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Strict Liability and Sick Building Syndrome: Defining a Building as a Product Under Restatement (Second) of Torts, Section 402A

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Over the past twenty years, both scientists and the general public have learned more about environmental risks. As the dangers to land, rivers and oceans have become painfully obvious, the concern over public health and safety has grown. Efforts to conserve energy and insulate ourselves against an increasingly polluted world have created an entirely new type of environmental concern: indoor air pollution.

One category of indoor air pollution is "sick building syndrome" (SBS). SBS has proven dangerous to public health, and vigorous litigation has developed in this area involving a variety of creative legal theories. One such theory is that of strict products liability. The cornerstone of this argument is that a "sick building" should be defined as a product.

This article will begin with a brief overview of sick building syndrome. Next, the ramifications of this syndrome are addressed. Finally, it will place the strict liability argument in the context of present litigation and define the future development of this area of the law.

I. SICK BUILDING SYNDROME

Sick building syndrome exists when levels of pollution increase within a building to the point where the building environment becomes unhealthy and dangerous to the occupants. The causes of SBS, and the pollutants which fall within the definition, are numer-

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ous and difficult to place within a narrow context. Although SBS can occur in older buildings as well as modern ones. those office and residential buildings constructed since the 1970s are more often affected.[1]

In the early 1970s, primarily as a result of the energy crisis, the construction and architectural design of buildings changed in an effort to increase energy efficiency. Congress encouraged these changes by providing tax incentives for building owners who reduced energy costs. One such change was that of sealing windows, eliminating the inflow of outside air that had previously resulted in decreased energy efficiency. Ventilation systems were then installed which monitored the quality of indoor air by controlling the amount of outside air that flowed into the building. In modern buildings designed with standard air conditioning, heating, and ventilation equipment, air is continuously recirculated throughout the building.

Ventilation systems actually become a major cause of indoor air pollution when they circulate only limited fresh air or polluted outside air through the building. When the air contains contaminants and the pollution levels increase, the ventilation system fails to remove the contaminated air and replace it with fresh air. Inadequate ventilation then exacerbates other causes of indoor air pollution such as air contamination from outside the building, irritants from within the building, and contamination from materials used in construction.[2]

Scientists feel that airborne microorganisms, allergens, and particles of synthetic materials, such as fiberglass insulation, are among the causes of SBS. Other pollutants include: formaldehyde, asbestos, radon, cigarette and tobacco smoke, viruses, fungi, carbon monoxide, and chemicals such as phenol, methanol, toluene, and xylene.[3]

The contaminants reach the air in a variety of covert ways. For example, formaldehyde, a toxic and cancer-causing material, may be contained in carpets, draperies, particle partitions, and pressurized wood office furniture.[4] Formaldehyde fumes are emitted into the air

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[1] Andrea Giampetro-Meyer, *Rethinking Workplace Safety: An Integration and Evaluation of Sick Building Syndrome and Fetal Protection Cases*, 8 UCLA J. Envtl. L. & Pol'y 1, 7-8 (1988).

[2] Ruth Gastel, *Occupational Disease: Insurance Issues*, INS. INFO. INST. REP., June 1994.

[3] Giampetro-Meyer, *supra* note 1, at 8.

[4] *Cf.* Andrew Blum, *Structures Face Legal Scrutiny Over Illnesses*, NAT'L LAW J., Jan. 25, 1988, at 31.

in a process called "off gassing."[5] Ammonia fumes can be released when cleaning solutions are used and ozone is released from the use of copy machines. Workers themselves contribute to indoor air contaminants through cigarette smoke. Still other pollutants can be emitted into the structure when the ventilation system draws in pollutants, such as carbon dioxide, from the outside. Finally, bacteria and fungi sometimes grow inside the ventilation system and then spread by being blown through the vents.[6]

Another dangerous pollutant is asbestos.[7] Over the past twenty years, concern over asbestos has increased greatly as its cancer-causing effects have become widely known. Primarily used in insulation, asbestos was installed in thousands of schools, office buildings, and other structures earlier this century. When the asbestos becomes old and dried, it becomes brittle and microscopic particles are released into the air. When inhaled these particles are believed to cause cancer. The concern over asbestos resulted in billions of dollars being spent on removal of the material from buildings.

By whatever route, pollutants reach the air inside the enclosed buildings and if the ventilation system is unable to draw out the contaminated air and replace it with fresh air, the level of pollutants rises. Compounding the problem is the possibility that more than one toxic or allergenic agent could be present, increasing the potential for two or more pollutants to combine and become even more dangerous through the reaction.

