 78.
\footnote{125} In equipping their apartments, the landlords in both \emph{Golden} and \emph{Fakhoury} created the risk that later injured tenants. \textit{Id.} at 71; \emph{Fakhoury}, 101 Cal. Rptr. at 476; \textit{supra} notes 120, 122 and accompanying text (discussing facts of \emph{Golden} and \emph{Fakhoury}).
\footnote{126} 698 P.2d 116, 122 (Cal. 1985).
\footnote{127} \textit{Id.}
\footnote{128} \textit{Id.}
\footnote{129} \textit{Id.} at 118-22; \textit{see infra} notes 145-60 and accompanying text (discussing majority's analysis).
\footnote{130} \emph{Becker}, 698 P.2d at 122 n.4 (stating court did not determine whether strict liability would apply to a disclosed defect).
\footnote{131} \textit{See infra} notes 162-65 and accompanying text (discussing issues \emph{Becker} failed to resolve).
\footnote{132} \emph{Becker}, 698 P.2d at 122; \textit{see infra} notes 309-21 and accompanying text (discussing residential-commercial distinction).
\end{footnotes}
injure tenants.\textsuperscript{133} Finally, the \textit{Becker} majority failed to provide guidelines for determining whether a landlord is "in the business of leasing" and thus subject to strict liability.\textsuperscript{134}

Appellate courts have faced all of these issues in cases decided after \textit{Becker}.\textsuperscript{135} In every case, they decided not to impose strict liability and limited \textit{Becker} to its facts.\textsuperscript{136} Consequently, California courts impose limited strict liability on landlords.\textsuperscript{137}

\textbf{A. Becker v. IRM Corp}

In \textit{Becker}, a residential tenant slipped in his shower and fell against an untempered glass shower door, which broke, severely lacerating his arm.\textsuperscript{138} The apartment was part of a thirty-six-unit complex that the landlord had purchased eleven years after it was built.\textsuperscript{139} Before the landlord purchased the complex, the landlord's representatives inspected it.\textsuperscript{140} They failed to discover that some of the shower doors were made of untempered glass.\textsuperscript{141}

The tenant sued the landlord in strict liability and negligence.\textsuperscript{142} The California Supreme Court held that the tenant was

\begin{footnotesize}
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\item \textsuperscript{133} \textit{Becker}, 698 P.2d at 122 n.4; see infra notes 322-31 and accompanying text (discussing latent-patent distinction).
\item \textsuperscript{134} \textit{Becker}, 698 P.2d at 122; see infra notes 332-41 and accompanying text (discussing prerequisite for strict landlord liability that landlord be in business of leasing).
\item \textsuperscript{135} See \textit{Vaerst} v. Tanzman, 272 Cal. Rptr. 503, 505 (Ct. App. 1990) (discussing latent-patent distinction and prerequisite for strict landlord liability that landlord be in business of leasing); \textit{Muro} v. Superior Court, 229 Cal. Rptr. 383, 385-87 (Ct. App. 1986) (discussing residential-commercial distinction); infra notes 169-91 and accompanying text (discussing \textit{Vaerst} and \textit{Muro}).
\item \textsuperscript{136} See \textit{Vaerst}, 272 Cal. Rptr. at 505 (declining to hold landlord who leased one unit strictly liable when patent defect injured tenant); \textit{Muro}, 229 Cal. Rptr. at 384 (declining to hold commercial landlord strictly liable); infra notes 169-91 and accompanying text (discussing \textit{Vaerst} and \textit{Muro}).
\item \textsuperscript{137} See infra notes 166-95 and accompanying text (describing current approach to landlord liability).
\item \textsuperscript{138} \textit{Becker}, 698 P.2d at 117.
\item \textsuperscript{139} \textit{Id}.
\item \textsuperscript{140} \textit{Id}.
\item \textsuperscript{141} \textit{Id}. After the accident, the landlord's maintenance man discovered that he could distinguish the tempered glass from the untempered glass by means of a small mark in the corner of each piece. \textit{Id}. at 118.
\item \textsuperscript{142} \textit{Id}. at 117. The trial court granted the landlord's motion for summary judgment on the ground that a landlord was not liable when a latent defect injured the tenant. \textit{Id}. Following the appellate court's reversal, the landlord appealed to the California Supreme Court. \textit{Id}.
\end{itemize}
\end{footnotesize}
entitled to maintain the strict liability claim as well as the negligence claim.\textsuperscript{143} Writing for a four-justice majority, Justice Broussard announced that landlords who engage in the business of leasing dwellings are strictly liable when preexisting latent defects injure tenants.\textsuperscript{144}

In support of adopting strict landlord liability, Justice Broussard cited the case law that expanded strict products liability\textsuperscript{145} and that increased landlord responsibility for leased premises.\textsuperscript{146} He began by noting that \textit{Greenman v. Yuba Power Products, Inc.},\textsuperscript{147} which established strict products liability, grew out of earlier cases in which manufacturers' liability derived from express or implied warranties.\textsuperscript{148} The \textit{Greenman} court adopted strict products liability to promote loss-spreading and ensure victim compensation.\textsuperscript{149} These policies, Broussard observed, justified the courts' subsequent expansion of strict products liability to distributors, retailers, and bailors.\textsuperscript{150} Further, he noted that courts had shifted from imposing warranty-based liability to imposing strict liability on sellers of real property, as well as sellers of more conventional products.\textsuperscript{151} Because lessors of personal property and sellers of real property are subject to strict liability,\textsuperscript{152} Justice Broussard concluded that landlords, as lessors of real property, should also be subject to strict liability.\textsuperscript{153}

\textsuperscript{143} \textit{Id.}

\textsuperscript{144} \textit{Id.} at 122. Justice Broussard declared: "[A] landlord engaged in the business of leasing dwellings is strictly liable in tort for injuries resulting from a latent defect in the premises when the defect existed at the time the premises were let to the tenant." \textit{Id.}

\textsuperscript{145} \textit{Id.} at 118-20; see \textit{supra} notes 99-126 and accompanying text (discussing expansion of strict products liability).

\textsuperscript{146} \textit{Becker}, 698 P.2d at 120-22; see \textit{supra} notes 44-98 and accompanying text (discussing development of landlord liability for defective premises).

\textsuperscript{147} 377 P.2d 897 (Cal. 1962); see \textit{supra} notes 99-102 and accompanying text (discussing \textit{Greenman}).

\textsuperscript{148} \textit{Becker}, 698 P.2d at 118.

\textsuperscript{149} See \textit{Greenman}, 377 P.2d at 900-01.

\textsuperscript{150} \textit{Becker}, 698 P.2d at 119.

\textsuperscript{151} \textit{Id.} at 119-20 (citing Avner v. Longridge Estates, 77 Cal. Rptr. 633, 639 (Ct. App. 1969); Kriegler v. Eichler Homes, Inc., 74 Cal. Rptr. 749, 752 (Ct. App. 1969)); see \textit{supra} notes 113-17 and accompanying text (discussing Kriegler and Avner).

\textsuperscript{152} Price v. Shell Oil Co., 466 P.2d 722, 726-27 (Cal. 1970) (lessor); \textit{Avner}, 77 Cal. Rptr. at 639 (mass developer); \textit{Kriegler}, 74 Cal. Rptr. at 752 (mass producer of homes).

\textsuperscript{153} \textit{Becker}, 698 P.2d at 122.
Justice Broussard also detailed the judicial trend toward holding landlords responsible for ensuring that the property they lease is suitable for its intended use. He cited *Green v. Superior Court* for its analogy between the urban tenant and the ordinary consumer, both of whom require protection from defective goods. He observed that because courts increasingly imposed strict products liability to protect consumers, the modern view of tenant-as-consumer supported imposing strict landlord liability to protect tenants. Finally, Justice Broussard cited a line of cases in which California courts held landlords strictly liable when

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154 *Id.* at 119. Justice Broussard, quoting the American Law Institute, observed that "[t]his judicial and statutory trend reflects a view that no one should be allowed or forced to live in unsafe and unhealthy housing." *Id.* at 120 (quoting *Restatement (Second) of Property (Landlord and Tenant)* § 5.0, at 150 (1977)). As evidence of legislative concern for the residential tenant’s plight, he cited California Civil Code § 1941, which requires that “the lessor of a building intended for use as a dwelling put it in fit condition for such use and repair all subsequent dilapidations.” *Becker*, 698 P.2d at 120 (citing *Cal. Civ. Code* § 1941 (West 1985)). Justice Broussard noted, however, that the legislature provided limited remedies for aggrieved tenants: They could repair and deduct the cost from the rent or abandon the premises. *Id.; see Cal. Civ. Code* § 1941 (West 1985) (setting forth tenants’ remedies when landlord fails to maintain leased premises in habitable condition). Justice Broussard stated that California courts had gone even further than the statute by declaring that a lease for a dwelling contains an implied warranty of habitability, the breach of which entitles tenants to withhold rent. *Becker*, 698 P.2d at 120-21.

155 517 P.2d 1168 (Cal. 1974).

156 *Becker*, 698 P.2d at 121; *see supra* notes 86-89 and accompanying text (discussing *Green*’s analogy between tenants and consumers). Justice Broussard observed:

*Green* analogized to the parallel dramatic changes in the law of commercial transactions where modern decisions have recognized that the consumer in an industrial society should be entitled to rely on the skill of the supplier to assure that goods and services are of adequate quality and, discarding the caveat emptor approach, have implied a warranty of merchantability and fitness.

*Becker*, 698 P.2d at 121. After noting that the *Green* court did not discuss whether a breach of an implied warranty of habitability would give rise to a cause of action for strict liability in tort, Justice Broussard stated that a subsequent appellate case had answered this question affirmatively. *Id.* at 121-22 (citing *Golden v. Conway*, 128 Cal. Rptr. 69, 78 (Ct. App. 1976)); *see supra* notes 121-25 and accompanying text (discussing *Golden*).

157 *Becker*, 698 P.2d at 121.

158 *Id.* at 122-23.
defective furniture or fixtures injured tenants.\textsuperscript{159} He concluded that these cases not only supported strict landlord liability, but compelled the court to adopt it.\textsuperscript{160}

\textsuperscript{159} Id. at 121-22. Several of these decisions were pre-\textit{Greenman} and involved short-term leases of furnished dwellings, thus coming under the common-law warranty exception. \textit{See} Hunter v. Freeman, 233 P.2d 65, 67 (Cal. Ct. App. 1951) (defective detachable heater); Forrester v. Hoover Hotel & Inv. Co., 196 P.2d 825, 828 (Cal. Ct. App. 1948) (defective folding bed); Charleville v. Metropolitan Trust Co., 29 P.2d 241, 244-45 (Cal. Ct. App. 1934) (defective folding bed); Fisher v. Pennington, 2 P.2d 518, 519-20 (Cal. Ct. App. 1931) (defect in door to which folding bed was attached); \textit{supra} notes 75-79 and accompanying text (discussing common-law warranty exception to landlord immunity). In the post-\textit{Greenman} cases, \textit{Fakhoury} and \textit{Golden}, the courts explicitly applied strict liability to landlords. \textit{See} \textit{Golden}, 128 Cal. Rptr. at 78; \textit{Fakhoury} v. Magner, 101 Cal. Rptr. 473, 476 ( Ct. App. 1972); \textit{supra} notes 120-25 and accompanying text (discussing \textit{Golden} and \textit{Fakhoury}).

