

Sick Building Syndrome and Building-Related Illness Claims: Defining the Practical and Legal Issues

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After more than a decade of litigation arising from civil claims based on exposure to airborne toxins,¹ there is now widespread recognition that contamination of indoor air quality (IAQ) is a significant threat to public health.

The Occupational Safety and Health Administration (OSHA) estimates that 30 percent of the nation's 4.5 million existing commercial buildings have IAQ problems of varying degree.² On April 5, 1994, OSHA published a seventy-page proposed IAQ rule in the *Federal Register*.³ While much of the media's attention has focused on the environmental tobacco smoke (ETS) aspect of the rule, commentators have suggested that the "more dramatic impact of this sweeping proposal" may be the "overall regulation of indoor air quality"⁴ in nonindustrial buildings affecting more than seventy million workers.⁵

An indication of the economic significance of the problem is OSHA's \$8.1 billion estimate of the cost of compliance with the IAQ aspects only (as distinguished from the ETS control requirements) of the proposed new rule.⁶ An indication of the current extent of public awareness of this issue is the fact that OSHA has received more public comment on this rule than that for any previous, proposed new rule in OSHA's twenty-three-year history.

Definition of the Problem

There are two primary sources of IAQ-related problems:

Microbial Contamination-those that are naturally occurring as a result of bacterial and fungal growth. This is often associated with excessive moisture within the building envelope. Typically, this problem is the result of improper drying in during the construction process, faulty roof or curtain wall construction, improper design or a lack of proper cleaning and maintenance of HVAC systems.

Volatile Organic Compounds (VOCs)-this other major source of the problem is man-made, consisting of often invisible and sometimes odorless fumes "associated with almost any synthetic product in a confined space-plastics, fibers, coatings and cleaning chemicals."⁷ Also included in this category would be microscopic fibers from "man-made materials" associated with insulation, acoustical ceiling tiles and other building components.

In distinguishing between "sick building syndrome" (SBS)⁸ and "building-related illness" (BRI) claims, potential claims are viewed on a continuum, ranging from the less serious, subtle and difficult-to-document to more serious conditions that have been clinically diagnosed and attributed to poor IAQ. Included in the SBS category are more general complaints such as headaches, fatigue, congestion and blurred vision. In the more serious BRI category are conditions such as asthma, bronchitis and Legionnaire's disease.⁹

Because all of these problems are the result of contamination of IAQ that directly affects human health, the authors also include in the BRI category even more serious conditions such as asbestosis and cancer associated with asbestos contamination and radon. The primary practical distinction between asbestos and other sources of IAQ contamination is that the former is a known health threat (and involves primarily structures that were built before the mid-to late 1970s), while the latter are still the subject of some debate within the scientific and medical community.¹⁰ These claims are included in the definition because they are necessary to more completely define the range of the potential problem and consequences and because much of the law in this area has arisen in the context of asbestos contamination. It may be fair to say that SBS and BRI claims are being treated by the courts as less severe “subsets” of the huge wave of litigation that arose during the 1980s from asbestos-related claims. It may also be fair to say that the law in this area is evolving with the science.”

Liability Issues

Legal issues on this subject arise in two broad categories:

Regulatory Liability

The regulatory side of IAQ is not addressed in this article. In addition to the proposed new rule described above, further pursuit of that subject should include reference to extensive legislation at the federal level for, which OSHA and EPA have enforcement responsibility. In that category are the National Environmental Policy Act, the Clean Air Act, the Toxic Substances Control Act, the Asbestos Hazard Emergency Response Act, the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), the Safe Drinking Water Act and the Radon Abatement Act of 1988. There are also significant regulatory requirements at the state and local level. Failure to comply with these minimum standards as they pertain to permitting, construction and remediation can result in criminal liability, fines, forfeitures and jail sentences.

Civil Liability For Damages

Civil remedies available to IAQ claimants vary depending upon the relationship of the parties and the nature of the damages claimed (*i.e.*, personal injury or property damage). Although the resulting claims may, ultimately be translated procedurally as cross-claims and third-party claims, the main claim frequently arises from the duty to abate an IAQ problem once it is identified.

As with other inherently dangerous situations that exist prior to actual injury, issues can arise regarding whether the owner or occupant of the structure has a duty to abate a known or suspected IAQ hazard. In most jurisdictions, an owner or occupant of an affected structure who undertakes abatement measures can seek indemnification from a contractor, supplier, manufacturer or design professional believed to be responsible for the problem.

Owner/Occupant's Duty Arising Under Premises Liability

“An owner or occupant of . . . buildings, who directly or impliedly invites others to enter for some . . . interest or advantage to the owner or occupant . . . owes to such persons a duty to use reasonable care to have the premises in a reasonably safe condition.”¹² Subject to the immunities afforded by applicable worker’s compensation laws, this principle also applies to employer/employee relationships. *Hannon v Hayes-Bickford Lunch System, Inc.*¹³ (duty owed by the owner or occupier of premises to the employees of an independent contractor performing work on the premises is the same duty owed to one of its employees-to disclose to the employee hidden defects of which the employer knows or which, with the exercise of reasonable care, the employer should know); *Quinnelly v Southern Maid Syrup Company, Inc.*¹⁴ (owner owes employee-invitee duty to use reasonable care in maintaining premises in reasonably safe condition and to give such invitee timely warning of latent and concealed perils known to owner, or that should be known to the owner by the exercise of due care). Some states have codified this common-law principle in so-called “safe workplace” statutes. See *Cyr v. Bergstrom Paper Co.*¹⁵; *Ozzella v. Peterson Builders, Inc.*¹⁶ The type of danger involved dictates the degree of care required. *Ahearn v Florida Power & Light Company*¹⁷ (law requires power companies to exercise a high degree of care to provide safe working conditions for the employees of an independent contractor; the duty is to exercise the degree of care commensurate with circumstances then existing or which may reasonably be expected to exist).

The Waterside Mall Verdict

An example of premises liability as the conceptual basis for SBS and BRI claims is the well-publicized suit that was filed several years ago by 19 current or former EPA employees against the owner-operator of the Waterside Mall office building in downtown Washington, D.C. That building has housed EPA’s headquarters since the early 1970s. The plaintiffs sought in excess of \$10 million in damages, alleging that they suffered “permanent brain damage” as a result of exposure to various airborne toxins in connection with building renovations performed 1986 through 1989.¹⁸ The plaintiffs claimed that they were thereby “sensitized to a large number of common chemicals, such that they became ill when exposed to even low doses of those chemicals” in everyday living, including such things as “gasoline fumes, perfumes, shoe polishes, dry cleaned clothing, cigarette smoke, copy machines, newsprint.”¹⁹

Five of these 19 cases went to trial and resulted in a jury verdict in favor of the plaintiffs that totaled just under \$1 million.²⁰ Although the Waterside Mall case did not attract much media attention, commentators and others that follow IAQ issues closely have described the result as a potential “landmark in sick building syndrome litigation” because all previous IAQ cases have involved known, specific hazards, such as asbestos, formaldehyde or pesticides.²¹

In those cases, the plaintiffs successfully showed direct damage to building occupants’ health from exposure to those agents. Although there have reportedly been substantial settlements in true SBS and BRI cases in the past, “this is the first case where a general, ‘multifactorial’ causal theory has resulted in a substantial jury award.”²²

Both the plaintiffs and the defendants claimed victory in the case. The plaintiffs' attorneys claim that this verdict sends a message to building owners and managers. The defense, meanwhile, suggests that the amount of the award will not be sufficient to pay for the plaintiffs' expert fees and costs incurred in preparing and presenting the case at trial.²³

Owner/Occupant's Duty To Abate

In indoor pollution cases, the employer's duty may require nothing less than abatement. The mere warning of a latent hazard of this type may not be sufficient because it cannot be reasonably avoided. Owners or occupants of properties have abated hazardous conditions and successfully sought indemnification from the entity that created the unreasonable risk of harm.

