

MOLD SUMMIT

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BREAK OUT DISCUSSIONS ? SESSION II

SICK BUILDINGS AND CONSTRUCTION LITIGATION

Presented by:

**DANIEL R. MAWHINNEY
THOMPSON & BOWIE, LLP
PORTLAND, MAINE**

**KURIS B. REEG
LERITZ, PLUNKERT & BRUNING, P.C.
ST. LOUIS, MISSOURI**

**DONALD G. PURDY
PURDY AND ASSOCIATES
ST. LOUIS, MISSOURI**

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I. INTRODUCTION

The recent explosion in mold related claims, while a distressing circumstance for building owners as well as for personal and commercial line insurers has posed challenges as well as business opportunities for environmental and mechanical engineers, contractors and architects. Indeed, a recent publication of the American Institute of Architects (AIA) advises that the design and project management of mold remediation is a leading opportunity for revenue and professional growth for AIA firms. See, *Architect's Handbook of Professional Practice*, 13 (superscript: th) Edition, 2001 @ Section 19.5, Indoor Air Quality Consulting.

This area of design practice has actually been expanding for some time to address real or imagined ailments linked to air quality. The release of "toxins" from building materials and the result of "improved" building envelopes that restricted outside air infiltration.

Since the early 1980's, insurers and design professionals have dealt with "sick building syndrome" (SBS) and later with the phenomenon of "multiple chemical sensitivity syndrome" (MCSS). As you have heard from other speakers, diagnosis of these conditions is often unspecific and often involves the elimination of other established and scientifically accepted diagnosis.

Increasingly, design and engineering professionals are called upon to address the problems that these professions have been accused of creating in the first place. The cadre of both potential defendants and remediation experts include architects, heating and air conditioning engineers, environmental engineers, mechanical engineers, structural engineers, general contractors as well as the suppliers and installers of HVAC systems and other building components.

II. THE FACT PATTERN

To facilitate discussion, the following discussion fact pattern has been established. The case is set in a suburban location where a small combination industrial/office park is situated. The complex includes light industrial usage, including two small manufacturing facilities, and office space which includes as major tenants a real estate firm, a paint store, an auto supply store, and a veterinary facility. The remaining tenants include an acupuncturist, a laundry mat and a law firm (the Plaintiff's counsel in this case). The story begins with an outbreak of neurological symptoms in 21 individuals who work in the office portion of the complex. These symptoms include visual and balance disturbances, trembling, impaired memory, labored breathing and chronic fatigue. The individuals are 80% male and 20% female. They are all in the 50 to 55 year old age bracket. One of the individuals became so debilitated that he has been forced to stop working and is using a walker and occasionally a wheelchair. He as well as others carry diagnoses that include multiple chemical sensitivity disorder, fibromyalgia, major depression and chronic fatigue syndrome. Initially, three of the men saw the same family physician who noted that the men all worked in the same complex. He referred them to the local university where neuropsychological testing and evaluation was done. In the process of taking a history from the three initial candidates, they reported similar symptoms with others that worked in the building and with whom they had exchanged e-mails. 18 others were identified. The university team has made the group the subject of a study and has employed a multi disciplinary team to evaluate the group. The initial law suit was filed on behalf of the 21 individuals and their families. The claim is that the building is "sick" and that the proximate cause of the problems encountered by the victims is "something in the building." Named initially as the defendants are the owners of the building and the paint company. Following initial discovery, it was determined that the veterinary hospital has been using a certain type of solvent, which has been known to cause neurological side effects in animals. It was also determined that the manufacturer of the carpeting in the office part of the complex was successfully sued for selling carpeting with residual solvent in the carpet which can cause pulmonary symptoms. Finally, the water supply was evaluated and determined to contain elevated levels of certain chemicals. With these discoveries, the veterinary hospital, the carpet manufacturer, and the water company were all added as additional defendants. All defendants cross-claimed and plead apportionment.

Following the initial pleadings and joinder of the above parties, further investigation was undertaken by the building owner.

The building façade incorporated prefabricated brick panels tied to a steel skeleton that formed the framework of the building. Unfortunately, contrary to the panel manufacturer's warranties, the panel leaked water. At backup system of interior flashings and weep holes were poorly installed and did not channel the water to the exterior of the façade as the architectural plans had apparently intended. Exploratory cuts made into the masonry panels revealed that a black slime was oozing down the space behind the panels. Word of this discovery coincided with the doubling of individuals reporting symptoms. Pleadings were amended to add additional parties associated with the construction of the building.

The building owner has retained a noted expert from the St. Louis area to provide further investigation regarding the diagnosis and potential remediation of the mold and other potential sources of the problems affecting the Plaintiffs.

III. ANALYSIS OF POTENTIAL ACTIONS

A. Potential Parties

The fact pattern lists multiple parties: 42 individuals who claim to have gotten "sick" from "the building"; the building owner; the building owner's insurer; the paint company; the carpet manufacturer; the water company; and the veterinary hospital; the architect; the panel manufacturer; the general contractor; the masonry contractor; the HVAC/mechanical engineer; and the HVAC sub-contractor. All defendants act as plaintiffs on their cross-claims. Before the case is resolved, some additional parties may

appear: the employer on a worker's compensation subrogation claim; the employer on a workers' compensation increased premium claim; a class action claim on behalf of other individuals in the building (potentially for two groups, namely those who actually do get "sick" and those who fear they might get "sick" and seek medical monitoring^{1}); medical liens holders asserted claims against any recovery by the 42 individuals; and potential disability insurance subrogation claimants. Various types of issues must be considered, depending on the relationship between the parties. For example, the building owner and the carpet manufacturer are likely in privity, which could give rise to breach of contract or negligent or intentional misrepresentation claims. The individual plaintiffs, on the other hand, likely do not have contractual remedies against the carpet manufacturer^{2} but may have contractual remedies against the building owner or their employer. The same issue may arise with the paint store, if that store was a supplier of paint for the building, or if the store has made certain warranties or promises in its lease agreement^{3}. An additional issue to consider is whether a named defendant is a separate corporate entity or part of another company or operated under an assumed name. In the first instance, the plaintiff should consider whether to name any (corporate) owner as a party. In turn, if the named defendant is a separate corporate entity or if the allegedly damaging product was purchased by the defendant from an unrelated manufacturer or distributor, the defendant may wish to pursue a contribution and/or indemnity claim against that manufacturer or distributor. These issues may come up, for example, with the paint store and the veterinary hospital^{4}. With respect to the carpet manufacturer, a logical claim may be against the installer, who may have used incorrect fastening agents (glue) or applied correct agent incorrectly^{5}.