\textsuperscript{160} \textit{Becker}, 698 P.2d at 122. Justice Lucas, in dissent, cited a line of cases in which courts had refused to apply strict liability to sellers of used goods. \textit{See id.} at 135-36 (Lucas, J., concurring in part and dissenting in part) (citing \textit{LaRosa} v. Superior Court, 176 Cal. Rptr. 224, 229 ( Ct. App. 1981); \textit{Wilkinson} v. Hicks, 179 Cal. Rptr. 5, 7-9 ( Ct. App. 1981); \textit{Tauber-Arons Auctioneers Co. v. Superior Court}, 161 Cal. Rptr. 789, 793-94 ( Ct. App. 1980)). In \textit{Tauber-Arons Auctioneers Co. v. Superior Court}, the California Court of Appeal observed that such suppliers sell their goods "as is," without performing any inspections or repairs. \textit{Tauber-Arons}, 161 Cal. Rptr. at 793-94. The court also noted that used-goods dealers are outside the original chain of distribution of the products they sell. \textit{Id.} The \textit{Tauber-Arons} court stated that whether courts should impose strict liability on a supplier depends on whether the supplier has a continuing business relationship with the manufacturer of the injurious product. \textit{See id.} at 793. The court argued that because used-goods dealers lack a continuing business relationship with the manufacturers of the products they sell, \textit{Tauber-Arons}, 161 Cal. Rptr. at 793-94, they are unable to pressure the manufacturers to improve safety. \textit{Id.} at 798. Similarly, used-goods dealers are unable to pass the costs of injuries up the distribution chain by seeking indemnity or contribution. \textit{See id.} For these reasons, the \textit{Tauber-Arons} court and others have declined to hold used-goods dealers strictly liable when defective used goods cause injury. \textit{Id.} at 793-94; \textit{see e.g.}, \textit{LaRosa}, 176 Cal. Rptr. at 229-31; \textit{Wilkinson}, 179 Cal. Rptr. at 7-9.

The used-goods dealer case may, at first glance, seem inconsistent with the cases imposing strict liability on bailors, given that after the first rental, leased goods are, in some sense, "used." \textit{See e.g.}, \textit{Becker}, 698 P.2d at 137 (Lucas, J., concurring in part and dissenting in part). The \textit{Becker} dissent resolves the apparent conflict by suggesting that commercial bailors (unlike used-goods dealers or landlords) generally have a continuing business relationship with either distributors or manufacturers. \textit{Id.} (Lucas, J., concurring in part and dissenting in part); \textit{see also} Livingston v. Begay, 652
Despite Justice Broussard's apparent certainty that the Becker facts warranted strict liability, his majority opinion stops short of embracing a general rule of strict landlord liability.\textsuperscript{161} The Becker majority failed to indicate whether courts should hold commercial landlords strictly liable.\textsuperscript{162} Additionally, the majority expressly refused to determine whether courts should hold landlords strictly liable when patent defects injure tenants.\textsuperscript{163} Finally, the majority provided no guidelines for determining when landlords' activities rise to the level of "the business of leasing"\textsuperscript{164} and subject them to strict liability.\textsuperscript{165}

B. Post-Becker: Limiting the Scope of Strict Landlord Liability

In the several appellate cases decided since Becker, the courts have faced the questions that Becker left unresolved.\textsuperscript{166} In each case, the courts avoided applying strict landlord liability by limiting Becker to its facts.\textsuperscript{167} Thus, in their reluctance to extend Becker, the courts have fashioned a rule of limited strict landlord liability.\textsuperscript{168}

\textsuperscript{161} See Becker, 698 P.2d at 122; infra notes 162-65 and accompanying text (discussing issues Becker failed to resolve).
\textsuperscript{162} Becker, 698 P.2d at 122. The court discussed only the liability of landlords who lease dwellings. Id.
\textsuperscript{163} Id. at 122 n.4.
\textsuperscript{164} Id. at 122.
\textsuperscript{165} Id.; see Love, supra note 4, at 134-35 n.661 (discussing problem of determining when landlord is in the business of leasing); Nolan & Ursin, supra note 4, at 161-62 (discussing "business of leasing" requirement).
\textsuperscript{166} See infra notes 169-91 and accompanying text (discussing Muro and Vaerst); see also Pierson v. Sharp Memorial Hosp., 264 Cal. Rptr. 673, 676 (Ct. App. 1989) (declining to hold hospital strictly liable for visitor's injuries on ground that hospital provided a service, not a product).
\textsuperscript{167} See Vaerst v. Tanzman, 272 Cal. Rptr. 503, 505 (Ct. App. 1990) (declining to hold landlord who leased one unit strictly liable when patent defect injured tenant); Muro v. Superior Court, 229 Cal. Rptr. 383, 384 (Ct. App. 1986) (declining to hold commercial landlord strictly liable).
\textsuperscript{168} See infra notes 301-08 and accompanying text (discussing limited strict landlord liability).
The first post-Becker case, Muro v. Superior Court,\(^{169}\) raised the issue of whether strict landlord liability should apply to commercial landlords.\(^{170}\) In Muro, the employee of a commercial tenant was injured when she fell on slippery stairs.\(^{171}\) She sued the landlord in strict liability, arguing that Becker should apply to commercial as well as residential property.\(^{172}\) The appellate court held that neither Becker's language nor its rationale supported holding commercial landlords strictly liable for tenant injuries.\(^{173}\)

The Muro court stated that the need to protect "powerless" residential tenants was central to the Becker court's adoption of strict landlord liability.\(^{174}\) Reasoning that commercial tenants need no special protection, the Muro court observed that commercial tenants are generally more sophisticated and have greater bargaining power than residential tenants.\(^{175}\) Further, the court noted that commercial tenants are more likely to negotiate lease terms than are residential tenants.\(^{176}\) Concluding that commercial tenants can absorb the costs of injuries as a business expense,\(^{177}\) the court found no reason to extend strict liability to commercial landlords.\(^{178}\)

A 1990 appellate decision, Vaerst v. Tanzman, further limited Becker.\(^{179}\) Vaerst raised the issue of whether landlords should be strictly liable when patent defects injure tenants.\(^{180}\) Additionally, Vaerst required the court to interpret the prerequisite that landlords be in the business of leasing for strict landlord liability.\(^{181}\) In Vaerst, a residential tenant's guest was injured when she fell on a stairway.\(^{182}\) The guest sued the landlord in strict liability, alleg-

\(^{169}\) 229 Cal. Rptr. 383 (Ct. App. 1986).

\(^{170}\) Id. at 385.

\(^{171}\) Id. at 384.

\(^{172}\) Id. The landlord demurred, arguing that the Becker rule of strict landlord liability did not apply to commercial rental property. Id. at 384-85. The trial court sustained the demurrer and the plaintiff appealed. Id. at 385.

\(^{173}\) Id.

\(^{174}\) Id.

\(^{175}\) Id. at 388.

\(^{176}\) Id.

\(^{177}\) Id. at 389.

\(^{178}\) Id.

\(^{179}\) 272 Cal. Rptr. 503, 506 (Ct. App. 1990).

\(^{180}\) Id. at 505.

\(^{181}\) Id.

\(^{182}\) Id. at 504. The landlord built the stairway and occupied the residence before leasing it to the tenant. Id.
ing that the landlord had "misedigned" the stairway's handrail. The *Vaerst* court determined that the defect in the handrail was patently obvious and held that the *Becker* formulation of strict landlord liability did not apply to such patent defects. The court reasoned that strict landlord liability is inappropriate in cases involving patent defects because tenants should be aware of, and able to guard against, such defects.

The *Vaerst* court also held that the landlord was not sufficiently engaged in the business of leasing property to warrant imposing strict liability. The court found that the landlord had leased the residence temporarily. Although the landlord had leased the property for two years and expected to do so for several more, the court characterized the lease as an isolated transaction. The *Vaerst* court concluded that a landlord who continuously rents a single unit is not in the business of leasing.

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183 *Id.* The trial court concluded that strict liability was inapplicable to the case and tried it on a negligence theory alone. *Id.* After a jury verdict for the defendant, the plaintiff appealed. *Id.*

184 *Id.* at 505. The court stated that "[t]he design defect in the handrail . . . was patent, visible and easily detectable." *Id.*

185 *Id.*

186 *Id.* (stating that detectability of defect strongly militates against imposition of strict liability). The *Vaerst* court relied on the *Becker* court's refusal to determine whether strict liability would apply when a patent defect caused tenant injuries. See *id.* (citing *Becker* v. IRM Corp., 698 P.2d 116, 122 n.4 (Cal. 1985)). The *Becker* majority stated in a footnote that it did not "determine whether strict liability would apply to a disclosed defect[,]" but the court cited the 1972 case *Luque v. McLean* in which the California Supreme Court recognized a strict products liability claim based on a patent defect. *Becker*, 698 P.2d at 122 n.4 (citing *Luque* v. *McLean*, 501 P.2d 1163, 1169 (Cal. 1972)). *Luque* involved a patent design defect in a lawnmower that caused plaintiff's injuries. *Luque*, 501 P.2d at 1165-66. The *Luque* court held that the plaintiff was not required to prove that he was unaware of the defect, stating that "the policy underlying the doctrine of strict liability compels the conclusion that recovery should not be limited to cases involving latent defects." *Id.* at 1169. The *Vaerst* court cited *Becker's* footnote discussing patent defects but did not mention *Luque*. See *Vaerst*, 272 Cal. Rptr. at 505.

187 *Vaerst*, 272 Cal. Rptr. at 505.

188 *Id.*

189 *Id.* at 509 (Poché, J., dissenting).

190 *Id.* at 505.

191 *Id.*
Thus, the appellate courts, in choosing to limit, rather than extend *Becker*, have rejected a general rule of strict landlord liability. Further, the *Vaerst* court openly criticized *Becker*, suggesting that even limited strict landlord liability is unwarranted. This appellate retreat from *Becker* suggests that the California Supreme Court should reconsider whether the benefit to tenants of imposing strict landlord liability outweighs the significant burden on landlords.

### III. California’s Strict Landlord Liability: Policies and Problems

The *Becker* court based its adoption of strict landlord liability on the analogy between tenants and consumers of products. The court, however, focused on the similarities between tenants and consumers without fully considering whether the policy justifications for strict products liability apply to strict landlord liabil-

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192 *See id.* (declining to hold landlord who leased one unit strictly liable when patent defect injured tenant); *Muro v. Superior Court*, 229 Cal. Rptr. 383, 384 (Ct. App. 1986) (declining to hold commercial landlord strictly liable); *supra* notes 169-91 and accompanying text (discussing *Vaerst* and *Muro*).