In *Indiana Harbor Belt Railroad Co. v. American Cyanamid Co.*,²⁴ an owner of a railroad switching yard brought an action to recover from a shipper of toxic chemicals cleanup costs resulting from a chemical spill. The train car containing the toxic chemicals was delivered to the plaintiff's rail yard, and was awaiting pickup from another carrier. While the box car was parked on a side track, a valve malfunctioned, spilling thousands of gallons of toxic chemicals onto the surrounding area and threatening the water supply of nearby communities. Due to the inherently dangerous nature of the toxic chemicals involved, the owner performed necessary cleanup operations. Thereafter, the owner sought reimbursement of the cost of the cleanup from the railroad that shipped the toxic materials, based on negligence and strict liability.

On summary judgment, the court ruled in favor of the plaintiff on strict liability grounds. Relying on Restatement (Second) Torts § 522(c), the court held that the practice of transporting such highly toxic chemicals was an abnormally dangerous activity, and that the law put the burden of all losses resulting from the spill on the shipper as a matter of public policy.

The same public policy argument has been applied in a commercial/residential setting involving formaldehyde foam insulation. In *Shooshanian v. Wagner*,²⁵ the plaintiffs brought an action based on breach of implied warranty and strict products liability against the installer and manufacturer of formaldehyde insulation in the structure (which contained the plaintiff's business and residence). The plaintiffs alleged that the insulation incorporated into the property was dangerously defective because it emitted toxic fumes that had caused physical harm to the occupants and would continue to pose a health threat.²⁶ Alleviation of the risk required tearing out the inner walls of the building, removing the insulation and replacing both the walls and insulation.

The appellate court held that the plaintiffs were not barred as a matter of law from maintaining an action in strict products liability for damage to their property. It focused on the fact that the claim for damages was not based on the defective nature of the product (which would fall under the economic loss rule²⁷) but, rather, on the basis that the product was "dangerously defective." The court derived this distinction from *Seely v. White Motor Co.*²⁸ In *Seely*, the court stated: "[t]he distinction rests . . . on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. *He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm.* He cannot be

held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands." (emphasis added).

The alleviation of unreasonable risk of injury is not new to tort law. In *Gladiola Biscuit Company v Southern Ice Company*,²⁹ an ice manufacturer sold snow ice to a wholesaler, who in turn sold the same to a biscuit manufacturer, who incorporated it into uncooked biscuits. During normal operations, a piece of glass was found in a batch of dough. More glass was also found in other bags of ice. The plaintiff subsequently recalled and destroyed its biscuit production for the previous two days.

Noting that strict liability was imposed on a manufacturer of food products, the court recognized that the biscuit manufacturer had a supervening duty to the eating public and to the noncomplying supplier to prevent avoidable consequences.³⁰ Accordingly, the court held that judgment should be entered for the biscuit manufacturer and that it should recover for both days of production.

The same rationale has been applied to a situation involving a product (Sarabond) incorporated into mortar used in the construction of a bank building. In *Philadelphia Nat'l Bank v Dow Chemical Co.*,³¹ the plaintiff contended that Sarabond caused corrosion of metals embedded in the mortar and brick panels of its building and cracking of masonry on the exterior of the building. Recovery was sought for: (1) costs of inspection and repair of the building; (2) loss of the building's use; (3) loss of customers; and (4) loss of employee time.

On motion for summary judgment by the manufacturer, the court restated the issue as whether the defect rendered the product unsafe or whether it merely made the product ineffective. If it was the latter, the claim would be barred under the economic loss doctrine; if the former, it would be recoverable in tort.

In viewing the facts, the court noted that the plaintiff demonstrated "a very real risk of injury to persons, by way of crumbling mortar and falling bricks, [was] present. Emergency repairs [had] been undertaken at the PNB building to prevent masonry from becoming dislodged, and numerous instances of crumbling masonry due to the incorporation of Sarabond into other buildings [were] cited." *Id.* at 63.

Based on the plaintiff's showing, and relying on two Pennsylvania court of common pleas decisions which held that strict liability applied to asbestos products used in the construction of schools, the court denied the motion for summary judgment and found that the plaintiff could recover in tort.

Similarly, in *Roseville Plaza Ltd. v. United States Gypsum Co.*,³² the federal court held that an owner's claim in tort against a seller of asbestos for abatement costs could withstand a motion to dismiss. There, the court reasoned that the plaintiff sought recovery for "analysis, removal, and replacement of the asbestos-containing building materials and other asbestos contaminated property"

Thus, since the claim was not based on the failure of the product to perform as a fire retardant, the action was better grounded in tort than in contract. Accordingly, the economic loss rule did not apply.

The *Philadelphia*, *Shooshanian* and *Roseville* analyses logically apply in indoor pollution settings. The risk of harm to the public, whether it be business guests or employees, is great—resulting in a duty to alleviate that unreasonable danger. Although the degree of danger and risk of harm may vary from asbestos to formaldehyde and other less toxic contaminants, the issue is whether each such risk is unreasonable. Ultimately, these risks may have to be evaluated by the courts on a case-by-case basis.

As stated by the court in *Livingston Bd. of Educ. v. United States Gypsum Co.*³³: “It is not immediately satisfying to say that decisions in [this] subject area are fact-sensitive, but it is accurate to say so. An examination of the parties, the transaction, and the claimed losses is necessary before the buyer or the transaction can be labeled commercial, or the losses be labeled economic.”³⁴

Contractor’s Duty To Abate/Indemnify

Aside from any contractual or warranty obligations, a contractor (or anyone for that matter) creating an unreasonable risk of physical harm has a duty to abate the same. If the entity creating the unreasonable risk does not alleviate the same, it will be required to indemnify the party abating the danger. See *United States v. Reserve Mining Company*,³⁵ (mining company required to reimburse Army Corps of Engineers for costs incurred in abating contamination of drinking water with carcinogenic amphibole asbestos fibers). Also, if parties share responsibility for a toxic threat of personal injury, one party may seek statutory contribution from the other tortfeasor(s). *Woodman v. United States*³⁶ (waste removal company which had contracts with Navy for removal of waste not precluded from seeking contribution from Navy for injuries caused by improper disposal of hazardous chemicals).

Manufacturer’s Duty To Abate/Indemnify

It is well established that injury or death from exposure to a product containing asbestos falls within the ambit of common-law negligence and strict liability. *Baione v. Owens-Illinois, Inc.*³⁷; *Adkins v. GAF Corp.*³⁸ Implicit in these holdings is that asbestos creates an unreasonable risk of harm. Thus, a manufacturer of asbestos products, or any similar toxic chemical, has a duty to abate the known unreasonable risk of danger created by the manufacturer.