B. Potential Causes of Action

By its very nature, a sick building syndrome claim may involve numerous plaintiffs and multiple defendants^{6}. With respect to new construction, claims will undoubtedly focus on the respective duties and liabilities of the architects, engineers, construction managers and supervisors, contractors, subcontractors, building material suppliers, and building material manufacturers^{7}. In addition, non-owner plaintiffs are likely to sue the property owner and any property management company for personal injuries, loss of use, and lost revenue (commercial tenants). In addition, in so-called "direct action" States, claims may be asserted against

the insurers of any of the above.^[8] Causes of action to consider are breach of contract, breach of express and implied warranties,^[9] strict liability, negligence, medical monitoring, breach of the covenant of quiet enjoyment by constructive eviction, fraudulent concealment and intentional or negligent misrepresentation, nuisance, assault, battery,^[10] and intentional or negligent infliction of emotional distress.^[11]

1. Breach of contract or express warranties

A contract is breached upon a party's "failure, without legal excuse, to perform any promise which forms the whole or part of a contract."

^[12] In addition, any nonperformance of a duty under a contract when performance of the duty is due under the contract is a

breach.^[13] When the terms of a contract are breached, expectancy damages may generally be recovered, but the parties are bound by any limitations included in their contract. Damages in sick building syndrome cases might include costs of performing construction and repairs in conformance with the original contract's requirements, costs of remediation, diminution of value,^[14] costs to relocate (self or tenants), lost profits, loss of use, financing costs, and engineering and architectural fees reasonably necessary to accomplish the reconstruction.^[15]

a. Measure of damages

In cases involving defective construction, the proper measure of damages is the cost of making the work conform to the contract (cost of cure), but where it appears that the cost of remedying the defects is grossly disproportionate to the benefits to be derived therefrom, the owner is only entitled to recover the difference between the value of the property as it would have been if the contract had been performed according to its terms and the value in its condition as constructed (diminution of value).

^[16] Damages for breach of express warranties are the same as those for breach of contract.^[17] Because emotional distress is fairly common in sick building syndrome cases, plaintiffs need to consider the fact that the law in many States does not allow for recovery of emotional distress damages in contract-based actions in the absence of specific statutory provisions, unless the breach is accompanied by an independent tort.^[18] The accompanying independent tort must be willful and must support the extra-contractual damages in its own right.^[19] A malicious motive in breaking a contract will not convert a contract action into a tort action.

^[20]

b. Limitations inherent in contract claims As noted above, parties are bound by any limitations included in their contract. Any such limitations should be considered when deciding whether to sue on a tort or contract theory. Another factor to consider is that the number and type of defendants which may be brought into a contract claim-based action are limited to the parties to the contract (and their insurers, in direct action States). In contrast, tort-based claims are not restrained by the privity requirement.^[21]

2. Breach of implied warranties

The assertion of a breach of implied warranty may be proper in some sick building syndrome cases. To establish a claim for breach of an implied warranty of fitness for a particular purpose, a buyer must prove (1) the existence of a warranty, (2) a breach of that warranty, and (3) a causal link between the breach and the alleged harm.^[22] Some courts have applied the doctrine of implied warranty of fitness to the construction business, holding that it is implied that the building will be erected in a reasonably good and workmanlike manner and will be reasonably fit for the intended purpose.^[23] Others have rejected this approach, reasoning that to adopt such a theory would in effect impose strict liability on architects and builders.^[24] The majority position limits the liability in tort of architects and others rendering "professional" services to those situations in which the professional is negligent in the provision of his or her services.

^[25]

3. Strict liability

In some product liability cases, it may be appropriate to assert strict product liability claims. A strict product liability plaintiff must prove

(1) that the product was defective, (2) that the defect existed when the product left the defendant's hands, and (3) that the defect caused the plaintiff's injuries.^[26] To recover, a plaintiff need not prove the defendant's actual negligence. Strict liability may be able to be asserted against suppliers (including retail sellers) or manufacturers of inherently dangerous products or in relation to a failure to warn of certain dangerous propensities of such products.^[27] For example, a strict liability claim should be able to be asserted against suppliers and manufacturers of carpet emitting dangerous levels of VOCs. In most states, strict liability claims cannot be asserted against those who render professional services.^[28] In addition, strict (products) liability frequently requires proof of physical injury.^[29]

4. Negligence

a. Elements

It is well established that the elements of a cause of action for negligence are (1) duty?the plaintiff(s) must be protected under some rule of law against the defendant's conduct; (2) breach of that duty; (3) that the breach of the duty be the proximate cause of plaintiff's injury; and (4) damages?the plaintiff(s) must have suffered a loss.^[30] In addition, the plaintiff must prove the defendant was the negligent party.^[31]

b. Standard of care

Before asserting a negligence claim, particular care must be exercised in ascertaining the level of duty each potential defendant has to the plaintiff(s). As stated above,^[32] design professionals only have a limited duty to the public at large, namely to exercise that skill and judgment which can be reasonably expected from similarly situated professionals.^[33] Under this standard, plaintiffs should be able to assert a claim that an architect negligently specified certain building materials which at the time of design were generally known to be unsafe or dangerous under the circumstances.^[34] Although the risk of reasonably unforeseeable latent defects might properly be shifted to the purchasers of the design professional's services,^[35] patent risks which the design professional could and should have foreseen should appropriately be borne by such professional.^[36] Because parties are free to contract for a stricter standard of care, those plaintiffs who are in privity with the design professional should include breach of contract and breach of express warranty claims in their complaints, to the extent such claims are supported by the contract or warranty at issue. Building contractors are generally held to a similar standard of care in tort,^[37] although this standard will frequently be extended by contract or warranty.^[38]