Depending on what type of pollution is found, the workers and other occupants may suffer various symptoms including breathlessness, dry cough, bronchial asthma, tightness in the chest, rashes and itching, eye irritation, drowsiness, dizziness, and other more serious effects such as Legionnaire's disease and cancer.[8]

One of the most infamous instances of SBS occurred in 1976, when 29 people were killed by Legionnaires' disease.[9] This deadly disease is caused by bacteria transmitted through the air conditioning system.[10] The same disease, and other cases of tuberculosis and

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[5] Terry Morehead Dworkin & Jane P. Mallor, *Liability for Formaldehyde-Contaminated Housing Materials: Toxic Torts in the Home*, 21 AM. BUS. L. J. 307, 309 (1983).

[6] *Cf.* Gastel, *supra* note 4.

[7] Giampetro-Meyer, *supra* note 1, at 9.

[8] Giampetro-Meyer, *supra* note 1, at 9.

[9] Catherine Cooney, *Researcher Challenges EPA on Indoor Air Threat*, ENV'T WK., Nov. 12, 1992.

[10] Cooney, *supra* note 9.

airborne infections, has killed other workers around the country.[11]

Of the 10 million commercial office buildings in the United States, it is believed that as many as 20 percent are "sick."[12] This affects hundreds of thousands of people a year and results in an estimated 36,000 deaths annually.[13] According to representatives from the Environmental Protection Agency, the Occupational Safety and Health Administration, and the Department of Energy, SBS has become one of the principal environmental problems confronting the United States in the 1990s.[14]

II. LEGAL RESPONSE TO SBS

While the focus on indoor air pollution continues to increase, courts already have begun to preside over their first cases involving SBS. Office workers and owners of buildings are now seeking compensation for their illnesses, lost work time, and economic loss from problems attributed to buildings which are contaminated. From a commercial point of view, SBS has significant implications, especially when considering recovery for denial of access, loss of business opportunity, loss of trading income, and diminution in value.

A cause of action in an SBS case generally is brought under : breach of contract, breach of express and implied warranties, negligence, or strict liability.[15] The primary emphasis of this article will be devoted to examining a cause of action brought under strict liability in tort. This theory is predicated on the building being considered a "product" as defined in the *Restatement (Second) of Torts Section 402A*.[16] First, however, let us briefly turn to the doctrine of warranty, including both implied warranty of merchantability and implied warranty of habitability, which provides an additional avenue of recovery.

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[11] *Id.*

[12] Robert W. Katz et al, *How to Prove a Sick Building Case*, TRIAL, Sept. 1991, at 58. Witnesses who have testified before Congress estimate that hundreds of thousands of people have probably sustained permanent damage resulting from the breakdown of their bodies' immune systems because of repeated exposure to harmful chemicals inside these "sick buildings". *Id.*

[13] Katz et al, *supra* note 14, at 58.

[14] Giampetro-Meyer, *supra* note 1, at 10.

[15] *Id.*

[16] *See generally* C. Jaye Berger, *Legal Aspects of Sick Building Syndrome*, N.Y. L.J., Sept. 10, 1991, at 1.

A. *Warranty*

An implied warranty of merchantability generally means that goods sold by a merchant will be fit for the ordinary purpose for which the goods are to be used, unless the goods are properly disclaimed.[17] Under this doctrine, a builder's or vendor's duty is to build or market houses that are reasonably fit for their intended use.[18] A plaintiff may recover if a residential dwelling contains dangerous levels of toxic fumes and is deemed unfit for habitation. As the definition implies, however, this doctrine is more limited than an action under negligence, since it would only apply to real property used for residential purposes and not to commercial buildings.[19]

An additional difficulty that plaintiffs may have to overcome is the requirement of privity imposed in many states.[20] The implied warranty of habitability was adopted to apply to the sale of new homes,[21] and there presently is a split of authority over whether to extend the doctrine to subsequent purchasers.[22]

B. *Strict Liability in Tort*

Strict products liability has moved away from the traditional notions of contract and privity and has proven to be an ever-expanding tort. As a legal theory, it has developed with the intention of holding a defendant strictly liable for a defective product (1) without proof of negligence; (2) without manifestation of intent to guarantee; (3) without requirement of privity of contract as a prerequisite to recovery; and (4) without recognizing the validity of contractual disclaimers of liability.[23] Although at first glance the idea of strict liability appears weighted against the defendant, certain public policy considerations have led courts to accept strict liability in tort as a more realistic theory of recovery than that of contract-warranty.[24]

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[17] U.C.C. § 2-314 (1994).

[18] Dworkin & Mallor, *supra* not 7, at 323.

[19] *Id.* at 324. In addition, action would not be permitted against manufactures of mobile homes as well because they are considered personal property. *Id.*

[20] *Id.* at 325.

[21] *Id.*

[22] *Id.*

[23] W. PAGE KEETON ET AL, PROSSER AND KEETON ON THE LAW OF TORTS § 98, at 692 (5th ed 1984).