In the vast majority of asbestos and other toxic, chemically based cases, the manufacturer is the primary defendant. This is due to the availability of a strict products liability cause of action and the fact that manufacturers are perceived as “deep pockets.”

Design Professional’s Duty to Abate/Indemnify

An action for abatement costs as to a design professional will, in all probability, be based on the negligent design or negligent approval of construction. See *Evanston Ins. Co. v. Treister*.³⁹

Generally, strict liability is not applicable to persons providing professional services. *Jackson v. City of Franklin*⁴⁰; *Chubb Group of Ins. Cos. v. C.F. Murphy & Associates, Inc.*⁴¹ (strict liability does not apply to architect of commercial building); *Sime v. Tvenge Associates Architects & Planners, P.C.*⁴² (strict liability not available against architect, absent showing design of ventilation system was mass marketed).

The Implied Warranty of Habitability

Many states recognize the doctrine of implied warranty of habitability only as to first purchasers of residential construction (i.e., single-family homes and condominiums.) *Conklin v. Hurley*⁴³ (implied warranties of fitness and merchantability apply to residential, but not to commercial settings); *Sims v. Lewis*⁴⁴; *Theis v. Heuer*⁴⁵; *Atherton Condominium Apartment Owner Ass'n. Bd. of Directors v. Blume Development Co.*⁴⁶; *Hays v. Gilliam*⁴⁷ (implied warranty of habitability not applicable to investor of commercial enterprise).

In *Conklin*, the court suggested that this distinction is premised on the notion that an ordinary homebuyer is not able to detect flaws in the construction of modern houses. A companion doctrine is the fraudulent concealment exception (i.e., duty to disclose to a prospective purchaser known latent defects) to the doctrine of caveat emptor, which is also limited to residential settings. See *Johnson v. Davis*⁴⁸; *Condon v. Kunse*⁴⁹ (doctrine of passive concealment does not apply to sale of farmland).

Some courts, however, have questioned the distinction between commercial and residential purchases and the resulting, significant disparity in the legal remedies available to residential and commercial buyers. See *Florida Eastern Properties, Inc. v. Southeast Commercial Developers, Inc.*⁵⁰ (per curiam affirmed based on *Conklin*, which held implied warranty of fitness and habitability only applied to first purchasers of residential dwellings, but certified the following question: “Do implied warranties of fitness and merchantability extend to first purchasers from developers of real estate with commercial structures on the land?”); *Haskell Co. v. The Lane Co., Ltd.*⁵¹ (held that caveat emptor applies to sales of commercial real property but certified the following question: “Should the commonlaw doctrine of *caveat emptor* continue to apply to commercial real property transactions; and, if not, with what legal principles should it be replaced?”). The Florida Supreme Court has not as yet responded to either of these certified questions.

The *Haskell* court discussed at length the need to replace the doctrine of caveat emptor in commercial settings. It noted that many of the policy considerations used to justify a duty to disclose in residential cases apply with equal force to commercial cases. It reasoned that small business professionals were more aligned with residential purchasers than a large corporate purchaser. Moreover, the court opined that “the buyer (or lessee) of commercial property has the same reasonable expectations as does the buyer (or lessee) of a residence—that he or she will receive what was bargained for, and be able to use it for its intended purposes.”⁵²

The *Haskell* analysis with respect to the duty to disclose applies with equal force to the implied warranty of habitability. Advocates for buyers of commercially, improved real estate will almost certainly make those and other arguments to courts in the future. For that reason,

developers and those in the building trades should expect SBS and BRI claims to be couched in terms of breach of the implied warranty of habitability in *both* residential and commercial settings.

Damage Issues-The Economic Loss Rule

Claimants bringing actions resulting from problems with IAQ who have a contract remedy against the party they view as responsible can recover their expectancy damages-that is, to be made whole under the contract.⁵³ These damages should include the loss in value of the structure, remediation and tenant relocation costs, as well as lost profit. If the contract limits damages, then the parties will be required to live with their bargained-for exchange. Attempts to circumvent such contractual limitations by bringing an action in negligence are no longer permitted in many jurisdictions. See *Casa Clara Condominium Ass'n., Inc. v Charley Toppino and Sons, Inc.*⁵⁴; *80 South Eighth Street Ltd. Partnership v. Carey-Canada, Inc.*⁵⁵; *Kershaw County Bd. of Educ. v. United States Gypsum Co.*⁵⁶; *Garweth Corp. a Boston Edison Co.*⁵⁷.

Of greater concern, however, are those situations where the claimant did not contract directly with the culpable party. The economic loss rule prohibits recovery in tort when a product damages itself, causing economic loss, but not causing either:

1. damage to *other* property, or
2. personal injury

A claimant which suffers such economic loss may not have a legal remedy in many jurisdictions. This discussion addresses such nonprivity claims and factors a court should consider when they arise in an IAQ contamination context.

Other Property Exception: Is a Building a Single Product?

In *Casa Clara*, the plaintiffs owned condominium units and single-family homes built with, and allegedly damaged by, concrete supplied by the defendant. The concrete allegedly contained a high content of salt that caused the reinforcing steel inserted in the concrete to rust, which, in turn, caused the concrete to crack and break off. The plaintiffs brought an action against the defendant for breach of common-law implied warranty, products liability, negligence and violation of the building code.

The court noted that the economic loss rule prohibits recovery in tort when a product damages itself, causing economic loss,⁵⁸ but does not cause personal injury or damage to any property other than itself.⁵⁹ The court in *Casa Clara* also noted that the distinction between tort recovery for physical injuries and warranty recovery for economic loss rests “on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. *He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his products in the consumer’s business unless he agrees that the product was designed to meet the consumer’s demands.* [citation omitted] An individual consumer, on the other hand, should not be charged at

the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. *He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will.*” (emphasis in original), citing *Seely v. White Motor Co.*⁶⁰

The rule as provided in *Seely* is the “fundamental boundary between contract law, which is designed to enforce the expectancy interests of the parties, and tort law, which imposes a duty of reasonable care and thereby encourages citizens to avoid causing physical harm to others.”⁶¹

With this distinction between tort and contract law in mind, the *Casa Clara* court noted that the homeowners were seeking purely economic damages. No one had sustained any physical injuries and no property, other than the structures built with the defendant’s concrete, had sustained any damage. The court rejected the homeowners’ argument that the defective concrete had thereby damaged “other property,” stating: “The character of a loss determines the appropriate remedies, and, to determine the character of a loss, one must look to, the *product purchased by the plaintiff, not the product sold by the defendant.*” (emphasis added).⁶²

The court found that the homeowners bargained for and purchased finished products, *i.e.*, dwellings, not the individual components of those dwellings. The concrete became an integral part of these finished products and, the court reasoned, therefore did not damage “other property” within the meaning of that exception.

Under the *Casa Clara* “home-is-a-product” analysis, it is difficult to conceive a situation, in either a commercial or residential setting, where an owner pursuing a noncontract remedy could avoid the bar of the economic loss rule. By way of example, a structure (whether it be a house, hospital or high-rise office building) found to be unfit for human habitation as a result of IAQ contamination attributable to a building component would *arguably* be a single product that had damaged itself. In that circumstance (and assuming the party against whom the owner has a contractual remedy is bankrupt or otherwise judgment-proof), the owner may be unable in some jurisdictions to sustain an action against a responsible third-party manufacturer, supplier or subcontractor to recover the cost of remediation, the cost to temporarily relocate tenants, rent concessions or other consequential, economic losses. For these and additional reasons, other jurisdictions have taken a different approach.