c. Abatement

In addition to being able to assert causes of action for creating a hazardous situation, plaintiffs also may be able to sue on the basis that the situation was not timely abated. With respect to building owners, case law suggests that the owner has an affirmative duty which requires nothing less than abatement of the unreasonable risk of physical harm, even if initiating abatement procedures means that the owner must later seek indemnification from the party that actually created the risk.^[39]

d. Failure to warn of risk / post-sale duty to warn

Section 10 of the Third Restatement of Torts: Products Liability sets forth a test for determining whether a product manufacturer, seller, or distributor has a post-sale duty to warn of a subsequently identified product defect.^[40] Section 10(a) provides that a post-sale duty to warn arises when a reasonable person in the seller's position would provide such a warning. Section 10(b) provides that a reasonable person in the seller's position would provide a post-sale warning when (1) the seller knows or reasonably should know that the product poses a substantial risk of harm to persons or property; and (2) those to whom a warning might be provided can be identified and may reasonably be assumed to be unaware of the risk of harm; and (3) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and (4) the risk of harm is sufficiently great to justify the burden of providing a warning. The post-sale duty to warn applies to "one engaged in the

business of selling or otherwise distributing products," which includes manufacturers, wholesalers, retailers, and other members of the chain of distribution.

(superscript: [41]) The duty in reality only falls upon those members of the distribution chain who acquire the relevant information or reasonably should know of the product defect as modified by the affected seller's ability to identify and notify the end-user who may be at risk.

(superscript: [42]) In the end, the factors enumerated in section 10(b) may dictate a different result with respect to each entity of the chain of distribution in any particular case.

5. Medical Monitoring(superscript: [43])

An increasing number of state courts and federal courts applying state law have recognized a separate claim for medical monitoring.(superscript: [44]) The term "medical monitoring" has different meanings in different contexts. As a medical term, "medical monitoring" refers to a physician's monitoring of a symptomatic disease in a particular patient. The purpose of the monitoring is to determine whether a patient's disease is worsening; if so, the doctor should diagnose the cause, and treat it, if possible.

(superscript: [45])

As an occupational term, "medical monitoring" refers to the screening of employees who work in an environment in which they are exposed to toxic substances to determine whether they are, in fact, receiving a dose of a particular substance. Medical monitoring in an occupational context is designed to detect ongoing exposures to eliminate the routes of uptake, as well as to determine if any unusual incidence of disease is occurring in the workplace. This type of medical monitoring is often referred to as "medical surveillance" in the medical and scientific community.

(superscript: [46])

In the legal context, "medical monitoring" refers to periodic screening tests for unimpaired individuals who have been exposed to a toxic substance and are allegedly at an increased risk of developing some disease in the future. These screening tests are designed to detect "latent diseases" before the disease process becomes symptomatic; in theory, such detection will permit a more favorable treatment outcome. This type of monitoring is called "medical screening" in the medical and scientific community.

(superscript: [47])

The distinctions among the three forms of medical monitoring are significant. The costs of medical monitoring in the medical context are generally recoverable under traditional common law principles, since they are intended for future medical expenses related to a present symptomatic injury.(superscript: [48]) By contrast, the costs of medical monitoring in the legal context are generally not recoverable as a measure of damages under traditional common law tort principles because, by definition, the plaintiff is not suffering from a symptomatic injury or impairment, and mere exposure to a hazardous substance, without more, has generally been adjudged insufficient to support recovery.(superscript: [49]) In 1997, two significant decisions on medical monitoring were issued. First, in May, the Pennsylvania Supreme Court recognized a common law cause of action for medical monitoring and identified the elements of such a claim in *Redland Soccer Club, Inc. v. Department of the Army*, 696 A.2d 137 (1997). The decision borrows generously from earlier opinions on the issue, such as *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970 (Utah 1993). However, *Redland Soccer* added a requirement that the plaintiff(s) prove "special medical monitoring," that is, a monitoring program that is different from the program that would be advisable in the absence of exposure. On the other hand, *Redland Soccer* does not contain a requirement that the plaintiff(s) prove that a beneficial treatment for the feared disease exists, noting that such requirement would unfairly prevent the plaintiff(s) from taking advantage of advances in medical science.

(superscript: [50])

Interpreting the Pennsylvania Hazardous Sites Cleanup Act (HSCA), 35 Pa. Stat. Ann. § 6020.101 et seq., and then holding that the elements of a HSCA-based action and a common law action for medical monitoring are the same, the *Redland Soccer Club* Court identified seven elements of the cause of action: (1) exposure greater than normal background levels; (2) to a proven hazardous substance; (3) caused by the defendant's negligence; (4) as a proximate result of the exposure, the

plaintiff has a significantly increased risk of contracting a serious latent disease; (5) a monitoring procedure exists that makes the early detection of the disease possible;

(6) the prescribed monitoring regime is different from that normally recommended in the absence of the exposure; and (7) the prescribed monitoring regime is reasonably necessary according to contemporary scientific principles.^[51] Some of the language used may cause some confusion. Specifically, with respect to the "significantly increased risk" element, the court's wording might suggest that only the increase in the risk need be significant. However, logic dictates that neither the risk itself nor the increase should independently be dispositive. Rather, both the risk and the increase should be significant.^[52] A second issue of confusion is likely to arise with respect to the seventh element identified by the Redland Soccer Club Court, namely the requirement that the prescribed monitoring regime must be reasonably necessary according to contemporary scientific principles. Since the court has clearly stated that the element does not refer to a medically beneficial

treatment,^[53] it is difficult to see how one distinguishes between a monitoring regime that is medically necessary according to scientific principles and one that is not. The second significant case relating to medical monitoring was issued in June 1997, when the United States Supreme Court decided *Metro-North Commuter R.R. Co. v. Buckley*, 117 S. Ct. 2113 (1997). In a deliberately narrow holding, the Court declined to recognize a tort liability rule providing for an unqualified cause of action for lump-sum medical monitoring costs under the Federal Employers' Liability Act (FELA).

^[54] The Court specifically stated, however, that it did not express any view about the extent to which FELA might, or might not, accommodate more finely tuned medical cost recovery rules.^[55]

Because of the Metro-North Court based its opinion entirely on policy, it may fairly be assumed that few if any federal statutes will be found to support lump-sum medical monitoring damages. In addition, because several state courts have also expressed concern about such lump-sum awards,^[56] it appears likely that lump-sum awards for medical monitoring will be severely curtailed in a majority of the States.