193 *See Nolan & Ursin, supra* note 4, at 160-66 (discussing possibility that *Becker* heralded general strict landlord liability).

194 *Vaerst v. Tanzman*, 272 Cal. Rptr. 503, 506 n.2 (Ct. App. 1990). The court stated:

*Becker* represents a minority view to which Chief Justice Lucas and Justice Mosk vigorously dissented. The overwhelming weight of outside authority consistently holds that the imposition of strict liability upon the landlord for latent defects in premises is unjustified in the absence of a showing that the landlord had notice or knowledge of the defect because the landlord is not an insurer of the property.


195 *See infra* part III (evaluating California’s current approach to landlord liability).

196 *Becker v. IRM Corp.*, 698 P.2d 116, 121 (Cal. 1985).
In developing and expanding strict products liability, courts have cited five categories of policy justifications: loss-spreading, enterprise liability, encouraging safety, protecting consumer expectations, and easing plaintiffs' proof problems. Section A of this Part considers whether these justifications apply to strict landlord liability and concludes that they are less compelling in the landlord-tenant context than in the products context.

Because these policy justifications do not support strict landlord liability, the Vaerst and Muro courts' refusal to extend Becker was appropriate. In limiting Becker, however, the appellate courts have created problematic distinctions. Landlords are subject to different standards of liability, depending on whether they lease residential or commercial property and whether the injurious defect was latent or patent. Additionally, neither Becker nor its progeny determine whether landlords who lease a small number of units are subject to strict liability. Section B

197 See infra notes 210-300 and accompanying text (evaluating traditional justifications for strict products liability in landlord-tenant context).
198 Highland, supra note 5, at 816-17; see infra notes 210-44 and accompanying text (discussing loss-spreading in landlord-tenant context).
199 Highland, supra note 5, at 811-14; see infra notes 245-62 and accompanying text (discussing enterprise liability in landlord-tenant context).
200 Highland, supra note 5, at 814-16; see infra notes 263-75 and accompanying text (discussing encouraging safety in landlord-tenant context).
201 Highland, supra note 5, at 818-19; see infra notes 276-84 and accompanying text (discussing protecting tenant expectations).
202 Highland, supra note 5, at 817-18; see infra notes 285-96 and accompanying text (discussing easing tenants' proof problems).
203 See infra notes 210-300 and accompanying text (evaluating traditional justifications for strict products liability in landlord-tenant context).
204 See Vaerst v. Tanzman, 272 Cal. Rptr. 503, 505 (Ct. App. 1990) (declining to hold landlord who leased one unit strictly liable when patent defect injured tenant); Muro v. Superior Court, 229 Cal. Rptr. 383, 384 (Ct. App. 1986) (declining to hold commercial landlord strictly liable).
205 See supra notes 169-91 and accompanying text (discussing Muro and Vaerst); infra notes 301-41 and accompanying text (evaluating Muro and Vaerst).
206 See Muro, 229 Cal. Rptr. at 384.
207 See Vaerst, 272 Cal. Rptr. at 505.
208 See Becker v. IRM Corp., 698 P.2d 116, 122 (Cal. 1985) (holding lessor of thirty-six unit complex strictly liable); Vaerst, 272 Cal. Rptr. at 505 (declining to hold lessor of one unit strictly liable).
of this Part discusses the potential for uncertainty and unfairness inherent in this limited strict liability approach and concludes that courts should adopt a different standard of liability altogether.\footnote{See infra notes 301-41 and accompanying text (evaluating limited strict landlord liability).}

A. Application of the Policy Justifications for Strict Products Liability to Strict Landlord Liability

1. Loss-Spreading

The principal justification for strict products liability is that it spreads the costs of consumer injuries throughout society.\footnote{Becker, 698 P.2d at 123; Price v. Shell Oil Co., 466 P.2d 722, 725-26 (Cal. 1970); see Browder, supra note 5, at 138-39 (discussing loss-spreading as justification for holding landlords strictly liable when latent defects injure tenants); Highland, supra note 5, at 816-17 (discussing “risk distribution” justification for strict products liability); Love, supra note 4, at 100 (discussing loss-spreading as justification for strict landlord liability); Nolan & Ursin, supra note 4, at 146-47 (discussing strict landlord liability). In Greenman, the California Supreme Court adopted strict products liability for manufacturers, noting that its purpose was “to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.” Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 901 (Cal. 1963). The California Supreme Court later declared in Becker that “[t]he paramount policy of the strict products liability rule remains the spreading throughout society of the cost of compensating otherwise defenseless victims of manufacturing defects.” Becker, 698 P.2d at 123.} Consumer injuries from defective products are inevitable.\footnote{See Highland, supra note 5, at 816.} Proponents of loss-spreading argue that these injuries are least harmful if their costs are broadly distributed.\footnote{Price, 466 P.2d at 725-26; Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440-41 (Cal. 1944) (Traynor, J., concurring); Highland, supra note 5, at 816.} Suppliers of consumer products can effectively spread injury costs by purchasing liability insurance and by adjusting product prices.\footnote{Price, 466 P.2d at 725-26; Escola, 150 P.2d at 441 (Traynor, J., concurring).} This loss-spreading justification presupposes, however, that the product in question is not a necessity.\footnote{See infra notes 215-18 and accompanying text (discussing adverse impact of strict liability on product availability and affordability).} If suppliers cannot make a product safe, consumers are generally better off without
it. A basic necessity, on the other hand, must be available as well as affordable to consumers. Imposing strict liability on an enterprise that supplies a basic necessity is likely to reduce the product’s affordability and availability. Thus, the loss-spreading justification loses its force when the product is a basic necessity. Because housing is a basic necessity, loss-spreading does not support imposing strict landlord liability on residential landlords.

A supplier may choose to sell an injurious product so long as the profits exceed the injury costs. Highland, supra note 5, at 813. If, however, injury costs become excessive, and the supplier cannot improve product safety, she will likely drop the product. See sources cited infra notes 216-17.

Cf. Brown v. Superior Court, 751 P.2d 470, 478-79 (Cal. 1988) (refusing to impose strict liability on drug manufacturers because of “public interest in the availability of drugs at an affordable price”). See Becker v. IRM Corp., 698 P.2d 116, 139 n.6 (Cal. 1985) (Lucas, J., concurring in part and dissenting in part) (arguing that imposing strict landlord liability will increase cost of rental housing); Comment, supra note 22, at 296 (arguing that increasing landlords’ responsibility for tenant security will decrease availability and affordability of rental housing); supra notes 22-27 and accompanying text (discussing adverse impact of high liability insurance costs on product availability and affordability); cf. Brown, 751 P.2d at 478-79 (refusing to impose strict liability on drug manufacturers because of “public interest in the availability of drugs at an affordable price”). See supra notes 215-17 and accompanying text (discussing adverse impact of strict liability on product availability and affordability).

Nash v. City of Santa Monica, 688 P.2d 894, 904 (Cal. 1984) (Bird, C.J., concurring in part and dissenting in part); see CAL. GOV’T CODE § 65580 (West 1983) (mandating that communities have general plans addressing housing needs). Section 65580(a) states: “The Legislature finds and declares as follows: (a) The availability of housing is of vital importance, and the early attainment of decent housing and a suitable living environment for every California family is a priority of the highest order.” Id.

See Becker, 698 P.2d at 139 n.6 (Lucas, J., concurring in part and dissenting in part). The Becker dissent criticized the majority for ignoring the economic impact of adopting strict landlord liability, protesting:

The majority never considers the economic effect of its holding. The only logical result is that the price of rental housing will increase because of the increased cost of insurance . . . . Even if landlords can sue participants in the original line of manufacture and marketing, the litigation costs involved will likely also have an effect on the price of rental housing. Arguably, instead of risk distribution, the majority’s conclusion will result in a general increased cost attributable to the risks involved without a concurrent benefit. Someone will have to pay for the additional litigation today’s decision is likely to create.
The Becker majority relied heavily on the loss-spreading justification, stating that landlords can distribute the costs of injuries by negotiating a low purchase price for property in poor condition, by adjusting rents, and by insuring the property. While these contentions seem reasonable in theory, in practice, the first two options are not available to all landlords. Landlords generally do not have expert knowledge of every component of a modern apartment building and thus will have difficulty forecasting the probability and severity of defect-related injuries. Therefore, their ability to distribute the costs of potential injuries by negotiating a lower purchase price is limited. Further, if a landlord is a small operator, she cannot effectively distribute sub-

Id.

221 Id. at 123. Although the Becker analysis focused on "the paramount policy" of loss-spreading, id., courts have cited other policy justifications for the strict liability doctrine, LaRosa v. Superior Court, 176 Cal. Rptr. 224, 235 (Ct. App. 1981). See generally, Highland, supra note 5 (discussing policy justifications for strict products liability). In fact, as one court recently noted, loss-spreading alone is probably insufficient to justify imposing strict liability. LaRosa, 176 Cal. Rptr. at 235. The argument that society as a whole can bear the cost of an injury more easily than the injured individual applies to all injuries. See id. at 226. Unless we are prepared to accept a tort system based entirely on strict liability, we must find some additional justification for imposing strict liability on landlords. See id. at 235.

222 Becker, 698 P.2d at 124.

223 See infra notes 224-27 and accompanying text (discussing landlords' limited ability to spread injury costs by negotiating purchase price and raising rents).


225 See Becker, 698 P.2d at 133 (Lucas, J., concurring in part and dissenting in part) (protesting holding landlords strictly liable given that landlords cannot foresee all tenant injuries).

226 See Becker, 698 P.2d at 137 (Lucas, J., concurring in part and dissenting in part). When the landlord in the introductory hypothetical purchased the duplex, for example, she had no reason to know of the attic's weak flooring. Because she was unaware of the defect, she could not bargain for a lower purchase price.
ststantial costs by raising rents on a few units. For such landlords, the only viable means of loss-spreading is to purchase liability insurance.

Courts and commentators cite landlords' access to liability insurance as one of the strongest arguments in favor of holding landlords strictly liable. Although landlords can and should insure their properties, under strict landlord liability, many will not be able to purchase adequate coverage and still provide affordable rental property. Imposing strict landlord liability will likely increase liability insurance costs in two ways. First, insurers will raise rates because of the increased probability that they will have to pay on a given claim. Second, landlords may have to purchase large amounts of coverage to adequately protect themselves against potentially sizeable personal injury judgments.

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227 The market will place a ceiling on the amount of rent that landlords may charge. Comment, supra note 22, at 296-97. Landlords may not be able to raise their rents even ten percent and remain competitive. Id. (stating that "the market is often so weak and the tenants' capacity to pay is often so low that any attempt to increase rent results in a sharp increase in the vacancy rate"); cf. Highland, supra note 5, at 813-14 (discussing impact of strict products liability on product prices).