Other Jurisdictions

In some jurisdictions, the “other property damage” exception to the economic loss rule has been accepted, at least to withstand a motion to dismiss, in indoor pollution settings. In *Northridge Co. v W.R. Grace and Co.*,⁶³ property owners brought a negligence and strict products liability action to recover damages to a building which had allegedly been contaminated with asbestos following installation of fireproofing materials.

In addressing the issue, the court noted that the plaintiffs asserted that asbestos contamination physically injured its other property, not that the material had failed to perform the functions for which it was purchased. The court held that the plaintiff’s allegation that the defendant’s asbestos containing product physically harmed the plaintiff’s building is the type of

injury which is actionable under claims for relief in strict liability and negligence. The court denied the defendant's motion to dismiss, noting that whether physical injury to the building had occurred was a question for the trier of fact.⁶⁴

The same rationale should apply to other forms of indoor pollution. The fact that no outwardly visible evidence of physical harm to the property exists should not be dispositive. Consistent with the rationale allowing a claimant to invoke the theory of strict liability,⁶⁵ IAQ contamination that is threatening to human health should be sufficient to invoke the property damage exception to the economic loss rule, notwithstanding the "other property damage" limitation on that exception.

Actual Personal Injury vs. Increased Risk of Personal Injury

The personal injury exception to the economic loss rule is universally accepted when actual *physical injury has already occurred*. However, there is a divergence of authority on whether an "increased risk" of physical injury is an exception to the rule. In IAQ contamination situations, public policy considerations of preventing unnecessary injury collide head-on with traditional notions of tort law where injury must occur before a negligence action exists.

In *Casa Clara*, the plaintiffs argued that the increased risk of personal injury posed by deteriorating concrete in the buildings in question in that case brought their claims within the personal injury exception to the economic loss rule. The court rejected this argument for "go[ing] completely against the principle that injury must occur before a negligence action exists."⁶⁶ Noting that, because injury had not occurred, its extent and the identity of injured persons was completely speculative, the *Casa Clara* court commented: "Thus, the degree of risk is indeterminate, with no guarantee that damages will be reasonably related to the risk of injury, and with no possibility for the producer of a product to structure its business behavior to cover that risk."⁶⁷

The *Casa Clara* decision must be viewed in the factual context in which it arose. Unlike the defective mortar in *Philadelphia Nat'l Bank v Dow Chemical Co.*,⁶⁸ the *Casa Clara* plaintiffs apparently failed to demonstrate an immediate and verifiable risk to human health comparable to the crumbling mortar and falling debris in *Philadelphia*. Unlike IAQ contaminant claims, there are not thousands of cases involving deteriorating concrete. Arguably, that health risk is not the same as the known risks of some forms of IAQ contamination.⁶⁹

When presented with SBS or BRI claims where, although not necessarily life-threatening, documented, present dangers to human health are involved, courts that have previously adopted the *Casa Clara* rationale should revisit their strict adherence to the economic loss rule in increased risk situations of this kind. Otherwise, recovery of economic loss damages by such claimants may be dependent on whether defendants who are subject to contract claims choose to pursue third-party claims against others in the chain of privity who may be more culpable for the loss involved.

Other Jurisdictions

In *Carey-Canada*, primarily on public policy grounds, the court distinguished a tort claim based on asbestos contamination from routine economic loss cases. The court noted that the claim was not that the asbestos fireproofing failed to perform satisfactorily as fireproofing. Rather, the plaintiff sought the costs of eliminating the risk of injury and of making the building safe for all those who use and occupy the property at issue. The court relied on decisions which held that where the claim is based on the contamination of the entire building with allegedly dangerous contaminants (asbestos fibers), the claim is not one for economic loss. See, e.g., *City of Greenville v. W.R. Grace & Co.*⁷⁰ (the risk posed by materials containing friable asbestos “is not the type of risk that is normally allocated between the parties to a contract by agreement”); *Independent School Dist. No. 197 v W.R. Grace & Co.*⁷¹ (claim arises not from a failure of the asbestos to perform its function as a fire retardant, but from contamination of the entire building with allegedly dangerous asbestos fibers); *Northridge*⁷² (“[t]he essence of the plaintiff’s claim is that Monokote releases toxic substances in the environment, thereby causing damage to the building and a health hazard to its occupants”).

Since the plaintiff was not seeking the benefit of the bargain, but was seeking to reduce the risk of injury to occupants of the building, the *Carey-Canada* court permitted an action in tort. The court stated: “One objective of tort law is to deter unreasonable risks of harm. A building owner acts reasonably in attempting to avoid or minimize risk of injury to occupants of the building. Rather than waiting for an occupant or user of the building to develop an asbestos related injury, we believe building owners should be encouraged to abate the hazard to protect the public.”⁷³

The *Carey-Canada* court’s decision is well reasoned and should find support in other jurisdictions.⁷⁴

Attendant Legal Issues

Other issues that frequently arise in IAQ cases can be quite complex. They include:

Applicability of Contractor’s Commercial General Liability (CGL) Insurance

A commercial general liability policy is intended to protect an insured from liability to a third party incurred as a result of the insured’s faulty workmanship or material. *Commercial Union Ins. Co. v R.H. Barto Co.*⁷⁵ It is not, however, intended to protect insureds from contractual liability for the cost of repair or replacement of the defective work or material itself.

The following illustration from *Commercial Union* marks the boundaries between “business risks” and “occurrences” giving rise to insurable liability: “When a craftsman applies stucco to an exterior wall of a home in a faulty manner and discoloration, peeling and chipping result, the poorly-performed work will perforce have to be replaced or repaired by the tradesman or by a surety. On the other hand, should the stucco peel and fall from the wall, and thereby cause injury to the homeowner or his neighbor standing below or to a passing automobile, an occurrence of harm arises which is the proper subject of risk-sharing as provided by the type of

policy before us in this case. The happenstance and extent of the latter liability is entirely unpredictable-the neighbor could suffer a scratched arm or fatal blow to the skull from the peeling stonework. Whether the liability of the businessman is predicated upon warranty theory or, preferably and more accurately, upon tort concepts, injury to persons and damage to *other* property constitute the risks intended to be covered under the CGL [policy].” (emphasis added).⁷⁶

This rationale is strikingly similar to that employed with regard to application of the economic loss rule. As with that analysis, when seemingly innocuous building materials or HVAC installations are found to emit particulates harmful to human health into the air space within a building envelope, the cost of abating that condition is arguably a loss within coverage of a standard CGL insurance policy.