IV. ANALYSIS OF POTENTIAL DEFENSES IN SICK BUILDING SYNDROME CASES

The appellate decisions show that plaintiffs must overcome significant hurdles if they are to receive a recovery from a jury for sick building syndrome causes of action. Some of the defenses that defendants may be able to assert are expiration of the appropriate statutory limitations period or statute of repose, end of the ordinary useful life of the product, the state-of-the-art doctrine, misuse or misapplication of the product, the economic loss doctrine, lack of advance knowledge of the (product) defect (regarding failure to warn claims), preemptive effect of workers' compensation statutes, immunities, statutory damage caps, joint powers agreements, and allocation of apportionment statutes. However, plaintiffs' biggest hurdle has proven to be causation. A. Statutes of Limitations, Statutes of Repose,^[57] and the Discovery Rule The decision whether to proceed under a tort or contract-based theory of liability should take into consideration the applicable statute of limitations or statute of repose. Frequently, statutes of limitations are more generous for contract-based claims than tort-based claims. Numerous States have enacted specific construction or real estate improvement statutes of limitations or statutes of repose. For example, Minnesota has enacted Minn. Stat. § 541.051, which provides (in the absence of fraud) for a two year statute of limitation after discovery of the injury, but limits accrual of causes of action (in tort and contract) to a maximum of ten years from substantial completion of the construction.^[58] It is the only statute of repose in Minnesota. The statute does not apply to actions for damages resulting from negligence in the maintenance, operation, or inspection of the real property improvement against the owner or other person in possession.^[59] The statute also does not apply to the manufacturer or supplier of any equipment or machinery installed upon real property.^[60] Similar statutes are in effect for example in Alabama,^[61] Arkansas,^[62]

California,^[63] Hawaii,^[64] New Jersey,^[65] Pennsylvania,^[66] Tennessee,

(superscript: [67]) Utah,(superscript: [68]) Virginia,(superscript: [69]) and Washington.(superscript: [70]) B. End of Ordinary Useful Life Every product and every building can be assigned an ordinary useful life, after which it is no longer expected to function as designed. If a plaintiff claims injury from for example the failure of an HVAC system, the manufacturer may be able to assert the end of the ordinary useful life of the system as a defense. In some States, evidence that a product was not defective, but that the accident occurred because the product was worn out or otherwise improperly maintained provides a complete defense.

(superscript: [71]) In other States, the end of a product's ordinary useful life is only a factor to be weighed by the jury, along with other factors, to determine the fault of the manufacturer and the fault of the user.(superscript: [72])

C. State-of-the-Art

Evidence that a product's design, methods of manufacture, and testing conformed to the generally recognized and prevailing standards or the state-of-the-art in existence at the time the design was prepared and the product was manufactured may in some States create a defense to a products liability claim(superscript: [73]) or a rebuttable presumption that the product is not defective.(superscript: [74]) In other States, the existing state-of-the-art at the time of design and manufacture is not a defense to a products liability action, but the fact finder may consider evidence of availability or non-availability of feasible alternatives in balancing the overall risk and utility of the product.(superscript: [75]) D. Misuse or Misapplication Misuse or misapplication in the

context of sick building syndrome cases might occur, for example, when the building owner or maintenance company fails to properly maintain and clean an HVAC system, thereby allowing fungi and bacteria to grow in the system. In some States, a seller named in an action based on strict liability who can show misapplication or misuse and that such misuse caused or contributed to the injury may assert this as a

defense.(superscript: [76]) In other States, misuse is a type of "fault" incorporated into comparative fault statutes or contributory fault jury instructions.(superscript: [77])

E. The Economic Loss Doctrine

The economic loss doctrine holds that economic losses arising out of commercial transactions are not recoverable under tort theories of negligence or strict products liability.(superscript: [78]) In some States, the doctrine explicitly excludes personal injury or damage to other property, while in other States this limitation on the doctrine is deemed to be inherent in the term "economic loss."(superscript: [79]) The prevailing view defines "economic loss" as "the diminution in the value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold.(superscript: [80]) Economic loss also includes repair or replacement costs, as well as lost profits caused by the defective product.(superscript: [81]) The economic loss doctrine provides a balance between two conflicting societal goals: that of encouraging marketplace efficiency through the voluntary contractual allocation of economic risks with that of discouraging conduct that leads to physical harm.(superscript: [82]) The underlying rationale for much of the economic loss doctrine is the Uniform Commercial Code and the ability of commercial parties to bargain for risks of loss.(superscript: [83]) The definition of economic loss contains a distinction between damage to the product itself, for which recovery in tort is precluded by the doctrine, and extraneous damage, including personal injury.(superscript: [84]) As in the asbestos context, building owners in sick building syndrome cases may wish to seek damages for increased maintenance and abatement of a dangerous condition caused by a product which performs well for the purpose for which it was bought, for example carpet, but which introduces harmful substances into the building, for example formaldehyde and other VOCs. In those circumstances, the damaged party should be able to proceed in tort, in addition to being able to proceed in contract. On the other hand, an HVAC system which allows the abundant formation of fungi appears not to function as it should and tort claims against the manufacturer and seller may be foreclosed by the economic loss doctrine.