Moreover, a ten percent rent increase on a small number of rental units will probably not provide much of an offset against the costs of tenant injuries. Assume, for example, the landlord in the introductory hypothetical charged a rent of five hundred dollars a month for each unit in her three duplexes. If, after the accident, she increased the rent ten percent and retained all her tenants, she would receive an additional thirty-six hundred dollars per year. Compare her situation with that of a manufacturer who sells a million units a year for thirty-six dollars each. If the manufacturer increased the price ten percent, she would receive an additional three million, six hundred thousand dollars per year. In other words, the manufacturer can offset the cost of product-related injuries a thousand times more effectively than the landlord.

228 See supra notes 221-27 and accompanying text.

229 Becker, 698 P.2d at 125; Browder, supra note 5, at 138-39; Nolan & Ursin, supra note 4, at 146-47; see Love, supra note 4, at 100.

230 See supra notes 4-5 and accompanying text (discussing reasons for holding landlords accountable for condition of leased premises).

231 See supra notes 23-26 and accompanying text (discussing adverse impact of high liability insurance costs on product availability and affordability).

232 See supra note 23 and accompanying text (stating that strict landlord liability will increase liability insurance rates).

233 Under strict liability, landlords cannot eliminate their risk of personal liability by conscientiously inspecting for and repairing all known defects.
Higher liability insurance costs will adversely affect the availability and affordability of rental housing.\textsuperscript{234} Landlords faced with higher costs will, if possible, raise rents.\textsuperscript{235} While commercial landlords may be able to spread injury costs among tenants by raising rents,\textsuperscript{236} such loss-spreading is impracticable in the residential setting.\textsuperscript{237} In urban areas, affordable housing is in short supply.\textsuperscript{238} Many low-income tenants cannot afford even small

\textit{Cf.} Highland, supra note 5, at 814 (noting that strict products liability may sometimes encourage suppliers to insure against liability rather than improve product safety). Landlords will be liable for any freakish accident resulting from any "defect." Becker v. IRM Corp., 698 P.2d 116, 133 (Cal. 1985) (Lucas, J., concurring in part and dissenting in part). They will thus wish to purchase as much insurance coverage as they possibly can. \textit{Cf.} Highland, supra note 5, at 814 & n.67 (noting that strict products liability may discourage suppliers from improving product safety because it is economically inefficient). If, on the other hand, the standard of liability is negligence, landlords can virtually eliminate their risk of liability by carefully maintaining their property. \textit{See} Brennan v. Cockrell Invs., Inc., 111 Cal. Rptr. 122, 125 (Ct. App. 1973) (holding that landlords' duty to tenants is one of ordinary care); e.g., Vaerst v. Tanzman, 272 Cal. Rptr. 503, 504 (Ct. App. 1990) (finding that landlord’s design and construction of stairway was reasonable).

\textsuperscript{234} \textit{See infra} notes 235-44 and accompanying text (discussing adverse impact of high liability insurance costs on availability of affordable housing).

\textsuperscript{235} \textit{See} Comment, supra note 22, at 296 (arguing that increasing landlords' responsibility for tenant security will increase liability insurance costs, forcing landlords to raise rents); \textit{infra} notes 236-44 and accompanying text (discussing adverse impact of high liability insurance costs on availability of affordable housing); \textit{cf.} Brown v. Superior Court, 751 P.2d 470, 478-79 (Cal. 1988) (noting that drug manufacturers pass on increased liability insurance costs to consumers); supra note 24 (discussing Brown).

\textsuperscript{236} Commercial rental property, unlike residential property, is not a basic necessity of life. \textit{See} Muro v. Superior Court, 229 Cal. Rptr. 383, 388-89 (Ct. App. 1986). Furthermore, the supply of commercial rental property generally exceeds the demand. \textit{Id.} at 389. Therefore, availability of affordable rental property is not an issue in the commercial setting. \textit{See id.} If commercial landlords charge high rents or go out of business, prospective tenants can still find suitable rental property. \textit{See id.} Thus, unlike the residential rental business, the commercial rental business can effectively spread the cost of tenant injuries.

\textsuperscript{237} \textit{See infra} notes 238-44 and accompanying text (discussing adverse impact of strict landlord liability on availability of affordable housing).

\textsuperscript{238} CAL. HEALTH & SAFETY CODE § 33250 (West 1973); Green v. Superior Court, 517 P.2d 1168, 1173 n.8 (Cal. 1974); Muro v. Superior Court, 229 Cal. Rptr. 383, 389 (Ct. App. 1986). The California legislature has formally recognized that "[t]he ordinary operations of private enterprise cannot
increases in rent. In rent-controlled areas, landlords, unable to raise rents, will be forced to absorb higher insurance costs. Such costs will reduce the profitability of the rental business so that few will be willing to engage in it. Landlords may convert unprofitable rental property to other uses or simply abandon it, further exacerbating the housing shortage. Thus, strict landlord liability may promote loss-spreading, but it will also reduce access to rental housing.

2. Enterprise Liability

Enterprise liability is a second possible justification for imposing strict landlord liability. Enterprise liability refers to the policy of forcing entrepreneurs to bear the costs when their enter-

provide an adequate supply of safe and sanitary dwelling accommodations at prices or rentals which persons and families of low income can afford.” Cal. Health & Safety Code § 33250 (West 1973).

See Comment, supra note 22, at 296; see United States President’s Commission on Housing, The Report of the President’s Commission on Housing 90 (1982) (stating that low income renters comprise larger fraction of total renter population than formerly).

See Comment, supra note 22, at 295-96 (arguing that increasing landlords’ responsibility for tenant security will increase liability insurance costs, severely burdening landlords in rent-controlled urban areas); cf. Brown v. Superior Court, 751 P.2d 470, 478-79 (Cal. 1988) (observing that drug manufacturers have withdrawn drugs from market because of high insurance costs); see supra note 25 (discussing Brown).

See Comment, supra note 22, at 298-99 (arguing that increasing landlords’ responsibility for tenant security will increase liability insurance costs, decreasing landlords’ profitability); cf. Brown, 751 P.2d at 478-79 (stating that drug manufacturers have decided not to market new drugs because of high liability insurance costs); supra note 26 (discussing Brown).

See Comment, supra note 22, at 296-97 (arguing that increasing landlords’ responsibility for tenant security will increase liability insurance costs, forcing some landlords out of business).

See id. (arguing that increasing landlords’ responsibility for tenant security will decrease availability of affordable rental housing); Cal. Health & Safety Code § 33250 (West 1973) (discussing housing shortage); Green v. Superior Court, 517 P. 1168, 1173 n.8 (Cal. 1974) (discussing rental housing shortage); Muro v. Superior Court, 229 Cal. Rptr. 383, 389 (Ct. App. 1986) (noting rental housing shortage).

See supra notes 210-43 and accompanying text.

See Becker v. IRM Corp., 698 P.2d 116, 136 n.2 (Cal. 1985) (Lucas, J., concurring in part and dissenting in part) (listing justifications for strict liability); cf. Highland, supra note 5, at 811 (discussing enterprise liability as justification for strict products liability).
prise injures consumers. Proponents of enterprise liability argue that suppliers should bear the injury costs of defective products because suppliers create the risk of injury and reap the profits. The rationale is that suppliers should absorb injury costs as part of the cost of doing business. Further, because suppliers control the risk of injury, they can choose between providing consumers with safe products or paying their tort claims. Landlords, however, do not always have this choice.

Generally, landlords neither design nor manufacture the products they supply. Therefore, unlike manufacturers, landlords have limited control over safety of design and workmanship.

246 Highland, supra note 5, at 811-12. Enterprise liability is related to loss-spreading in that both involve shifting loss from the individual to the enterprise. Id. at 811-12, 816. Loss-spreading, however, is a purely pragmatic concept, whereas enterprise liability has a moral component. See id. at 811-12. The official comment to § 402A of the Restatement (Second) of Torts, which adopted strict products liability, illustrates this moral component: "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 . . . ." Restatement (Second) of Torts § 402A cmt. f (1965); see Highland, supra note 5, at 812 (discussing enterprise liability as justification for strict products liability).

247 Highland, supra note 5, at 812.

248 Id.

249 See id. at 813 (stating that businesses may sell defective products as long as they can pay resulting injury costs).

250 Id. at 813-14.

251 See infra notes 252-53 and accompanying text (discussing landlords' limited ability to make leased premises safe).


253 Becker, 698 P.2d at 138 (Lucas, J., concurring in part and dissenting in part); accord Dwyer v. Skyline Apartments, Inc., 301 A.2d 463, 467 (N.J. Super. Ct. App. Div.) (declining to hold landlords strictly liable for tenant injuries), aff'd, 311 A.2d 1 (1973). Distributors and retailers are similarly unable to ensure safe design and workmanship of the products they supply, yet they are subject to strict liability. See supra notes 103-12 and accompanying text (discussing expansion of strict products liability to distributors and retailers). Courts have explained that imposing strict liability on such suppliers is not unjust because they generally have continuing business relationships with the manufacturers and can seek indemnity or contribution if sued. Cf. Vandermark v. Ford Motor Co., 391 P.2d 168, 171-72 (Cal. 1964) (retailer). Because landlords rarely have such relationships with the developers of their properties, they are unable to shift
Holding landlords strictly liable when defects beyond their control injure tenants is unfair.\textsuperscript{254} Moreover, unlike retailers or distributors, landlords generally have no continuing business relationship with the builders responsible for such defects.\textsuperscript{255} Because landlords will not be able to receive indemnity or contribution from builders who are no longer in business, imposing strict landlord liability makes them "the last outpost of liability."\textsuperscript{256} They are thus forced to bear the burden of tenant injuries even though they may be innocent of any wrongdoing.\textsuperscript{257}

Although landlords often have no link to the builders who make the initial choices that affect product safety,\textsuperscript{258} imposing strict landlord liability requires landlords to pay for those choices by absorbing the costs of tenant injuries.\textsuperscript{259} Proponents of enterprise liability assume that suppliers, directly or indirectly, control the risks associated with their products.\textsuperscript{260} But because landlords do not fully control the risks associated with the property they

\textsuperscript{254} Becker, 698 P.2d at 137 (Lucas, J., concurring in part and dissenting in part). "No matter how carefully [landlords] inspect, and no matter how impossible to discern the defect, [landlords] are now the last outpost of liability for countless unrelated products in which they have no particular expertise." \textit{Id.}

\textsuperscript{255} \textit{Id.} at 135 (Lucas, J., concurring in part and dissenting in part); see also \textit{Livingston}, 652 P.2d at 738-39 (declining to hold motel operator strictly liable).

\textsuperscript{256} Becker, 698 P.2d at 135 (Lucas, J., concurring in part and dissenting in part).

\textsuperscript{257} See \textit{id.}


\textsuperscript{259} See Becker, 698 P.2d at 137 (Lucas, J., concurring in part and dissenting in part).