Courts addressing the issue have uniformly held that CGL policies cover damages arising from asbestos exposure. See *United States Fidelity & Guar. Co. v. Wilkin Insulation Co.*⁷⁷ (insurer had duty to defend under post-1973 standard CGL policy); *Continental Cas. Co. v. RapidAmerican Corp.*⁷⁸ (insurer had duty to defend under standard 1966 CGL policy); *Cole v. Celotex Corp.*⁷⁹ (parties stipulated that standard 1966 CGL policy applied).⁸⁰

The heavily contested issue, then, becomes which event triggers coverage of the CGL policy. There are generally four distinct theories regarding events that trigger CGL insurance coverage:⁸¹

- (1) the exposure theory⁸²
- (2) the injury-in-fact theory⁸³
- (3) the manifestation theory⁸⁴ and
- (4) the continuous trigger, triple trigger or multiple theory⁸⁵

Counsel should be aware that state law is unsettled on this issue and should carefully analyze the pertinent facts with reference to the four trigger theories in deciding how to most accurately and advantageously present an IAQ claim to a CGL carrier.

Applicability of Design Professional Liability Insurance

Reported cases concerning a design professional’s liability in the context of indoor pollution are few. Accordingly, general principles regarding coverage under design professional policies are here analogized to an indoor pollution setting. This discussion also includes a brief review of the distinction between “claims made” and “occurrence” policies in this context.

Typically, professional liability insurance⁸⁶ for design professionals covers claims arising from a professional act, error or omission of the insured arising out of the performance of professional services. See *Gibraltar Cas. Co. v. Sargent & Lundy*⁸⁷ (interpreting architect’s professional liability policy). Recognizing that coverage and damage provisions of professional liability policies vary, the following is the policy provision addressed by the court in *Gibraltar*: “compensation for loss or injury to person or property, including compensation for *bodily injury, personal injury or property damage*, but does not include fines, penalties or the return, withdrawal or reduction of professional fees.” (emphasis in original)⁸⁸

In *Gibraltar*, the court addressed the issue of whether an insurer had a duty to defend its insured, an architect, with respect to allegations of negligent design of an atomic power plant. The plaintiff sought damages for loss of use of the facility and costs associated with substantial delays allegedly due to the architect's negligence. The insurer argued that the complaint alleged only noncovered economic losses such as lost investment, lost profits and interest paid to finance the investment.

The court rejected the insurer's argument, noting that loss of the right to use property is loss of an incident of ownership. The court further found that loss of use damages include the cost of correcting the defect. See also *United States Fidelity & Guar. Co. v. Wilkin Insulation Co.*⁸⁹ (loss of use of public buildings alleged where incorporation of asbestos made buildings unsafe for use until asbestos-containing materials were replaced).

In typical indoor pollution contexts, claims against design professionals would be based on negligent design of the structure or specification of improper materials. Accordingly, under policies similar to the one contained in *Gibraltar* (assuming no pollution exclusion clauses), the insurer would be liable to defend and indemnify the design professional for damages for cost of repair, loss of use of the facility and personal injury.

An insurer's exposure on these types of policies can be substantial. In order to limit their exposure, some professional liability policies contain pollution exclusion clauses, similar to that addressed by the court in *Evanston Ins. Co. v. Treister*,⁹⁰ as follows:

Pollution Exclusion Endorsement

"It is hereby understood and agreed that such insurance as is afforded by this policy does not apply to any claim based upon, arising out of or in any way involving the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants."

In *Treister*, a class action suit was brought by residents of a government housing project, alleging that a typhoid epidemic was caused by cross-contamination of water and sewer lines as a result of negligent installation. The Virgin Islands government cross-claimed, seeking damages from the architect based on his failure to carry out his responsibilities as the architect of record for the project. The architect settled with the class action plaintiffs and the government. The architect then sought indemnification from its own professional liability insurer (which had previously denied coverage).

The insurer contended that the claim against the insured architect arose from the alleged pollution of the water lines and was therefore precluded by the pollution exclusion clause. The court, however, noted that the claim was based on the architect's alleged negligent errors and omissions in the design and approval of the construction of the water and sewer lines. The government had thus sought damages against the insured not as a result of the pollution, but as a result of the unusable condition of the water and sewer lines. Accordingly, the pollution exclusion did not apply to the government's claim.

The *Treister* court's analysis is correct. There is a distinction between damages related to the effects of the pollution (e.g., personal injuries) and damages related to the effects of negligent design of the water/sewer system (e.g., cost of replacement and loss of use). With respect to claims on policies that include such a pollution exclusion, therefore, counsel should plead accordingly.

Occurrence and "Claims Made" Policies

Generally, a "claims made" policy is "one in which indemnity is provided no matter when the alleged error or omission or act of negligence occurred, provided the misdeed complained of is discovered and the claim for indemnity is made against the insurer during the policy period." *Stine v Continental Cas. Co.*⁹¹ In contrast, an "occurrence" policy is "... one in which indemnity is provided no matter when the claim is brought for the misdeed complained of, providing it occurred during the policy period An 'occurrence' policy protects the policyholder from liability for any act done while the policy is in effect, whereas a 'claims made' policy protects the holder only against claims made during the life of the policy."⁹²

Since an "occurrence" policy covers damages arising from acts that occurred during the policy period, the risk for the carrier in a latent indoor pollution context can be great. Because these indefinite periods of risk can last years or even decades, the premiums for "occurrence" policies relating to professional malpractice are high. "Claims made" policies are more prevalent in the current market because of the more limited window of exposure for carriers and the resulting lower premiums for insureds. It also places the burden on the insured to self-monitor its risk of exposure. If the insured believes that the likelihood of claims as a result of errors or omissions has diminished, then it has the option to not renew its "claims made" coverage. On the other hand, if the insured remains concerned about potential exposure, then it should keep the policy in force.

Interplay with Workers' Compensation Insurance

"The purpose of workers' compensation acts is to provide for employers a liability that is limited and determinative, and to employees a remedy that is both expeditious and independent of proof of fault. Workers' compensation acts constitute social legislation, the design, intent, and purpose of which is to provide for injured workmen, and if they should die from injuries received in their employment-for their dependents, in such a way that the burden may fall on the industry served, not on society." *Florida Erection Services, Inc. v. McDonald.*⁹³

Workers' compensation acts cover injuries caused by indoor pollution. *Champlain Cable Corp. v. Employers Mut. Liability Ins. Co. of Wisconsin*⁹⁴ (asbestos); *Souza v. Raytheon Co.*⁹⁵ (injuries resulting from inhalation of hysol gas fumes that were prevalent in workplace covered by workers' compensation benefits); *Eastern Airlines, Inc. v. Crittenden*⁹⁶ (flight attendant who developed bronchial condition caused by exposure to cigarette smoke in the work place entitled to workers' compensation benefits); *Wood v. Harry Harmon Insulation*⁹⁷ (employee who worked in insulation business from 1949 through 1973 entitled to workers' compensation benefits for injuries resulting from disease caused by inhalation of asbestos fibers).