F. Causation Sick building syndrome defendants will gladly note that the biggest obstacle to plaintiffs has been the fact they must prove their claimed injuries were proximately caused by the

defendant's actions or lack thereof. By definition, sick building syndrome^{as distinguished from building-related illness?}is a definition of exclusion.^(superscript: [85]) The exact cause of plaintiffs' symptoms is frequently not known, despite extensive medical treatment. In workers' compensation cases, this fact is less important as long as it is clear the injury was sustained in the course of employment and as a result of that employment (a sizeable enough hurdle in itself). However, in cases based on negligence or strict liability, plaintiffs must frequently distinguish between multiple possible causes, which often proves impossible. The attached compendium contains decisions *inter alia* illustrating the crucial importance of the causation element in a plaintiff's case. In light of the complex and costly nature of sick building syndrome litigation, plaintiffs and their counsel would do well to thoroughly analyze their causation-evidence (frequently the plaintiff's treating physician's opinions) before commencing a sick building syndrome action. Those same costs should provide possible defendants with adequate incentives to monitor their premises for possible problems and to attempt to cure any problems expeditiously. V. CONCLUSION The potential that one employee's complaints of irritation of the eyes, nose and throat, headache, fatigue and irritability, chest tightness and wheezing, skin dryness, or gastrointestinal complaints could evolve into a complex multi-party or even a class action sick building syndrome case is disconcerting and gives any possible defendant reason to pay close attention to the work environment in all stages, including design, manufacture, and maintenance, and to recognize legitimate health concerns. Similarly, the saying one ounce of prevention is worth a pound of cure is an important one in this context. Careful consideration of building plans, HVAC design, air flow, and building materials is key to avoiding or reducing exposure to sick building syndrome claims. At the same time, "sick building syndrome" allegations are easily made, but as numerous plaintiffs have found out, not necessarily easily proved.

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(superscript: [1]) See *infra* section III.B.5.

(superscript: [2]) It may be possible to assert a third-party beneficiary claim against a manufacturer, however.

(superscript: [3]) The feasibility of asserting a third-party beneficiary claim becomes much better if such warranties have been made.

(superscript: [4]) Sherwin-Williams for example operates its own paint stores, in addition to manufacturing paints. Sears and other companies, on the other hand, purchase paint from a manufacturer and resell it under their own (Sears) or the manufacturer's label. The second group of stores may wish to assert a contribution claim against the manufacturer in the event of a claim.

(superscript: [5]) Excessive amounts of glue may contain excessive moisture, creating fertile ground for the growth of bacteria and fungi.

(superscript: [6]) See *Klocke v. A & D Ltd. Partnership*, 629 N.E.2d 49, 51 (Ohio Ct. App. 1993) (certifying a class described as "[a]ll persons who worked and conducted business in the Alms & Doepke Building from July 1, 1985, to the present"). In *Klocke*, the class action complaint indicated that class members were exposed to "irritants and inadequate ventilation" in a building located in Cincinnati, Ohio. *Id.* at 50-51. The

appellant presented medical testimony indicating that "the symptoms suffered by the class representatives were consistent with symptoms of persons exposed to a 'sick building,' that is, the sick building syndrome." *Id.* at 51. The complaint alleged that the injuries were caused by noxious fumes, bacteria, fungi, dust, and other irritants. *Id.* The Ohio Court of Appeals found that "the claims of the representative parties [were] typical of the claims of the class," despite that fact that there were a great number of variables surrounding the alleged injuries, such as: (1) variable concentrations of the offending contaminants over time, (2)

variable combinations of individual contaminants over time, (3) variable effects of weather on the concentration of contaminants, (4) variable reactions to the contaminants and variable degrees of suffering based on the occupants' individual constitutions, general state of health, past medical histories, individual allergic reactions, age, and sex, (5) variable reactions based on the occupants' location within the building, and (6) variable lengths of exposure. *Id.*; see also *Knoke v. East Jackson Pub. Sch. Dist.*, 506 N.W. 2d 878, 880 (Mich. Ct. App. 1993) (holding that union did not breach its duty of fair representation in not pursuing a school counselor's individual grievance concerning an alleged sick building). In 1981, Richard Knoke "began to experience symptoms he attributed to changes in the ventilation system of East Jackson Middle School, where he worked." *Knoke* 506 N.W.2d at 879. Arbitration of Knoke's grievance was held in abeyance while the union was pursuing a related class grievance on behalf of a group of teachers. *Id.* Although the union failed to sustain its burden of proof, it claimed "that the school building was an environmental hazard" and sought to either secure additional sick days or employee transfers. *Id.*; see also *Padgett v. Capitol West Assoc.*, No. CV91?397573S, 1992 WL 394414, at *1 (Conn. Super. Ct. Dec. 30, 1992) (ruling on plaintiff's objection to an interrogatory in a class action wherein the plaintiff claimed injuries resulting from sick building syndrome). The plaintiff claimed that she and numerous other persons suffered injuries as a result of being "exposed to hazardous conditions, such as particulate matter, vapors and fumes in the air, present at the building in which the plaintiff worked." *Padgett*, at *1.

(superscript: [7]) An example of complex litigation may be found in the Palm Beach County, Florida, Judicial Center case, which involved three major architectural firms, a major construction management firm, a major general contractor, over seventy-four subcontractors, and numerous consultants. See *supra* note 20 and accompanying text.

(superscript: [8]) See e.g., Wis. Stats. § 803.04, subd. 2.

(superscript: [9]) For a critical view of homeowner warranties, see Robert A. Zupkus, *Homeowner Warranties Uncovered, For the Defense*, May 1998, 28.

(superscript: [10]) Heady, *supra* note 1, at 1064 & n.152 (citing Carl B. Meyer, *The Environmental Fate of Toxic Waters, The Certainty of Harm, Toxic Torts, and Toxic Regulation*, 19 *Env'tl. L.* 321, 357-64 (1988) (arguing that exposure to indoor air pollution caused by formaldehyde should be treated as a toxic battery)).

(superscript: [11]) In the asbestos context, claims have also been brought for trespass, restitution, unfair trade practices, conspiracy, fraud, concert of action, and enterprise liability. See James L. Connaughton, *Comment, Recovery for Risk Comes of Age: Asbestos in Schools and the Duty to Abate a Latent Environmental Hazard*, 83 *Nw. U. L. Rev.* 512, 513 n.6.

(superscript: [12]) *Black's Law Dictionary* 188 (6th (Centennial) ed. 1990).

(superscript: [13]) *Lane Enters., Inc. v. L.B. Foster Co.*, 700 A.2d 465, 471 (Pa. Super. Ct. 1997) (citing *Restatement (Second) of Contracts* § 235(2) (1981)), *rev'd on other grounds*, No. 0712 W.D.Alloc. 1997, 0713 W.D. Alloc. 1997, __ A.2d __, 1998 WL 272154 (Pa. Apr. 15, 1998).

(superscript: [14]) As an alternative to remediation or in addition to remediation if the remediation only partially resolves the problem.