\textsuperscript{260} See Highland, \textit{supra} note 5, at 812-13 (discussing enterprise liability as justification for strict products liability).
lease, the policy of enterprise liability does not support strict landlord liability.

3. Encouraging Safety

Encouraging safety is a third possible justification for imposing strict landlord liability. Imposing strict liability on suppliers of consumer products encourages them either to correct product defects or to stop marketing defective products altogether.

261 Landlords can repair patent defects and inspect for and repair latent defects. See supra note 4 (discussing reasons for placing burden of repairs on landlord). But some latent defects, like the weak flooring in the introductory hypothetical, will escape detection. See supra notes 11-15 and accompanying text (discussing hypothetical landlord’s liability when tenant fell through attic’s weak flooring). In such cases, the builder, not the landlord, may be responsible for creating these defects and thus the risk of injury. See supra note 252 and accompanying text (stating that landlords generally do not manufacture rental housing).

262 See Becker, 698 P.2d at 138-39 (Lucas, J., concurring in part and dissenting in part). The Becker dissent stated:

[W]here the landlord has no continuing relationship with the chain of marketing leading back to the manufacturer of the defective product, and thus has no way of influencing the production or design of the product or of adjusting potential costs of the manufacturer’s enterprise or others in the business of marketing the item at issue, imposition of strict liability is inappropriate.

Id. at 139.

263 See id. at 136 n.2 (Lucas, J., concurring in part and dissenting in part) (listing justifications for strict liability); cf. Price v. Shell Oil Co., 466 P.2d 722, 725-27 (Cal. 1970) (discussing encouraging safety as justification for strict products liability); Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440-41 (Cal. 1944) (Traynor, J., concurring) (discussing strict products liability); Highland, supra note 5, at 814-16 (discussing “deterrence” as justification for strict products liability). Justice Traynor discussed this rationale in his Escola concurrence:

[P]ublic policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot . . . .

It is to the public interest to discourage the marketing of products having defects that are a menace to the public.

Escola, 150 P.2d at 440-41 (Traynor, J., concurring).

264 Highland, supra note 5, at 814-16. Under a strict liability regime, however, suppliers may have a greater incentive to insure against loss than to avoid it by inspecting and repairing the premises. See id. at 811-14 (discussing tension between enterprise liability and maximal deterrence of
Similarly, imposing strict liability on landlords would encourage landlords to ensure that rental property is free of defects. Unlike other suppliers, however, landlords' ability to improve their products' safety is rather limited. Landlords cannot redesign the products or switch manufacturers; they can only repair the defects they know about. While imposing strict landlord liability will encourage landlords to make such repairs, it provides no greater safety incentive than imposing negligence liability.

Some might argue that strict landlord liability is necessary to ensure that landlords inspect for latent defects. Prior to Becker, negligence liability did not encourage landlords to repair latent defects because the landlord's duty of ordinary care did not include a duty to inspect for such defects. Thus, landlords were not liable when latent defects injured tenants unless the defects were reasonably obvious. But Becker solved this prob-

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265 See supra note 4 (discussing reasons for holding landlords accountable for condition of leased premises).

266 See Becker, 698 P.2d at 137 (Lucas, J., concurring in part and dissenting in part) (emphasizing landlords' lack of expert knowledge of all products present in modern apartments and lack of connection to builders).

267 Browder, supra note 5, at 136-39; see Becker, 698 P.2d at 139 (Lucas, J., concurring in part and dissenting in part) (imposing strict liability "does nothing to aid in the goals of deterrence or product safety").

268 See Browder, supra note 5, at 137-38. Professor Browder observed:

For many, if not most, cases involving injuries caused by defects in leased premises, a negligence doctrine will vindicate the basic goals of the new regime in landlord-tenant relations. Such a doctrine implies the requirement that a landlord know or should know of such a defect . . . . The basic policy of forcing improvements in deteriorated or defective housing is not relevant if no one knows of the particular defect.

Id. Professor Browder argued, however, that courts should impose strict landlord liability when latent defects injure tenants because landlords can spread the loss via liability insurance. Id.

269 See id. at 131-41 (advocating imposing strict landlord liability when latent defects injure tenants).

270 Witkin, supra note 69, at 780; see, e.g., D Dalton v. Williams 183 P.2d 325, 328 (Cal. Ct. App. 1947) (refusing to hold landlord liable for failing to discover and repair defective water faucet handle).

271 See Brennan v. Cockrell Invs., Inc., 111 Cal. Rptr. 122, 125 (Ct. App. 1973) (discussing landlord's duty of ordinary care); Witkin, supra note 69, at 775 (discussing Brennan).
lem by expanding the scope of the landlord's duty. The Becker court, in analyzing the tenant's negligence claim, interpreted the landlord's duty of ordinary care to include a duty to inspect for latent defects. Because landlords' lack of awareness of a defect no longer shields them from liability, negligence liability now provides landlords with a strong incentive to repair both latent and patent defects. Thus, while strict liability encourages safety, courts can achieve the same result by imposing the less burdensome negligence liability.

4. Protecting Tenant Expectations

Protecting tenant expectations is a fourth possible justification for imposing strict landlord liability. Buyers of consumer products expect that such products will be free of defects. Imposing strict products liability on suppliers protects this expec-

\[272\] See Becker v. IRM Corp., 698 P.2d 116, 125 (Cal. 1985) (imposing duty to inspect prior to leasing); accord Mansur v. Eubanks, 401 So.2d 1328, 1329-30 (Fla. 1981).

\[273\] Becker, 698 P.2d at 125. Both the majority and dissent in Becker agreed that a reasonable inspection would have revealed that some of the shower doors were made of untempered glass. See id. at 126, 139. The landlord was thus liable in negligence as well as in strict liability. See id. at 126.

\[274\] See supra notes 270-73 and accompanying text.

\[275\] See supra notes 267-74 and accompanying text.

\[276\] See Becker, 698 P.2d at 136 n.2 (Lucas, J., concurring in part and dissenting in part) (listing justifications for strict liability); cf. Price v. Shell Oil Co., 466 P.2d 722, 725-27 (Cal. 1970) (discussing protecting consumer expectations as justification for strict products liability). Courts and commentators also discuss this justification in terms of enforcing landlords' implied representations. See Becker, 698 P.2d at 122 (stating that in renting premises, landlords impliedly represent that premises are fit for use as dwellings); Highland, supra note 5, at 818-19 (discussing implied representation justification for strict liability).

\[277\] Escola v. Coca Cola Bottling Co., 150 P.2d 436, 443 (Cal. 1944) (Traynor, J., concurring). In Escola, Justice Traynor argued:

The consumer no longer has means or skill enough to investigate for himself the soundness of a product, even when it is not contained in a sealed package, and his erstwhile vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing devices such as trademarks. Consumers no longer approach products warily but accept them on faith, relying on the reputation of the manufacturer or the trade mark [sic].

Id. (Traynor, J., concurring) (citations omitted).
tation by forcing suppliers to guarantee that the products they sell will perform safely. 278

Tenants, however, do not expect that the property they lease will be completely free of defects. 279 Rather, tenants expect that landlords will repair defects when they know or should know that defects exist. 280 If landlords negligently fail to repair defects, and the defects cause injuries, tenants expect that landlords will be liable. 281 But tenants do not expect that landlords will be liable, regardless of fault, for every imperfection that contributes to tenant injuries. 282 Therefore, imposing strict landlord liability is not necessary to vindicate tenant expectations. 283 Given that tenants expect only that the landlord will behave reasonably, negligence liability sufficiently protects tenant expectations. 284

5. Easing Plaintiff’s Proof Problems

Easing proof problems associated with negligence claims is a fifth possible justification for imposing strict landlord liability. 285 To win a strict liability claim, a plaintiff tenant need only prove that a defect in the leased premises injured her. 286 To win a negligence claim, by contrast, a plaintiff must prove that the defen-

279 Becker, 698 P.2d at 138 (Lucas, J., concurring in part and dissenting in part).
281 See sources cited supra note 280.
282 See Becker, 698 P.2d at 138 (J. Lucas, concurring in part and dissenting in part); accord Dwyer, 301 A.2d at 467.
283 See Browder, supra note 5, at 137 (stating that “a negligence doctrine will vindicate the basic policy goals of the new regime in landlord-tenant relations”); sources cited supra note 282.
284 Becker, 698 P.2d at 138 (Lucas, J., concurring in part and dissenting in part); accord Dwyer, 301 A.2d at 467.
dant owed her a duty of care, that the defendant breached the duty, and that the plaintiff suffered a compensable injury as a result. Because of tenants' limited knowledge of the property's condition and the landlord's management practices, proving landlord negligence may sometimes be difficult.

For the tenant injured when her apartment heating system catches fire, for instance, the only source of information about how the landlord maintained the heating system may be the defendant landlord herself. Because the landlord will not supply the tenant with evidence of the landlord's own negligence, the tenant may not be able to establish a negligence claim. Thus, imposing negligence liability may not always ensure that deserving injured tenants recover for their injuries.

Under strict landlord liability, all tenants who prove that defective premises injured them will recover. But imposing strict liability will remove a significant barrier to recovery and will inevitably encourage spurious claims.

Under current law, the ten-

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289 See Love, supra note 4, at 136 (discussing tenants' proof problems). Professor Love points out:

When a defective condition is created by the landlord's affirmative acts, the plaintiff is in a position analogous to that of a consumer in an action against a manufacturer. It may be difficult for the plaintiff to prove specific acts of negligence, particularly if he was not present at the time the defective condition was produced. When the landlord fails to discover or repair a defective condition created by a third person, the plaintiff is in a position analogous to that of a consumer in an action against a retailer. It may be impossible for the plaintiff to prove that the landlord knew or should have known of the defective condition.

Id. (footnotes omitted).

290 See sources cited supra note 288.

291 See Love, supra note 4, at 136 (discussing tenant's proof problems); cf. Cronin, 501 P.2d at 1162 (discussing consumers' proof problems); Escola, 150 P.2d at 443 (Traynor, J., concurring) (discussing strict products liability).


293 The Becker dissent recognized this potential problem when it noted that "[a]ny landlord . . . will now be insurer for defects in any wire, screw, latch, cabinet door, pipe or other article on and in [her] premises at the time
ant injured on the leased property can threaten to sue the landlord if she can trace her injury to an arguable defect, however trivial.\textsuperscript{294} Even though the claim may be a sham, the landlord may decide to settle rather than risk expensive litigation.\textsuperscript{295} Thus, while imposing strict landlord liability ensures that landlords compensate deserving tenants for their injuries, holding landlords strictly liable will sometimes force them to compensate undeserving tenants as well.\textsuperscript{296}

Courts and commentators have concluded that the policies of loss-spreading, enterprise liability, encouraging safety, protecting consumer expectations, and easing plaintiffs' proof problems justify strict products liability.\textsuperscript{297} Of these five justifications, only easing plaintiffs' proof problems strongly supports strict landlord liability.\textsuperscript{298} Loss-spreading and enterprise liability seem impracticable and unjust.\textsuperscript{299} Moreover, courts can encourage safety and protect tenant expectations without resorting to strict landlord liability.\textsuperscript{300}

\textbf{B. The Problematic Distinctions of Limited Strict Landlord Liability}

The appellate courts, in limiting \textit{Becker}, have apparently concluded that a general rule of strict landlord liability is unwarranted.\textsuperscript{301} The \textit{Muro} and \textit{Vaerst} courts thus identified situations in which they are let." Becker \textit{v.} IRM Corp., 698 P.2d 116, 133 (Cal. 1985) (Lucas, J., concurring in part and dissenting in part).