In determining whether an employee is entitled to compensation in an indoor pollution context, there are two theories under which coverage may be established: (1) exposure theory and (2) occupational disease theory.⁹⁸ The exposure theory permits an employee to recover for injuries sustained while in the employ of a particular employer. In contrast, the occupational disease theory permits an injured worker to recover, in theory, from an industry. The focus is on the type of occupation with the result that, if an employee had multiple employers in the same occupation, he or she may recover from their last employer, provided he or she was injuriously exposed to the same contaminant as with the prior employers.⁹⁹

Under the exposure theory, the plaintiff must satisfy the following three-prong test: (1) the claimant must have had a prolonged exposure; (2) a causal relationship must be established between the exposure and the injury or aggravation; and (3) the claimant must establish that he or she has been subject to a hazard greater than that to which the general public is exposed. *Lake v. Irwin Yacht & Marine Corp.*¹⁰⁰

With regard to the “occupational disease theory,” the following four-factor test is applied to determine whether a claimant can recover: (1) the disease must be actually caused by employment conditions that are characteristic of and peculiar to a particular occupation; (2) the disease must be actually contracted during employment in the particular occupation; (3) the occupation must present a particular hazard of the disease occurring so as to distinguish that occupation from usual occupations, or the incidence of the disease must be substantially higher in the occupation than in the general public; and (4) if the disease is an ordinary disease of life, the incidence of such a disease must be substantially higher in the particular occupation than in the general public.¹⁰¹

The requirements of an occupational disease were satisfied by the plaintiff in *Eastern Airlines*. There, the plaintiff developed a bronchial condition caused by exposure to cigarette smoke while she was working as a flight attendant. She had successive periods of disability during which she did not work and her condition improved. But, when she returned to work, her condition would worsen as a result of new exposure.

The occupational disease requirements have also been satisfied in a myriad of other chemically based injuries. See, e.g., *Robinson v. SAIF Corp.*¹⁰² (phenols, hydrocarbons and formaldehyde); *Intalco Aluminum Corp. v. Department of Labor and Industries*¹⁰³ (claimants entitled to benefits due to injuries from exposure to air pollution in plant producing aluminum); *Souza* (inhalation of hysol gas fumes that were prevalent in the workplace constituted an “occupational disease

An employer’s tort immunity does not, of course, preclude tort claims against third parties alleged to also be responsible for the injury, such as building owners or property managers (see discussion of 1993 Waterside Mall jury verdict above), contractors, suppliers or design professionals. *Mitchell v. Shell Oil Co.*¹⁰⁴ (Montana Workers’ Compensation Act expressly allows an injured worker to maintain an action in tort against a third party responsible for his injury, regardless of fact employee may have been compensated by immediate employer via Workers’ Compensation Act); *Hogan v. Deerfield 21 Corp.*¹⁰⁵ Also, a workers’

compensation carrier which has paid benefits may be entitled to statutory subrogation rights for the pro rata amount of compensation paid. *Anderson v National Carriers, Inc.*¹⁰⁶; *Whitely v. United States Fidelity and Guar. Co.*¹⁰⁷

Liability of Performance Bond Surety

“The purpose of a performance bond is to guarantee the completion of the contract upon default by the contractor.” *American Home Assur. Co. v. Larkin General Hosp., Ltd.*¹⁰⁸

“Ordinarily a performance bond only ensures the completion of the contract. The surety agrees to complete the construction or to pay the obligee the reasonable costs of completion if the contractor defaults.”¹⁰⁹

Whether based on a breach of the implied warranty of habitability¹¹⁰ or some other theory, an owner fortunate enough to identify an IAQ contamination problem prior to his acceptance of the work is virtually certain to maintain that the contractor has not completed its work if the building has been found to be unsafe for human beings. In the absence of a statutory exemption from liability in favor of the surety,¹¹¹ there is no reason conceptually why the owner could not at that point pursue both the contractor and the surety on the contractor’s performance bond.

But occasions on which an IAQ problem is identified during the construction phase are the exception. Typically, such problems are not identified until after substantial completion and occupancy, *i.e.*, as latent defects in the work. There is a split of authority as to whether a performance bond surety is liable for latent defects.

In *Florida Bd. of Regents v. Fidelity & Deposit Co. of Maryland*,¹¹² the court stated, in dicta, that once a building is substantially completed, the surety under a performance bond is relieved of any further liability—even if there are latent defects. The court reasoned that “[t]he purpose of a performance bond is to `ensure the physical completion of the work upon default,’ [citation omitted] and to insure against any losses which the owner may suffer if performance default occurs.”¹¹³

See also *Town of Esopus v. Brinnier & Larios, P. C.*¹¹⁴ (statute of limitations for surety began to run when contractor completed its work and the owner accepted and made final payment; latent defect or fraud uncovered at a later date does not change this limitation). But see *School Bd. of Pinellas County v. St. Paul Fire & Marine Ins. Co.*¹¹⁵ (since the contractor is liable for latent defects, the surety is as well).

California has adopted the opposite view, holding sureties liable for latent defects even if the principal/contractor is no longer liable due to a statute of repose. See *Regents of the University of California v. Hartford Acc. & Indem. Co.*¹¹⁶ There the court held that, because the applicable statute of repose did not specifically address sureties, its protection was not available to the surety even though it was available to the contractor. See also *Salem Realty Co. v. Batson*¹¹⁷ (surety liable for latent defect).

Conclusion

There are two primary sources of IAQ related problems: microbial contamination and volatile organic compounds. Personal injuries arising from these contaminants range from minor irritations to fatal diseases. The seriousness of the problem has given rise, at the state and federal level, to extensive legislation with respect to minimum standards for IAQ as they relate to permitting, construction and remediation and the imposition of criminal liability, fines, forfeitures and jail sentences for failures to comply.

Civil claims for property damage and personal injury are available to IAQ claimants based on breach of contract, express and implied warranty, negligence and strict liability theories. Liability may be found on the part of owners, property managers, lessees or other occupants, employers, contractors, suppliers, manufacturers and design professionals. These duties may require an owner, occupant or employer to abate the contamination before injury occurs, and a manufacturer or contractor to indemnify the abating party.

Counsel must also be prepared to address other legal issues that typically attend an IAQ claim, including the economic loss rule, the determination of liability insurance coverage, the interplay with workers' compensation insurance coverage and the liability of performance bond sureties.

Endnotes

1. As of December 1990, there were at least 100,000 asbestos personal injury claims and over 2,000 formaldehyde suits filed. Korneich, *Minimizing Liability For Indoor Pollution*, 4 Tul. Envtl. L. J. 61 (1990).
2. Veasy, Apr. 1994 Special Report, *Indoor Pollution News*.
3. 59 Fed. Reg. 15,968 (1994) (to be codified at 29 C.F.R. pts. 1910, 1915, 1926 and 1928) (proposed April 5, 1994).
4. Veasey, at 59.
5. A March 25, 1994, OSHA press release advised as follows:
Assistant Secretary of Labor Joseph A. Dear, head of OSHA, added that "the rule is one of the most extensive ever proposed by OSHA. The environmental tobacco smoke provisions in the proposal apply to more than 6 million workplaces under OSHA jurisdiction, while the indoor air provisions apply to more than 4.5 million nonindustrial worksites."
Nonindustrial workplaces include offices, schools and training centers, commercial establishments, health care facilities, cafeterias and factory break rooms.
6. Veasey, at 59.
7. As described by the Envirosense Consortium, a nonprofit organization composed of manufactures and suppliers of products and services directly related to IAQ.
8. Some commentators refer to this entire problem as "tight building syndrome" rather than sick building syndrome, citing the increased emphasis in the construction industry following the fuel shortgages of the early 1970s on making new buildings more energy efficient by making them more airtight. It may not be coincidence that these claims began to appear with increasing frequency following that period.
9. OSHA regards SBS and BRI claims as two distinct phenomena. In its April 5 *Federal Register* announcement, OSHA defined SBS with reference to a 1993 World Health Organization definition of the physical symptoms of SBS, including "irritation of the eyes, nose and throat; dry mucous membranes and skin, erythema, mental fatigue and headache, respiratory infections and cough; hoarseness of voice and wheezing; hypersensitivity reactions; nausea and dizziness."
BRI claims, on the other hand, are "specific medical condition[s] that can be documented by physical signs and laboratory findings and [are] traceable to a specific contaminant source." Veasey, at 60.
10. See Sandler, *Multiple Chemical Sensitivity: Myth or Reality? Occupational Hazards*, Apr. 1993.
11. *Call v. Prudential* was an unreported decision in California in 1985. Nonetheless, it received a substantial amount of attention within the industry because, at the motion hearing stage, the court established the principle that expert testimony was admissible to prove causation, thus establishing for the first time that IAQ science had risen to such a level that it could be relied upon by the courts.
With respect to the current standard for the admissibility of scientific evidence in federal court, see *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, ___ U.S. ___, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). In *Flanagan v. State*, 625 So.2d 872 (Fla. 1993), the Florida Supreme Court retained the more stringent, pre-*Daubert* standard known as the *Frye* test, first announced in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). See also Cox, *Goodbye, Frye; Hello, Daubert*, *The Practical Litigator*, Mar. 1994.
12. 41 Fla Jur 2d, *Premises Liability* § 14, at 26; see also, D.E. Evins, Annotation, *Liability of Owner or Operator of Self-Service Laundry for Personal Injury or Damages to Patron or Frequenter of Premises from Defect in Premises or Appliance*, 23 ALR 3d § 2 at 1248.
13. 145 N.E. 2d 191 (Mass. 1957).