[24] *Id.* at 693.

There are three general policy considerations which have influenced courts. The first is that manufacturers who make and sell products are in the best position to bear the costs of damages due to defectively dangerous goods.[25] Second, the adoption of strict liability with the elimination of the necessity of proving negligence promotes accident prevention.[26] Finally, strict liability is favored from a policy standpoint. Because of litigation costs, proof of fault or negligence in the sale of a defective product should no longer be required, especially if a product defect is properly defined and limited.[27]

The first case to apply strict liability generally was *Greenman v. Yuba Power Products, Inc.*[28] The *Greenman* court believed that a judicial remedy should be provided "to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by injured persons who are powerless to protect themselves."[29] This principle led to the adoption by the American Law Institute of the *Restatement (Second) of Torts Section 402A* in 1964.
Section 402A provides:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
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> (2) The rule stated in Subsection (1) applies although
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> (a) the seller has exercised all possible care in the preparation and sale of his product, and
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> (b) the user or consumer has not bought the product from or entered into any contractual relations with the seller.[30]

Comment c of section 402A underscores the framers' intent to address the policy considerations behind adoption of the theory and states:

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[25] *Id.* at 692.
[26] *Id.*
[27] *Id.* at 693.
[28] Greenman v. Yuba Power Products, Inc., 377 P.2d 897 (Cal. 1962).
[29] *Id.* at 901.
[30] RESTATEMENT (SECOND) of TORTS § 402A (1977).

> [P]ublic policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.[31]

In terms of holding building manufacturers liable under strict liability, it is important to understand not only section 402A but also those policy considerations which gave rise to its formation. For example, in traditional products liability cases one can easily identify the defective "product," and it is generally obvious that the product has entered the stream of commerce. As previously mentioned, the tort has expanded since its inception and courts have weighed the prospect of extending strict liability to buildings.[32] Courts since have struggled with the application of traditional policy considerations and different jurisdictions have applied the doctrine with varying results.

1. Is a Building a Product?

When bringing a cause of action against a building manufacturer under strict liability in tort, one of the most perplexing issues is whether the building or structure is a "product" within the meaning of section 402A. The question is difficult because a building is not perceived as a product in the traditional sense. Under a broader interpretation, however, a structure such as an office building may be perceived as a product since it is a manufactured whole derived from smaller parts. When there is a defect in the design, manufacture, or one of the parts, the building can become dangerous like any other manufactured product.[33]

A number of courts have held that a building may constitute a "product" for the purposes of strict liability, but most have done so in the context of mass-produced structures, such as mobile homes

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[31] *Id.* at cmt. c.

[32] Katz et al, *supra* note 14, at 62.

[33] In determining whether a building should be considered a product, courts have had difficulty interpreting comment d of § 402A which states liability " . . . extends to any product sold in the condition, . . . in which it is expected to reach the ultimate consumer." RESTATEMENT (SECOND) of TORTS § 402A cmt. d (1977). The comment also applies the rule to products which, if they are defective, may be expected to and do cause only "physical harm" in the form of damage to the user's land or chattels. *Id.*

and homes constructed as part of housing developments.

In *Blagg v. Fred Hunt Co. Inc.*, the Supreme Court of Arkansas held that a house was a "product" for the purposes of the Arkansas strict liability statute.[34] In that case, the second owner of a house brought an action against the builder-vendor for defects in the house after it was discovered that formaldehyde fumes were being emitted from the carpet and padding.[35] The court gave lengthy consideration to the issue and reasoned that there was "no meaningful distinction between the mass production and sale of homes and the mass production and sale of automobiles."[36] Citing decisions from New Jersey and California, the court felt that the pertinent overriding policy considerations were the same.[37]

In *Oliver v. Superior Court*,[38] the California Court of Appeals further defined the limit of liability of home developers when it held that the strict liability doctrine did not apply to occasional construction and sale of residences. In *Oliver*, the builder had built only two homes in two locations.[39] The court, finding no authority for extending the doctrine to the occasional construction and sale of residences, held that the doctrine applied only to mass-produced homes because developers of such homes are "in the business" of producing and selling them.[40]

Jurisdictions which define "products" to include only homes or structures that are prefabricated and mass-produced eliminate unique structures, whether or not they are unreasonably dangerous to the user. The Montana Supreme Court, in *Papp v. Rocky Mountain Oil & Minerals, Inc.*,[41] upheld a lower court decision that an oil separator facility was not a product as would be required for strict tort liability. In that case, a man working within the facility died of lethal inhalation of hydrogen sulphide gas that came from allegedly faulty components where he was working.[42] The appellant alleged strict liability, negligence, and negligent failure to warn on the premise that the separator facility and its components were unrea-