(superscript: [15]) See, e.g., *Centex-Rooney Constr. Co. v. Martin County*, 706 So.2d 20, 27 (Fla. Dist. Ct. App. 1997), *reh'g, reh'g en banc, and cert. of conflict denied* (Mar. 11, 1998).

(superscript: [16]) *Rands v. Forest Lake Lumber Mart, Inc.*, 402 N.W.2d 565, 568-69 (Minn. Ct. App. 1987); *Restatement (Second) of Contracts* § 348 (1981).

(superscript: [17]) *Rands*, 402 N.W.2d at 568 (citing *Marshall v. Marvin H. Anderson Constr. Co.*, 167 N.W.2d 724, 727-28 (Minn. 1969)).

(superscript: [18]) See *Deli v. University of Minn.*, No. C9?97?1530, __ N.W.2d __, 1998 WL 248924, *3 (Minn. Ct. App. May 19, 1998); *Lickteig v. Alderson, Ondov, Leonard & Sween, P.A.*, 556 N.W.2d 557, 561 (Minn. 1996); William L. Prosser, *The Borderland of Tort and Contract*, in *Selected Topics On the Law of Torts* 380, 426 (1953) (noting there is no recovery for mental suffering in contract actions).

(superscript: [19]) *Deli*, 1998 WL 248924, at *3 (citing *Lickteig*, 556 N.W.2d at 561).

(superscript: [20]) *Deli*, 1998 WL 248924, at *3; *Wild v. Rarig*, 234 N.W.2d 775, 790 (Minn. 1975) (concluding bad faith breach of contract does not become tort).

(superscript: [21]) Although lack of privity of contract was the most effective defense architects, builders, and engineers had to third-party actions for negligence in early American jurisprudence, the prevailing rule today is that their duty extends beyond the limits of the privity of contract doctrine and lack of privity of contract will not bar an action for negligence or strict liability against an architect or other member of the building team. See e.g., *Heady*, supra note 1, at 1068. Minnesota expressly adopted a rule of liability to third parties on the part of building contractors in *Murphy v. Barlow Realty Co.*, 289 N.W. 563 (Minn. 1939). See also *Pacific Indem. Co. v. Thompson?Yaeger, Inc.*, 260 N.W.2d 548, 554 (Minn. 1977); *A.E. Inv. Corp. v. Link Builders, Inc.*, 214 N.W.2d 764, 769 (Wis. 1974) (holding architect who was responsible for design and supervision of construction activities liable for negligence to future third-party tenants with whom the architect is not in privity of contract).

(superscript: [22]) *Anderson v. Lloyd's Feed Serv.*, 443 N.W.2d 208, 210 (Minn. Ct. App. 1989).

(superscript: [23]) See, e.g., *Markman v. Hoefer*, 106 N.W.2d 59, 62 (Iowa 1960); *Weeks v. Slavick Builders, Inc.*, 180 N.W.2d 503, 506 (Mich. Ct. App. 1970) (holding that the doctrine of implied warranty of fitness extends to residential dwelling houses, whether purchased prior to, during, or after construction), aff'd, 181 N.W.2d 271 (Mich. 1970); *Schipper v. Levitt & Sons, Inc.*, 207 A.2d 314, 325-26 (N.J. 1965) (holding that the doctrine of implied warranty of fitness extends to developer of mass produced single family housing).

(superscript: [24]) *City of Mounds View v. Walijarvi*, 263 N.W.2d 420, 423 (Minn. 1978).

(superscript: [25]) *Id.* (citing *Gravley v. Providence Partnership*, 549 F.2d 958 (4th Cir. 1977); *Ryan v. Morgan Spear Assocs., Inc.*, 546 S.W.2d 678 (Tex. Civ. App. 1977); *Borman's, Inc. v. Lake State Dev. Co.*, 230 N.W.2d 363 (Mich. Ct. App. 1975); *Sears, Roebuck & Co. v. Enco Assocs.*, 370 N.Y.S.2d 338 (N.Y. Sup. Ct. 1975), aff'd sub nom. *Sears, Roebuck & Co. v. Enco Assocs., Inc.*, 385 N.Y.S.2d 613 (N.Y. App. Div. 1976); *Mississippi Meadows, Inc. v. Hodson*, 299 N.E.2d 359 (Ill App. Ct. 1973); *Scott v. Potomac Ins. Co. of D.C.*, 341 P.2d 1083 (Or. 1959); *Smith v. Goff*, 325 P.2d 1061 (Okla. 1958); *Ressler v. Nielsen*, 76 N.W.2d 157 (N.D. 1956); *Palmer v. Brown*, 273 P.2d 306 (Cal. Ct. App. 1954)).

(superscript: [26]) *Heller v. Schwan's Sales Enters., Inc.*, 548 N.W.2d 287, 290 (Minn. Ct. App. 1996).

(superscript: [27]) See Restatement (Second) of Torts § 402A; Restatement (Third) of Torts: Products Liability § 402A; *Marcon v. Kmart Corp.*, 573 N.W.2d 728, 730 (Minn. Ct. App. 1998).

(superscript: [28]) *W. Page Keeton, et al., Prosser and Keeton on the Law of Torts* § 104, at 719-20 (5th ed. 1984); *City of Mounds View*, 263 N.W.2d at 423 and cases cited therein.

(superscript: [29]) 2 *American Law of Products Liability* 3d § 16:40, at 55-56 (1987).

(superscript: [30]) *Minneapolis Employees Retirement Fund v. Allison-Williams Co.*, 519 N.W.2d 176, 182 (Minn. 1994) (citing *Hudson v. Snyder Body, Inc.*, 326 N.W.2d 149, 157 (Minn. 1982)).

(superscript: [31]) *Leuer v. Johnson*, 450 N.W.2d 363, 366 (Minn. Ct. App. 1990) (affirming order granting summary judgment where neither the instrumentality causing the accident nor the controller of that instrumentality could be identified), review denied (Minn. Mar. 16, 1990); *Pettitte v. SCI Corp.*, 893 S.W.2d 746, 748 (Tex. Ct. App. 1995). An exception to this rule may exist if the relevant State has adopted market share liability.