14. 164 So.2d 240 (Fla. 2d DCA 1964).
15. 444 N.E.2d 1349 (Ohio App. 1982).
16. 743 F.Supp. 1302 (E.D. Wis. 1990).
17. 129 So.2d 457 (Fla. 2d DCA), *cert. denied*, 135 So.2d 741 (Fla. 1961).
18. Indoor Pollution News, Apr. 4, 1994, at 51; August 15, 1994, interview with counsel for plaintiff, Thomas Glancey.
19. *Id.*
20. *Id.*; see also Indoor Air Quality Update, Vol. 7, No. 2, Feb. 1994, at 1.
21. Indoor Air Bulletin, Vol. 3, No. 2, at 11.
22. *Id.*
23. *Id.* at 12.
24. 662 F.Supp. 635 (N.D. 111. 1987), appeal dismissed, 860 F.2d 1441 (7th Cir. 1987).
25. 672 P.2d 455 (Alaska 1983).
26. *Id.* at 463.
27. See *infra* pp. 14-21.
28. 403 P.2d 145 (Cal. 1965).
29. 267 F.2d 138 (5th Cir. 1959).
30. *Id.* at 142.
31. 605 F.Supp. 60 (E.D. Pa. 1985).
32. 811 F.Supp. 1200 (E.D. Mich. 1992).
33. 592 A.2d 653, 655 (ICJ. Super. Ct. App. Div. 1991).
34. As stated previously with respect to indoor pollution situations, owners/occupants may not have the luxury of merely warning of an unreasonable risk. Instead, remedial action may be required.
35. 408 F.Supp. 1212 (D. Minn. 1976) .
36. 764 F.Supp. 1455 (M.D. Fla. 1991).
37. 599 So.2d 1377 (Fla. 2d DCA 1992).
38. 923 F.2d 1225 (6th Cir. 1991).
39. 794 F.Supp. 560 (D.V.I. 1992).
40. 554 N.E.2d 932 (Ohio App. 1988).
41. 656 SW.2d 766 (Mo. Ct. App. 1983).
42. 488 NW.2d 606 (N.D. 1992) .
43. 428 So.2d 654 (Fla. 1983) .
44. 374 So.2d 298 (Ala. 1979).
45. 280 N.E.2d 300 (Ind. 1972).
46. 799 P.2d 250 (Wash. 1990).
47. 655 S.W.2d 158 (Tenn. Ct. App. 1983) .
48. 480 So.2d 625 (Fla. 1985).
49. 432 S.E.2d 266 (Ga. Ct. App. 1993) .
50. 479 So.2d 793 (Fla. 5th DCA 1985) .
51. 612 So.2d 669 (Fla. 3d DCA), rev. dismissed, 620 So.2d 762 (Fla. 1993) .
52. *Id.* at 676.
53. See 25 C.J.S. Damages § 72, at 843 (“In case of a breach of contract the measure of damages is the amount which will compensate the injured person for the loss which a fulfillment of the contract would have prevented or the breach of it has entailed”).
54. 620 So.2d 1244 (Fla. 1993).
55. 486 N.W. 2d 393 (Minn. 1992), motion to withdraw denied and amended in part, 492 NW.2d 256 (Minn. 1992).
56. 396 S.E.2d 369 (S.C. 1990).
57. 613 N.E.2d 92 (Mass. 1993).
58. “Economic loss has been defined as ‘damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits-without any claim of personal injury or damage to other property.’ [citation omitted] It includes ‘the diminution in the value of the product because it is inferior in quality and does not work for the general purpose for which it was manufactured and sold.’ [citation omitted] In other words, economic losses are ‘disappointed economic expectations,’ which are protected by contract law rather than tort law.” Casa Clara, 620 So.2d at 1246.
59. The economic loss rule has been adopted in a majority of jurisdictions. See the cases collected in the appendix to William K. Jones, Product Defects Causing Commercial Loss: The Ascendancy of Contract over Tort, 44 U.Miami L. Rev. 731, 799 (1990). See also House & Bell, The Economic Loss Rule: A Fair Balancing of Interests, 11 The Construction Lawyer, Apr. 1991.
60. 63 Cal.2d 9, 45 Cal. Rptr. 17, 23, 403 P.2d 145, 151 (1965).
61. Casa Clara, 620 So.2d at 1246, citing Sidney R. Barret, Jr., Recovery of Economic Loss in Tort for Construction Defects: A Critical Analysis, 40 S.C.L. Rev. 891, 894 (1989).
62. *Id.* at 1247.
63. 471 N.W.2d 179 (Wis. 1991).
64. See also School Dist. of City of Independence, Missouri v. United States Gypsum Company, 750 S.W.2d 442 (Mo. App. 1988) (upholding jury verdict awarding plaintiff’s damages for costs of replacing asbestos ceiling tile and other property due to contamination of the buildings by asbestos under a theory of strict liability); Town of Hooksett School Dist. v. W.R. Grace and Co., 617 F.Supp. 126 (D.N.H. 1984) (holding that contamination from asbestos constitutes physical injury to premises and denying motion to dismiss).
65. See *supra* pp. 7-12.
66. Casa Clara, 620 So.2d at 1247.
67. *Id.*
68. 605 F.Supp. 60 (E.D. Pa. 1985). See *supra* pp. 9-10.
69. Carey-Canada, 486 N.W. 2d at 398.
70. 827 F.2d 975, 978 (4th Cir. 1987), *reh’g denied*, 840 F.2d 219 (4th Cir. 1988)
71. 752 F.Supp. 286, 302 (D. Minn. 1990).

72. 471 NW.2d at 186.