\textsuperscript{294} Even if all components of the property are in good condition, tenants can allege that "design" defects injured them. See, \textit{e.g.}, \textit{Vaerst v. Tanzman}, 272 Cal. Rptr. 503, 504 (Ct. App. 1990) (plaintiff alleged that stairway was misdesigned); \textit{cf.} Barker \textit{v.} Lull Eng'g Co., 573 P.2d 443 (Cal. 1978) (discussing mismanufacture, design defect, and failure to warn claims in strict products liability).

\textsuperscript{295} \textit{See Becker}, 698 P.2d at 139 (stating that strict landlord liability "amounts, in effect, to insurance for tenants").

\textsuperscript{296} \textit{See supra} notes 292-95 and accompanying text.

\textsuperscript{297} \textit{See supra} notes 198-202 and accompanying text.

\textsuperscript{298} \textit{See supra} notes 285-95 and accompanying text.

\textsuperscript{299} \textit{See supra} notes 21-62 and accompanying text.

\textsuperscript{300} \textit{See supra} notes 263-84 and accompanying text.

\textsuperscript{301} \textit{See Vaerst v. Tanzman}, 272 Cal. Rptr. 503, 505 (Ct. App. 1990) (declining to hold landlord who leased one unit strictly liable when patent defect injured tenant); \textit{Muro v. Superior Court}, 229 Cal. Rptr. 383, 384 (Ct. App. 1986) (declining to hold commercial landlord strictly liable); \textit{supra} notes 169-91 and accompanying text (discussing \textit{Vaerst} and \textit{Muro}).
which Becker does not apply. As a result, residential landlords are subject to strict liability unless the injurious defect is patent, in which case, negligence liability applies. Commercial landlords, by contrast, are subject only to negligence liability, regardless of the nature of the defect. The distinctions of this limited strict landlord liability approach are unwarranted and problematic, and they unnecessarily complicate landlord liability law. An additional problem with limited strict landlord liability is that neither Becker nor its progeny have indicated whether landlords who lease a small number of units are strictly liable. Far from being a well-reasoned approach to landlord liability, limited strict landlord liability is a byproduct of the courts’ retreat from Becker.

1. The Residential-Commercial Distinction

The Muro court exempted commercial landlords from strict liability on the ground that commercial tenants do not need the same special protections that residential tenants do. This distinction, however, focuses only on the individuals who negotiate commercial leases; it ignores the less sophisticated employees

302 See Vaerst, 272 Cal. Rptr. at 505 (holding that strict landlord liability does not apply to landlords who lease a single unit or when patent defects injure tenants); Muro, 229 Cal. Rptr. at 384 (holding that strict landlord liability does not apply to commercial landlords).
304 Vaerst, 272 Cal. Rptr. at 505.
305 Muro, 229 Cal. Rptr. at 384.
306 See infra notes 309-41 and accompanying text (evaluating Muro and Vaerst distinctions).
307 See Becker, 698 P.2d at 122 (holding landlord who leased thirty-six unit complex strictly liable); Vaerst, 272 Cal. Rptr. at 505 (declining to hold landlord who leased one unit strictly liable).
308 See Vaerst, 272 Cal. Rptr. at 506 n.2 (criticizing Becker); supra note 194 (discussing Vaerst’s criticism of Becker).
and customers who also enter the premises. \footnote{See supra notes 174-78 and accompanying text (discussing Muro).} Employees and customers are even less likely than residential tenants to discover and avoid dangerous defects because they probably do not inspect the property at all. \footnote{See Nolan & Ursin, supra note 4, at 166 (advocating strict landlord liability for commercial landlords); cf. Love, supra note 4, at 103 (discussing whether commercial leases should contain implied warranties of fitness).} If injured, they may be able to recover from commercial tenants. \footnote{Muro, 229 Cal. Rptr. at 389 (stating that commercial tenants can absorb injury costs as business expenses).} Injured employees’ recovery, however, will be limited to workers’ compensation benefits. \footnote{California Labor Code § 3602 provides that the right to compensation under the Workers’ Compensation Act is the exclusive remedy available to an injured employee. CAL. LAB. CODE § 3602 (West 1989).} Injured customers may not even be able to establish their claims, as they must prove negligence when they know even less about the leased premises’ condition than residential tenants. \footnote{See supra notes 285-96 and accompanying text (discussing tenants’ proof problems).}

Furthermore, Muro’s assumption that commercial tenants’ resources and bargaining power approximate those of commercial landlords is not always true. \footnote{Levinson & Silver, supra note 309, at 69-70 (arguing that courts should extend residential warranties to commercial rental property).} Small commercial tenants may lack the bargaining power to force landlords to change unfavorable terms in the lease. \footnote{Id.} Small commercial tenants may also lack the financial resources to repair defects or to absorb the injury costs. \footnote{Id.; see Davidow v. Inwood North Professional Group — Phase I, 747 S.W.2d 373, 377 (Tex. 1988) (arguing that commercial tenants, like residential tenants, need protection of implied warranty of fitness).} Indeed, small commercial tenants face many of the same problems as residential tenants. \footnote{Davidow, 747 S.W.2d at 377; Levinson & Silver, supra note 309, at 69-70.}

As the Muro court points out, the landlord-tenant relationship may often be different in the commercial and residential settings. \footnote{See supra notes 174-78 and accompanying text (discussing basis for Muro’s residential-commercial distinction).} But the similarity of commercial employees, commercial customers, and small commercial tenants to residential tenants...
outweighs the differences.\textsuperscript{320} Therefore, the \textit{Muro} court's distinction between residential and commercial landlords is unjustified.\textsuperscript{321}

2. The Latent-Patent Distinction

Equally unjustified is the \textit{Vaerst} court's distinction between patent and latent defects.\textsuperscript{322} The court refused to impose strict landlord liability when a patent defect caused injury on the ground that tenants can avoid obvious defects.\textsuperscript{323} The court reasoned that tenants are not defenseless against patent defects, as they are against latent defects.\textsuperscript{324} After \textit{Vaerst}, therefore, when a patent defect injures a tenant, the tenant may only recover if the landlord was negligent.\textsuperscript{325} \textit{Vaerst} immunizes landlords who ignore patent defects from strict liability, while those who, despite their best efforts, fail to discover latent defects are strictly liable.\textsuperscript{326}

\textsuperscript{320} \textit{Davidow}, 747 S.W.2d at 377; Levinson & Silver, \textit{supra} note 309, at 69-70; \textit{see supra} notes 310-14 and accompanying text (discussing problems of commercial employees and customers).

\textsuperscript{321} Traditional common-law courts found no reason to distinguish between residential and commercial landlords. Browder, \textit{supra} note 5, at 102. Both were equally subject to liability under the exceptions to the no-duty rule. \textit{Id}. Similarly, when Delaware enacted a statute defining landlords' responsibility for the condition of leased premises, it did not distinguish between residential and commercial landlords; the statute applies to both. \textit{Del. Code Ann. tit. 25, § 5303} (1989).

\textsuperscript{322} \textit{See infra} notes 323-31 and accompanying text (evaluating latent-patent distinction).

\textsuperscript{323} \textit{Vaerst} v. Tanzman, 272 Cal. Rptr. 503, 505 (Ct. App. 1990).

\textsuperscript{324} \textit{Id.}; \textit{see supra} note 7 (discussing appropriate standard of liability when patent defects injure).

\textsuperscript{325} \textit{Vaerst}, 272 Cal. Rptr. at 505.

\textsuperscript{326} The California Supreme Court has expressly rejected this result in the products liability context:

\begin{quote}
It would indeed be anomalous to allow a plaintiff to prove that a manufacturer was negligent in marketing an obviously defective product, but to preclude him from establishing the manufacturer's strict liability for doing the same thing. The result would be to immunize from strict liability manufacturers who callously ignore patent dangers in their products while subjecting to such liability those who innocently market products with latent defects.
\end{quote}

Public policy demands that landlords supply safe rental property.\footnote{327} Because landlords have the skill and financial resources to repair defects,\footnote{328} they should repair all dangerous defects.\footnote{329} To encourage landlords to repair patent as well as latent defects, the same standard of liability should apply to both.\footnote{330} Because the distinction between latent and patent defects rests on the tenant’s ability to avoid injury, courts should handle it as a defense, rather than an issue of liability.\footnote{331}

3. The “In the Business of Leasing” Prerequisite

The post-\textit{Becker} cases, in addition to creating problematic distinctions, failed to resolve the question of whether a particular landlord is in the business of leasing.\footnote{332} The \textit{Vaerst} court determined that a landlord who continuously rents a single unit is not

\footnotesize{328} See supra notes 4, 59-64 and accompanying text (discussing reasons for holding landlords accountable for leased premises’ condition).
\footnotesize{329} See supra note 7 (discussing appropriate standard of liability when patent defects injure tenants).
\footnotesize{330} Vaerst v. Tanzman, 272 Cal. Rptr. 503, 509 (Ct. App. 1990) (Poché, J., dissenting); Neisser, supra note 76, at 529; Nolan & Ursin, supra note 4, at 162-63; cf. Luque, 501 P.2d at 1169 (holding that injurious defect’s patency did not bar strict products liability claim). \textit{But see} Browder, supra note 5, at 137-40 (advocating strict landlord liability when latent defects injure tenants).
\footnotesize{331} Depending on the particular facts, landlords could assert either assumption of the risk, \textit{Keeton et al.}, supra note 1, § 68, at 480-81, or comparative negligence, \textit{id.} § 67, at 468-70. The assumption of the risk defense applies when a plaintiff voluntarily exposed herself to a known and appreciated danger. \textit{Id.} § 68, at 480-81. In California, assumption of the risk is no longer a complete defense to a strict liability claim. Daly v. General Motors Corp., 575 P.2d 1162, 1168-69 (Cal. 1978). Instead, the jury reduces the plaintiff’s award according to comparative negligence principles. \textit{Id.}

The comparative negligence doctrine applies when a plaintiff’s negligence and a defendant’s negligence coincided to produce plaintiff’s injury. \textit{Keeton et al.}, supra note 1, § 67, at 468-70. In comparative negligence jurisdictions such as California, the jury determines the plaintiff’s percentage contribution to her injury and reduces her damages award proportionately. \textit{See} Li v. Yellow Cab Co., 532 P.2d 1226, 1243 (Cal. 1975) (adopting comparative negligence); \textit{see also} \textit{Keeton et al.}, supra note 1, § 67, at 471-73 (discussing “pure” comparative negligence). \textit{See generally} Love, supra note 4, at 155-56 (discussing defenses to strict landlord liability).
\footnotesize{332} \textit{See Vaerst}, 272 Cal. Rptr. at 505 (determining that landlord who leases one unit is not in business of leasing, but failing to explain rationale).
in the business of leasing. The court failed, however, to provide any guidelines for determining whether a landlord who continuously rents a small number of units is in the business of leasing. Today, seven years after Becker, small operators still cannot be certain whether they are strictly liable for tenant injuries.