(superscript: [32]) See notes 51-53 and accompanying text.

(superscript: [33]) *Mears Park Holding Corp. v. Morse/Diesel, Inc.*, 427 N.W.2d 281, 285 (Minn. Ct. App. 1988); *City of Mounds View*, 263 N.W.2d at 423-24; *Paxton v. Alameda County*, 259 P.2d 934, 937-38 (Cal. Dist. Ct. App. 1953); *Coombs v. Beede*, 36 A. 104 (Me. 1896). See also cases cited in note 53.

(superscript: [34]) Plaintiffs should keep in mind, however, that design professionals "deal in somewhat inexact sciences and are continually called upon to exercise their skilled judgment in order to anticipate and provide for random factors which are incapable of precise measurement. The indeterminate nature of these factors makes it impossible for professional service people to gauge them with complete accuracy in every instance . . . and an architect cannot be certain that a structural design will interact with natural forces as anticipated. Because of the inescapable

possibility of error which inheres in these services, the law has traditionally required, not perfect results, but rather the exercise of that skill and judgment which can be reasonably expected from similarly situated professionals." *City of Mounds View*, 263 N.W.2d at 424.

(superscript: [35]) *City of Mounds View*, 263 N.W.2d at 424.

(superscript: [36]) See, e.g., *Caldwell v. Bechtel, Inc.*, 631 F.2d 989, 1001-03 (D.C. Cir. 1980); *Kostohryz v. McGuire*, 212 N.W.2d 850, 854 (Minn. 1973) (duty and liability of an architect, whether sounding in tort or arising out of breach of contract, is to perform the services for which he is engaged in good faith and with reasonable care and competence and to be liable for damages occasioned by any failure to do so); Prosser, *supra* note 56, § 93, at 667-68 ("by entering into a contract with A, the defendant may place himself in such a relation toward B that the law will impose upon him an obligation, sounding in tort and not in contract, to act in such a way that B will not be injured. The incidental fact of the existence of the contract with A does not negative the responsibility of the actor when he enters upon a course of affirmative conduct which may be expected to affect the interests of another person").

(superscript: [37]) Murray H. Wright & Edward E. Nicholas, III, *The Collision of Tort and Contract in the Construction Industry*, 21 U. Rich. L. Rev. 457, 463 & n.32 (1987); see also Heady, *supra* note 1, at 1074-75.

(superscript: [38]) But see Zupkus, *supra* note 38 (critical view of homeowner warranties).

(superscript: [39]) Heady, *supra* note 1, at 1076.

(superscript: [40]) While the Third Restatement of Torts: Products Liability is not a recitation of binding law, it is a composition of legal principles generally followed by the majority of States and is expected to have a substantial impact on the development of products liability law in the United States.

(superscript: [41]) Restatement (Third) of Torts: Products Liability § 10(a).

(superscript: [42]) Comment c to section 10 provides that:

A duty to warn after the time of sale cannot arise unless the product seller or other distributor knows or in the exercise of reasonable care should know of the product-related risk that causes plaintiff's harm. The seller may have known or should have known of the risk at the time of sale, in which case failure to warn will cause the product to be defective under section 2(c). But even if the product is not defective at the time of sale because no reasonable seller would have known of the risk under § 2(c), knowledge of the risk may come after sale and may give rise to a duty to warn at that time. As a practical matter, most post-sale duties to warn arise when new information is brought to the attention of the seller, after the time of sale, concerning risks accompanying the product's use or consumption. When risks are not actually brought to the attention of the sellers, the burden of constantly monitoring product performance in the field is usually too burdensome to support a post-sale duty to warn. However, when reasonable grounds exist for the seller to suspect that a hitherto unknown risk exists, especially when the risk involved is great, the duty of reasonable care may require investigation. With regard to one class of products, prescription drugs and devices, courts traditionally impose a continuing duty of reasonable care to test and monitor after sale to discover product-related risks.

(superscript: [43]) Although at times characterized by parties as an equitable remedy, the United States District Court for the Eastern District of Pennsylvania determined recently that a medical monitoring claim entitles a party to right by jury trial under the Seventh Amendment to the United States Constitution. *Barnes v. American Tobacco Co.*, 989 F. Supp. 661 (E.D. Pa. 1997).

(superscript: [44]) See, e.g., *Ayers v. Jackson Township*, 525 A.2d 287 (1987); *In re Paoli R.R. Yard PCB Litigation*, 916 F.2d 829 (3d Cir.

1990) (predicting Pennsylvania law), cert. denied, 499 U.S. 961 (1991) ("Paoli I"); *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970 (Utah 1993); *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795 (Cal. 1993); *Burns v. Jaquays Mining Corp.*, 752 P.2d 28 (Ariz. Ct. App. 1987). But see *Ball v. Joy Techs., Inc.*, 958 F.2d 36 (4th Cir. 1991) (interpreting West Virginia and Virginia law).

(superscript: [45]) Thomas M. Goutman and Robert Toland II, *Recovery for Medical Monitoring, For the Defense*, April 1997, at 23.

(superscript: [46]) *Id.*

(superscript: [47]) *Id.*, at 23-24.

(superscript: [48]) *Id.*, at 24; Restatement (Second) of Torts § 924(c); *Metro-North Commuter R.R. Co. v. Buckley*, 117 S. Ct. 2113, 2121 (1997) ("The parties do not dispute—and we assume—that an exposed plaintiff can recover related reasonable medical monitoring costs if and when he develops symptoms").

(superscript: [49]) Goutman and Toland, *supra* note 73, at 24; Stephen J. Imbriglia, *Stemming the Flood of Medical Monitoring Claims, For the Defense*, March 1998, at 29.

(superscript: [50]) *Redland Soccer*, 696 A.2d at 146 n.8.

(superscript: [51]) *Id.*, 696 A.2d at 145-46.

(superscript: [52]) Imbriglia correctly notes that an exposure may theoretically increase an individual's risk from one in ten million to one in five million, but that such doubling of the risk would still not generate a risk generally deemed significant and such exposure should accordingly not qualify for compensation. At the same time, significant preexisting risk that is insignificantly increased also should not qualify for compensation. Imbriglia, *supra* note 77, at 31.