73. Carey-Canada, 486 N.W. 2d at 398.

74. Some courts and commentators have placed emphasis on the identity of the claimant, finding the economic loss rule not to apply where the plaintiff seeking a tort remedy was a governmental entity or other not-for-profit entity. See Kushman & Kirksey, "Emerging Trends in the Application of Economic Loss Rule"-paper submitted for April 7-8, 1994, program of the Forum on the Construction Industry of the American Bar Association. Further, while different courts appear to struggle and reach conflicting results with respect to the property damage exception in a construction context, the prevailing trend appears to favor the recovery of costs associated with replacing defective building materials that are alleged to be contaminating the rest of a building, notwithstanding the economic loss rule. The majority of courts in that circumstance have held that contamination of the building itself is damaged "other property." Id.

75. 440 So.2d 383 (Fla. 4th DCA 1983), pet. review denied, 451 So.2d 850 (Fla. 1984).

76. Id. at 387.

77. 578 N.E.2d 926 (Ill. 1991).

78. 609 N.E.2d 506 (ICy. 1993).

79. 599 So.2d 1058 (La. 1992).

80. Cole is noteworthy because a successful action was brought against 11 former executive officers of a company for failure to provide a safe work place between 1945 and 1976 (the latter being the year the Louisiana legislature amended the Louisiana workers' compensation law to eliminate negligence suits against executive officers of corporate employers).

81. Matter of Celotex Corp., 152 BR. 647, 650-51, n.3 (Bankr. M.D. Fla. 1993).

82. This theory encompasses exposure for bodily injury claims, installation for property damage claims, and disposal or leakage of the contaminant for environmental claims. See, e.g., Insurance Co. of North America v. Forty-Eight Insulations, Inc., 633 F.2d 1212 (6th Cir. 1980), cert. denied, 454 U.S. 1109, 102 S.Ct. 686, 70 L.Ed.2d 650 (1981); Porter v. American Optical Corp., 641 F.2d 1128 (5th Cir.), cert. denied, 454 U.S. 1109, 102 S.Ct. 686, 70 L.Ed.2d 650 (1981); Commercial Union Ins. Co. v. Sepco Corp., 765 F.2d 1543 (11th Cir. 1985); Continental Ins. Companies v. Northeastern Pharmaceutical & Chem. Co., Inc., 842 F.2d 977 (8th Cir.), cert. denied, 488 U.S. 821, 109 S.Ct. 66, 102 L.Ed.2d 43 (1988).

83. This theory encompasses injury-in-fact for bodily injury claims and property claims and disposal or leakage of the contaminant for environmental claims. See, e.g., American Home Prods. Corp. v. Liberty Mut. Ins. Co., 748 F.2d 760 (2d Cir. 1984); W.R. Grace & Co. v. Continental Cas. Co., 896 F.2d 865 (5th Cir. 1990); State of New York v. Amro Realty Corp., 697 F.Supp. 99 (N.D.N.Y. 1988) aff'd in part, rev'd in part, 936 F.2d 1420 (2d Cir. 1991).

84. This theory encompasses manifestation for bodily injury claims, discovery for property damage claims and discovery of the disposal or leakage of the contaminant for environmental claims. See, e.g., Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co., 682 F.2d 12 (1st Cir. 1982), cert. denied, 460 U.S. 1028, 103 S.Ct. 1279, 75 L.Ed.2d 500 (1983); Mraz v. Canadian Universal Ins. Co., Ltd., 804 F.2d 1325 (4th Cir. 1986).

85. This theory covers the entire period from first exposure or installation or disposal or leakage through ultimate manifestation or discovery or clean-up for bodily injury claims, property damage claims and environmental claims. See, e.g., Keene Corp. v. Ins. Co. of North America, 667 F.2d 1034 (D.C.Cir. 1981), cert. denied, 455 U.S. 1007, 102 S.Ct. 1644, 71 L.Ed.2d 875 (1982); Lac D'Amiante Du Quebec, Ltee. v. American Home Assur. Co., 613 F.Supp. 1549 (D.N.J. 1985), vacated as to insolvent defendant only, 864 F.2d 1033 (3d Cir. 1988).

86. Also referred to as "errors and omissions" policies.

87. 574 N.E.2d 664 (111. App. 1st Dist. 1990) appeal denied, 580 N.E.2d 113 (111. 1991).

88. Id. at 669.

89. 550 N.E.2d 1032 (Ill. App. 3d 1989), affirmed, 578 N.E. 2d 926 (111. 1991).

90. 794 F.Supp. 560, 571 (D.V.I. 1992).

91. 349 NW.2d 127, 130 (Mich. 1984).

92. Id. at 130-31, citing St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 535, n. 3, 98 S.Ct. 2923, 2926, n. 3, 57 L.Ed.2d 932 (1978).

93. 395 So.2d 203, 209 (Fla. 1st DCA 1981), citing 35 Fla. Jur., Workers' Compensation, § 4.

94. 479 A.2d 835 (Del. 1984).

95. 490 A.2d 500 (R.I. 1985).

96. 596 So.2d 112 (Fla. 1st DCA 1992).

97. 511 So.2d 690 (Fla. 1st DCA 1987), review denied, 520 So.2d 584 (Fla. 1988).

98. See Eastern Airlines, 596 So.2d 112.

99. Notwithstanding the last employer/carrier rule, if a claimant contracts an occupational disease with multiple periods of disability, the carrier at risk during each term of disability is responsible for the benefits which accrued in connection with that period of risk. See Eastern Airlines, 596 So.2d 112.

100. 398 So. 2d 902, 903 (Fla. 1st DCA 1981).

101. Id. at 904.

102. 717 P. 2d 1202 (Or. App. 1986).

103. 833 P.2d 390 (Wash. Ct. App. 1992), review denied, 847 P.2d 481 (Wash. 1993).

104. 579 F.Supp. 1326 (D. Mont. 1984).

105. 605 So.2d 979 (Fla. 4th DCA 1992).

106. 727 P.2d 899 (Kan. 1986).

107. 454 So.2d 63 (Fla. 1st DCA 1984), review denied, 462 So.2d 1108 (Fla. 1985).

108. 593 So.2d 195, 198 (Fla. 1992).

109. Id.

110. See supra p. 12.

111. An example of such an exemption is that enacted by the Florida Legislature in 1992. Fla. Stat. § 627.756(2) provides as follows:

A surety who issues a bid, performance, or payment bond in connection with construction activities where hazardous substances exist or are discovered is liable under §§. 376.308 and 403.727 only to the extent provided in this subsection. In case of a default, the surety is liable only for the cost of completion of the contract work in accordance with the plans and specifications, less the balance of funds remaining to be paid under the contract, up to the penal sum of the bond. The surety is not liable on, a bond to indemnify or compensate the obligee for loss or liability arising from personal injury or property damage, whether or not caused by a breach of the bonded contract. Further, a right of action does not accrue on a bond to or for the use of any person other than the obligee named in the bond. (emphasis added).

112. 416 So.2d 30 (Fla. 5th DCA 1982).

113. *Id.* at 32.

114. 135 A.D.2d 935, 522 N.Y. S.2d 337 (1CY. 1987).

115. 449 So.2d 872 (Fla. 2d DCA), review denied, 458 So.2d 274 (Fla. 1984).

116. 581 P.2d 197 (Cal. 1979).

117. 123 S.E.2d 744 (N.C. 1962).