The Muro and Vaerst courts’ reluctance to extend Becker has produced a piecemeal approach to landlord liability. The distinctions between commercial and residential landlords and between latent and patent defects are both unwarranted. Moreover, the courts’ failure to delineate which landlords are in the business of leasing leaves significant potential for uncertain and unfair results. This limited strict landlord liability approach is unsatisfactory. Courts should therefore abandon strict landlord liability entirely and adopt a uniform standard of fault-based liability.

IV. AN ALTERNATIVE APPROACH: MODIFIED NEGLIGENCE

As an alternative to the current approach to landlord liability when preexisting defects injure tenants, this Comment proposes a form of modified negligence that is a compromise between strict landlord liability and negligence. Under modified negligence,
an injured tenant, as in strict landlord liability, would only have to prove that a defect caused her injuries. Such proof would raise a rebuttable presumption that the landlord was negligent. This presumption would arise regardless of whether the defect was latent or patent. The burden would then shift to the landlord to prove that she used ordinary care in maintaining the leased premises. If the defect was latent, the landlord would have to demonstrate that she conducted a reasonable inspection, but failed to discover the defect. If the defect was patent, the landlord would have to prove that the burden of reducing the risk was greater than the likelihood and probable seriousness of the injury. Further, the landlord could assert that the tenant was

\footnote{343 See supra note 286 and accompanying text (discussing elements of strict liability claim).}

\footnote{344 See supra notes 285-96 and accompanying text (discussing tenants' proof problems).}

\footnote{345 A rebuttable presumption is an inference that a party may refute by presenting contradictory evidence. Black's Law Dictionary 1267 (6th ed. 1990). In the absence of such evidence, the inference governs the jury's determination of the particular fact at issue. Id. A rebuttable presumption shifts the burden of proof from the party whom the presumption favors to the opposing party. Id.}

\footnote{346 This modified negligence approach is analogous to the situation in which a plaintiff in a tort action can assert defendant's violation of a statute as evidence of negligence. See Keeton et al., supra note 1, § 36, at 220-22. California courts hold that such evidence raises a rebuttable presumption that the defendant was negligent. Id. at 229-31. Similarly, under modified negligence, a tenant's proof that defective premises caused her injury would raise a rebuttable presumption that the landlord was negligent.}

\footnote{347 See supra notes 322-31 and accompanying text (discussing latent-patent distinction).}

\footnote{348 See supra notes 345-46 (discussing rebuttable presumptions).}

\footnote{349 As the Becker court stated, "The duty to inspect should charge the defendant only with those matters which would have been disclosed by a reasonable inspection." Becker v. IRM Corp., 698 P.2d 116, 126 (Cal. 1985).}

\footnote{350 In determining whether or not a landlord was negligent, the court should consider the factors set forth in Rowland v. Christian, 443 P.2d 561, 564 (Cal. 1968), namely,}

the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the
negligent in failing to guard against a patent defect.\textsuperscript{351} If the tenant's own negligence contributed to her injury, the jury would reduce the damages award proportionately.\textsuperscript{352} This modified negligence approach would apply to residential and commercial landlords alike.\textsuperscript{353}

Modified negligence would promote the most important of the policies discussed above.\textsuperscript{354} It would spread the loss of most tenant injuries, but unlike strict landlord liability, it would be fair to landlords and would minimally impact the availability of affordable housing.\textsuperscript{355} In addition, modified negligence would encourage safety, protect tenant expectations, and ease tenants' proof problems.\textsuperscript{356}

This Comment's proposed approach would promote loss-spreading because, like strict landlord liability, it would encourage landlords to insure the property they lease.\textsuperscript{357} The risk of liability would be higher under modified negligence than under simple negligence because to recover under modified negligence, tenants need not prove landlord negligence.\textsuperscript{358} Modified negligence would thus ensure that all tenants injured by defective

\begin{flushright}
availability, cost, and prevalence of insurance for the risk involved.
\end{flushright}

\textit{Id.}

\textsuperscript{351} See supra note 331 (discussing defenses to strict liability).

\textsuperscript{352} See supra note 331 (discussing comparative negligence).

\textsuperscript{353} See supra notes 309-21 and accompanying text (discussing residential-commercial distinction).

\textsuperscript{354} Part III.A.2 concludes that enterprise liability should not apply to the business of renting real property because landlords, unlike other suppliers, do not fully control the risks associated with their product. See supra notes 245-62 and accompanying text. The enterprise liability justification is therefore omitted from the discussion evaluating modified negligence. See infra notes 355-84 and accompanying text.

\textsuperscript{355} See infra notes 357-69 and accompanying text.

\textsuperscript{356} See infra notes 370-84 and accompanying text.

\textsuperscript{357} See supra notes 210-44 and accompanying text (discussing loss-spreading). Under modified negligence, landlords would likely purchase somewhat less coverage than under strict liability, because they would not be automatically liable whenever latent defects injure tenants. See supra note 233 (discussing landlords' ability to reduce risk of negligence liability). But because of the relative ease with which tenants could sue, modified negligence would strongly encourage landlords to insure. See supra note 344 and accompanying text (discussing modified negligence's easing of tenants' proof problems).

\textsuperscript{358} See supra notes 342-53 and accompanying text (discussing modified negligence approach).
premises receive either settlements or trials.\textsuperscript{359} Moreover, in cases that go to trial, this approach favors tenants with a presumption of landlord negligence.\textsuperscript{360} Unlike strict landlord liability, however, modified negligence would require landlords to insure only against their own negligence, not against the risk that arguable defects may cause tenant injuries.\textsuperscript{361} Because modified negligence affords landlords an opportunity to defend themselves, landlords would not be unfairly burdened with the costs of tenant accidents.\textsuperscript{362}

Furthermore, modified negligence is superior to strict landlord liability in that it would balance the interests of landlords and tenants without appreciably reducing the availability of affordable housing.\textsuperscript{363} Liability insurance rates would be lower than under strict landlord liability because landlords would not be automati-


\textsuperscript{360} See supra notes 342-53 and accompanying text (discussing modified negligence approach).

\textsuperscript{361} See Becker v. IRM Corp., 698 P.2d 116, 137 (Cal. 1985) (Lucas, J., concurring in part and dissenting in part); supra notes 17-21, 251-59 and accompanying text (discussing potential for harsh results under strict landlord liability).

\textsuperscript{362} Under modified negligence, the outcome in cases similar to the hypothetical discussed in the introduction would be quite different. See supra notes 11-15 and accompanying text (presenting hypothetical). The tenant in the hypothetical would be able to establish that a latent defect injured him, raising a presumption of landlord negligence. See supra notes 342-53 and accompanying text (discussing modified negligence approach). The landlord could rebut the presumption by demonstrating that she regularly inspected the duplex for dry rot and termites and never discovered the weakness in the attic flooring. See supra notes 342-53 and accompanying text (discussing modified negligence approach). If the jury believed that her inspections were reasonable, the landlord would not be liable. See Becker, 698 P.2d at 125 (stating that landlord's duty includes duty to conduct reasonable inspection).

\textsuperscript{363} See supra notes 228-44 and accompanying text (discussing adverse impact of strict liability on product availability and affordability).
cally liable whenever latent defects injure tenants.\textsuperscript{364} Moreover, landlords would be able to reduce their insurance needs because they could reduce their risk of liability by managing their property with ordinary care.\textsuperscript{365} Thus, conscientious landlords could safely purchase less extensive coverage under modified negligence than under strict landlord liability.\textsuperscript{366}

Lower liability insurance costs would translate to lower rents for tenants and greater profitability for landlords.\textsuperscript{367} Greater profitability would encourage landlords to participate in the rental business, preserving the availability of rental property.\textsuperscript{368} Therefore, modified negligence, unlike strict landlord liability, would promote loss-spreading without sacrificing affordable housing.\textsuperscript{369}

Modified negligence would also encourage safety.\textsuperscript{370} As discussed above,\textsuperscript{371} fault-based liability provides as strong a safety incentive as strict liability.\textsuperscript{372} Because modified negligence imposes a duty to inspect, it would encourage landlords to seek

\textsuperscript{364} See Browder, supra note 5, at 138-39 & n.210; supra note 23 and accompanying text (discussing adverse impact of strict liability on insurance rates).

\textsuperscript{365} See supra note 233 and accompanying text (discussing landlord’s ability to reduce risk of negligence liability).

\textsuperscript{366} Cf. Highland, supra note 5, at 814 & n.67 (noting that strict products liability may discourage suppliers from improving product safety because it is economically inefficient).

\textsuperscript{367} Because landlords’ costs should be lower, they would be able to maintain reasonable profit margins at lower rents. See supra note 233 and accompanying text (observing that landlords pass increased liability insurance costs on to tenants by raising rents).

\textsuperscript{368} For landlords in rent-controlled areas, reduced costs would mean greater profitability. See supra notes 240-43 and accompanying text (observing that increased liability insurance costs will force landlords in rent-controlled areas out of business). Cf. Brown v. Superior Court, 751 P.2d 470, 478-79 (Cal. 1988) (pointing out that drug manufacturers agreed to supply new vaccine for influenza after government assumed risk of liability).

\textsuperscript{369} See supra notes 357-68 and accompanying text.

\textsuperscript{370} See infra notes 371-75 and accompanying text (discussing encouraging safety).

\textsuperscript{371} See supra notes 263-75 and accompanying text (discussing encouraging safety).