(superscript: [53]) See *Redland Soccer Club*, 696 A.2d at 146 n.8.

(superscript: [54]) 45 U.S.C. § 51 et seq.

(superscript: [55]) *Metro-North*, 117 S. Ct. at 2124.

(superscript: [56]) *Ayers*, 525 A.2d at 314 (recommending in future cases creation of "a court-supervised fund to administer medical-surveillance payments"); *Hansen*, 858 P.2d at 982 (suggesting insurance mechanism or court-supervised fund as proper remedy); *Potter*, 863 P.2d at 825 n. 28 (suggesting that a lump-sum damages award would be inappropriate); *Burns*, 752 P.2d at 34 (holding that lump-sum damages are not appropriate). But see *Honeycutt v. Walden*, 743 S.W.2d 809 (Ark. 1988) (damages award for future medical expenses made necessary by physical injury are awarded as lump-sum payment).

(superscript: [57]) Statutes of repose limit potential liability by limiting time during which cause of action can arise. It is distinguishable from a statute of limitations in that a statute of repose cuts off the right of action after a specified time, measured from delivery of the product or completion of the work, regardless of the time of accrual of the cause of action or of notice of invasion of legal rights. *Black's Law Dictionary* 1411.

(superscript: [58]) Minn. Stat. § 541.051, subd. 1(a).

(superscript: [59]) Minn. Stat. § 541.051, subd. 1(c).

(superscript: [60]) Minn. Stat. § 541.051, subd. 1(d).

(superscript: [61]) Ala. Code § 6-5-218.

(superscript: [62]) Ark. Code Ann. § 16-56-112.

(superscript: [63]) Cal. Civ. Pro. Code § 337.15 (West).

(superscript: [64]) Haw. Rev. Stat. § 657-8.

(superscript: [65]) N.J. Stat. Ann. § 2A:14-1.1 (West).

(superscript: [66]) 42 Pa. Cons. Stat. Ann. § 5536.

(superscript: [67]) Tenn. Code Ann. § 28-3-202.

(superscript: [68]) Utah Code Ann. § 78-12-25.5.

(superscript: [69]) Va. Code Ann. § 8.01-250 (Michie).

(superscript: [70]) Wash. Rev. Code Ann. § 4.16.300-320 (West).

(superscript: [71]) See e.g., *Auld v. Sears, Roebuck & Co.*, 25 N.Y.S.2d 491 (N.Y. App. Div. 1941), *aff'd* 41 N.E.2d 927 (N.Y. 1942); *Blair v. Martin's*, 433 N.Y.S.2d 221 (N.Y. App. Div. 1980).

(superscript: [72]) See e.g., Minn. Stat. § 604.03; *Holder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826 (Minn. 1988).

(superscript: [73]) See e.g., *Heath v. Sears, Roebuck & Co.*, 464 A.2d 288, 298 (N.H. 1983); N.H. Rev. Stat. Ann. § 507:8-g.

(superscript: [74]) See e.g., *Ky. Rev. Stat. § 411.310(2)*; *Ingersoll-Rand Co. v. Rice*, 775 S.W.2d 924 (Ky. Ct. App. 1988).

(superscript: [75]) See e.g., *Turner v. General Motors Corp.*, 584 S.W.2d 844 (Tex. 1979); *Owens-Corning Fiberglass Corp. v. Caldwell*, 818 S.W.2d 749 (Tex. 1991); *Rossen v. Goon*, 549 N.Y.S.2d 887 (N.Y. App. Div. 1990); *Voss v. Black & Decker Mfg. Co.*, 450 N.E.2d 204 (1983).

(superscript: [76]) See, e.g., *Banner Welders, Inc. v. Knighton*, 425 So.2d 441, 448 (Ala. 1982); *Ariz. Rev. Stat. § 12-683(3)*; *Gosewisch v. American Honda Motor Co.*, 737 P.2d 376, 381-83 (1987); *Mont. Code Ann. § 61-13-106*.

(superscript: [77]) See e.g., *Minn. Stat. § 604.01, subd. 1a*; *Minnesota District Judges Association, Jury Instruction Guides ? Civil, JIG 130* (3d ed. 1986).

(superscript: [78]) See, e.g., *80 South Eighth St. Ltd. Partnership v. Carey-Canada, Inc.*, 486 N.W.2d 393 (Minn. 1992); *Hapka v. Paquin Farms*, 458 N.W.2d 683 (Minn. 1990); *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 870 (1986); *Spring Motor Distribs., Inc. v. Ford Motor Co.*, 489 A.2d 660 (N.J. 1985); *Moorman Mfg. Co. v. National Tank Co.*, 435 N.E.2d 443, 445 (Ill. 1982); *Redarowicz v. Ohlendorf*, 441 N.E.2d 324 (Ill. 1982); *Seely v. White Motor Co.*, 403 P.2d 145 (Cal. 1965); *Wright & Nicholas*, supra note 65.

(superscript: [79]) See note 106, supra.

(superscript: [80]) *Connaughton*, supra note 39, at 519 (citing *Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co.*, 652 F.2d 1165, 1169 (3d Cir. 1981), quoting Comment, *Manufacturers' Liability to Remote Purchasers for "Economic Loss" Damages? Tort or Contract?*, 114 U. Pa. L. Rev. 539 (1966)).

(superscript: [81]) *Connaughton*, supra note 39, at 519.

(superscript: [82]) *Carey-Canada*, 486 N.W.2d at 396.

(superscript: [83]) *Id.*

(superscript: [84]) See *id.*, at 397 (claim for costs of maintenance, removal and replacement of monokote asbestos-containing fireproofing is not economic loss); *City of Greenville v. W.R. Grace & Co.*, 827 F.2d 975, 978 (4th Cir. 1987); *T.H.S. Northstar Assocs. v. W.R. Grace & Co.*, 767 F. Supp. 969, 974 (D. Minn. 1991); *Northridge Co. v. W.R. Grace & Co.*, 471 N.W.2d 179, 186 (Wis. 1991); *Connaughton*, supra note 39, at 521-26.

(superscript: [85]) See notes 6-11 and accompanying text.(See attached file: bios.doc)(See attached file: l-fdcc 043003.doc)