\textsuperscript{372} In fact, fault-based liability may provide a stronger safety incentive than strict liability. See Highland, supra note 5, at 814 & n.67; supra note 264 and accompanying text (discussing tension between enterprise liability and maximal deterrence).
out and repair latent defects.\footnote{Landlords would not be able to assert their lack of awareness of latent defects as a defense, when such defects were discoverable. See supra notes 269-74 and accompanying text (discussing need to encourage landlords to inspect for latent defects).} Because it imposes an equivalent duty to repair potentially dangerous patent defects, it would, unlike strict landlord liability, give landlords the same incentive to repair patent defects.\footnote{See supra notes 322-31 and accompanying text (discussing need to encourage landlords to repair patent as well as latent defects).} Thus, modified negligence would encourage landlords to make necessary repairs, regardless of the nature of the defect.\footnote{See supra notes 370-74.}

Additionally, modified negligence would protect tenant expectations by ensuring tenants a remedy when landlords negligently supply unsafe property.\footnote{See supra notes 276-84 and accompanying text (discussing protecting tenant expectations).} Tenants expect that landlords will be liable if defects that could have been corrected injure tenants.\footnote{Becker v. IRM Corp., 698 P.2d 116, 138 (Cal. 1985) (Lucas, J., concurring in part and dissenting in part); accord Dwyer v. Skyline Apartments, Inc., 301 A.2d 463, 467 (N.J. Super. Ct. App. Div.) (declining to hold landlords strictly liable for tenant injuries), aff'd, 311 A.2d 1 (N.J. 1973).} They do not expect that landlords will be liable without fault.\footnote{See sources cited supra note 377.} Thus, modified negligence, as a form of fault-based liability, better comports with tenant expectations than strict landlord liability.\footnote{Becker, 698 P.2d at 138 (Lucas, J., concurring in part and dissenting in part); accord Dwyer, 301 A.2d at 467 (declining to hold landlords strictly liable for tenant injuries); see Browder, supra note 5, at 137 (stating that “a negligence doctrine will vindicate the basic goals of the new regime in landlord-tenant relations”).}

Finally, modified negligence would ease tenants' proof problems to the same extent as strict landlord liability, because
injured tenants' burden of proof is the same under both approaches.\textsuperscript{380} This aspect of modified negligence would eliminate proof problems that stem from tenants' lack of familiarity with their building's history or their landlord's management practices.\textsuperscript{381} Modified negligence would thus ensure that tenants do not lose meritorious cases because of the difficulty of proving negligence.\textsuperscript{382} It would also, however, afford landlords an opportunity to defeat spurious claims by presenting evidence rebutting the presumption of negligence.\textsuperscript{383} Thus, under modified negligence, undeserving, opportunistic tenants would find it more difficult to collect from landlords than under strict landlord liability.\textsuperscript{384}

This Comment's proposed approach applies generally to all landlords\textsuperscript{385} and would thus avoid the problematic distinctions of \textit{Muro} and \textit{Vaerst}.\textsuperscript{386} Under modified negligence, residential and commercial landlords would be subject to the same standard of liability.\textsuperscript{387} Therefore, modified negligence would protect com-

\textsuperscript{380} \textit{See supra} notes 286, 343-44 and accompanying text (discussing tenant's burden of proof under strict liability and modified negligence, respectively).

\textsuperscript{381} \textit{See supra} notes 285-96 (discussing tenants' proof problems).

\textsuperscript{382} \textit{See Love, supra} note 4, at 196 (discussing easing tenants' proof problems as justification for strict landlord liability); \textit{cf.} Cronin v. J.B.E. Olson Corp., 501 P.2d 1153, 1162 (Cal. 1972) (discussing easing plaintiffs' proof problems as justification for strict products liability); Escola v. Coca Cola Bottling Co., 150 P.2d 436, 443 (Cal. 1944) (Traynor, J., concurring) (discussing strict products liability).

\textsuperscript{383} \textit{See supra} notes 293-96 and accompanying text (discussing potential for spurious claims under strict landlord liability). If a tenant alleges that an arguable design defect injured her (a steep stairway, for instance), under modified negligence, the landlord would have a chance of defeating her claim. \textit{See supra} notes 342-53 and accompanying text (discussing modified negligence). The landlord could present evidence that she took reasonable precautions to prevent injury, such as installing adequate lighting and warning the tenant. If the jury found that such precautions were sufficient to satisfy the landlord's duty of care, the landlord would not be liable. \textit{See Rowland v. Christian}, 443 P.2d 561, 564 (Cal. 1968) (discussing considerations for determining landowner negligence).

\textsuperscript{384} \textit{See supra} note 383.

\textsuperscript{385} \textit{See supra} text accompanying notes 342-53 (discussing modified negligence approach).

\textsuperscript{386} \textit{See supra} notes 309-31 and accompanying text (discussing \textit{Muro}'s residential-commercial distinction and \textit{Vaerst}'s latent-patent distinction).

\textsuperscript{387} \textit{See supra} text accompanying notes 342-53 (discussing modified negligence approach).
mmercial employees and customers and small commercial tenants as well as residential tenants.\textsuperscript{388}

Similarly, a single standard of liability would apply whether the defect is latent or patent.\textsuperscript{389} Therefore, modified negligence would encourage landlords to repair both types of defects.\textsuperscript{390} By treating the distinction between latent and patent defects as a defense,\textsuperscript{391} modified negligence would avoid imposing a higher standard of liability on the landlord who had no notice of a defect than on the landlord who had actual knowledge.\textsuperscript{392}

Finally, because modified negligence would apply to all landlords,\textsuperscript{393} it would avoid the line-drawing problems associated with determining who is in the business of leasing.\textsuperscript{394} Any person who leases property would be subject to modified negligence.\textsuperscript{395} Thus, modified negligence offers more comprehensive protection for tenants,\textsuperscript{396} greater justice for landlords,\textsuperscript{397} and greater simplicity for courts than the current California approach.\textsuperscript{398}

\textsuperscript{388} See supra notes 309-21 and accompanying text (discussing problems with residential-commercial distinction).

\textsuperscript{389} See supra text accompanying notes 342-53 (discussing modified negligence approach).

\textsuperscript{390} Cf. Luque v. McLean, 501 P.2d 1163, 1169 (Cal. 1972) (holding that injurious defect's patency did not bar strict products liability claim because public policy demands that manufacturers correct patent as well as latent defects).

\textsuperscript{391} This is the approach the California Supreme Court advocated in \textit{Luque}, 501 P.2d at 1169; see also supra note 331 and accompanying text (discussing defenses).

\textsuperscript{392} See supra notes 322-31 and accompanying text (discussing problems with latent-patent distinction).

\textsuperscript{393} See supra text accompanying notes 342-53 (discussing modified negligence approach).

\textsuperscript{394} See supra notes 332-41 and accompanying text (discussing problems with determining whether landlord is in the business of leasing).

\textsuperscript{395} See supra text accompanying notes 342-52 (discussing modified negligence approach).

\textsuperscript{396} Modified negligence would protect all tenants by affording commercial and residential tenants the same remedy and would encourage landlords to repair all defects. See supra notes 385-92 and accompanying text (discussing how modified negligence eliminates limited strict landlord liability's problematic distinctions).

\textsuperscript{397} Modified negligence would afford landlords an opportunity to defend themselves against spurious claims. See supra notes 383-84 and accompanying text (discussing how modified negligence reduces spurious claims).

\textsuperscript{398} Courts would not have to determine whether an injurious defect was latent or patent or whether a landlord was in the business of leasing. See
CONCLUSION

When the Becker court adopted strict landlord liability, it focused on the rule’s benefits to tenants;\textsuperscript{399} the court discounted the burden on landlords\textsuperscript{400} and ignored the adverse impact on the rental property market.\textsuperscript{401} These costs of strict landlord liability significantly outweigh its benefits.\textsuperscript{402} Holding landlords strictly liable exposes them to potentially crippling liability for minor defects in the myriad products that comprise the leased premises.\textsuperscript{403} Even more troubling, imposing strict landlord liability will decrease the availability of already scarce affordable housing.\textsuperscript{404} While strict landlord liability encourages safety and ensures that tenants recover for their injuries,\textsuperscript{405} there are other,

\textit{supra} notes 389-97 and accompanying text (discussing how modified negligence eliminates these line-drawing problems).

\textsuperscript{399} See Becker v. IRM Corp., 698 P.2d 116, 122-23 (Cal. 1985) (emphasizing loss-spreading and need to protect tenants).

\textsuperscript{400} See id. at 124 (discussing landlords’ ability to bear repair and injury costs).

\textsuperscript{401} Id. at 139 n.6 (Lucas, J., concurring in part and dissenting in part). Justice Lucas observed that “‘[o]ne problem in analyzing product liability law is our tendency to study rule changes in isolation and not to analyze their aggregate effect on liability costs or primary behavior.’” Id. at 133 (Lucas, J., concurring in part and dissenting in part) (quoting Richard A. Epstein, \textit{Symposium: The Passage of Time: The Implications for Product Liability: Commentary}, 58 N.Y.U. L. Rev. 930, 931 (1983)).

\textsuperscript{402} See \textit{supra} notes 11-27 and accompanying text (discussing strict landlord liability’s unfairness to landlords and adverse impact on availability of affordable housing).

\textsuperscript{403} See Becker, 698 P.2d at 137 (Lucas, J., concurring in part and dissenting in part); \textit{supra} notes 11-21, 252-62 and accompanying text (discussing potential for harsh results under strict landlord liability).

\textsuperscript{404} See Becker, 698 P.2d at 139 n.6 (Lucas, J., concurring in part and dissenting in part) (arguing that imposing strict landlord liability will increase cost of rental housing); Comment, \textit{supra} note 22, at 294 (arguing that increasing landlords’ responsibility for tenant security will decrease availability and affordability of rental housing); cf. Brown v. Superior Court, 751 P.2d 470, 478-79 (Cal. 1988) (refusing to impose strict liability on drug manufacturers because of “public interest in the availability of drugs at an affordable price”); \textit{supra} notes 22-27, 229-44 and accompanying text (discussing strict liability’s adverse impact on product availability and affordability).

\textsuperscript{405} See \textit{supra} notes 210-44, 263-75, 285-96 and accompanying text (discussing loss-spreading, encouraging safety, and easing tenants’ proof problems).
less costly, means to these ends. The decisions since Becker have recognized that, in most cases, negligence liability effectively protects tenants without unduly burdening landlords. These decisions, however, have led to a fragmented approach to landlord liability, characterized by distinctions that are unworkable as well as unwarranted.

The California Supreme Court should therefore overrule Becker and adopt a uniform standard of negligence liability such as this Comment’s proposed modified negligence approach. Inferring landlord negligence from tenants’ proof that defects caused their injuries promotes loss-spreading, encourages safety, protects tenant expectations, and eases tenants’ proof problems. Unlike strict landlord liability, modified negligence achieves these goals without forcing on the enterprise a burden it is ill-equipped to bear.

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406 See supra notes 342-53 and accompanying text (discussing modified negligence approach).

407 See Vaerst v. Tanzman, 272 Cal. Rptr. 503, 505 (Ct. App. 1990) (declining to hold landlord who leased one unit strictly liable when patent defect injured tenant); Muro v. Superior Court, 229 Cal. Rptr. 383, 384 (Ct. App. 1986) (declining to hold commercial landlord strictly liable); see supra notes 169-91 (discussing Vaerst and Muro).

408 See supra notes 301-41 and accompanying text (discussing problems with limited strict landlord liability).

409 See supra notes 342-53 and accompanying text (discussing modified negligence approach).

410 See supra notes 351-98 and accompanying text (evaluating modified negligence approach).

411 See supra notes 357-69 and accompanying text (explaining how modified negligence avoids strict landlord liability’s unfairness to landlords and adverse impact on availability of affordable housing).

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