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[34] Blagg v. Fred Hunt Co. Inc., 612 S.W.2d 321 (Ark. 1981).
[35] *Id.* at 321-22.
[36] *Id.* at 324 (quoting Schipper v. Levitt and Sons, Inc., 207 A.2d 314 (1965)).
[37] *Id.* at 324.
[38] Oliver v. Superior Ct., 259 Cal. Rptr. 160 (Cal. Ct. App. 1989).
[39] *Id.* at 162.
[40] *Id.*
[41] Papp v. Rocky Mountain Oil & Minerals, Inc., 769 P.2d 1249 (Mont. 1989).
[42] *Id.* at 1250.

sonably dangerous and defective.[43] The court tested the alleged product against policy considerations, including whether or not the building was in the stream of commerce, and concluded that, since there was no issue of disparity in bargaining power or a manufacturer's use of persuasive advertising or marketing devices to cause the consumer to buy the product, the worker was not a "consumer" using the treater facility after it had reached the stream of commerce.[44] The treater facility therefore was not a product.[45]

In Washington, the Court of Appeals held that a boathouse was not a product where a lessee and a guest were overcome by exhaust fumes as a result of inadequate ventilation.[46] Although the court felt the plaintiff's argument inadequate, it reasoned that the boathouse was not a product since the drafters of the Restatement did not intend for such buildings to be considered products.[47] In a footnote, the court interpreted comments b and d of Section 402A to negate any intention on the part of its framers to include buildings in the definition of a product.[48] This theory is further developed in *Board of Education of Clifton v. W.R. Grace*,[49] where a board of education brought suit to recover for the removal of asbestos from a school building. Citing *Greenman v. Yuba Power Products Inc.*, the court reasoned that since comment d lists a number of products within the purview of Section 402A and does not include buildings, and because the liability of builders is described and articulated in other sections of the *Restatement*, the drafters had not intended Section 402A to apply to buildings.[50]

Other courts are not so quick to dismiss the consideration of buildings as products. Although reluctant to place a building within the purview of Section 402A, some courts have made an attempt to address the issue as if the buildings *could* be considered products should public policy so warrant. Courts thus have attempted to make a determination of products on a case by case basis guided by public policy, the comments of Section 402A, and the Model Uniform Products Liability Act.

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[43] *Id.* at 1252.

[44] *Id.* at 1256.

[45] *Id.*

[46] Charlton v. Day Island Marina, Inc., 732 P.2d 1008, 1009 (Wash. Ct. App. 1987).

[47] *Id.* at 1011.

[48] *Id.* at 1013.

[49] Board of Educ. v. Grace, 609 A.2d 92, 93 (N.J. Super. Ct. Law Div. 1992).

[50] *Id.* at 106.

In *Messier v. Ass'n of Apartment Owners*,[51] a Hawaii court held that a condominium apartment building was not a product for purposes of strict liability when a worker was injured after a metal panel attached to the roof became dislodged and struck him. The court reached this conclusion only after determining that policy reasons precluded the finding of a product where the injury occurred from an identified component of leased or rented premises.[52] The court reasoned that application of the strict products liability rule did not apply because the plaintiff did not face a great degree of difficulty in proving negligence, and withholding the rule did not measurably diminish the plaintiff's chances of obtaining compensation for his injuries.[53]

The door nevertheless remains open for an item to be considered a "product" if it would effectuate the policy for imposing strict liability in tort. In *Chicago Board of Education v. A, C, & S Inc.*,[54] the court found that while some buildings as a whole may not be considered products, a part of a structure may qualify for such a consideration. Similarly, the New York Supreme Court, in *Trustees of Columbia v. Mitchell/Giurgola*,[55] held strict liability in tort could be maintained where the wall of a building was an unduly dangerous product due to allegedly defective precast panels and facing tiles.[56]

Using these same policy considerations, courts have determined that a building may constitute a product. The Hawaii Court of Appeals in *Kaneko v. Hilo Coast Processing*[57] held that prefabricated buildings were products. The court reasoned that strict liability, as applied to "assembly type" situations, would reaffirm the policy considerations underlying the strict products liability rule. First, maximum protection would be afforded to persons injured by defective products. Second, the burden of distributing the risk would be placed on the seller-manufacturer as a cost of doing business. And

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[51] Messier v. Association of Apartment Owners, 735 P.2d 939, 943 (Haw. Ct. App. 1987).

[52] *Id.* at 947.

[53] *Id.*

[54] Chicago Bd. of Educ. v. A, C, & S, Inc., 525 N.E.2d 950, 960 (Ill. App. Ct. 1988).

[55] Trustees of Columbia v. Mitchell/Giurgola Assoc., 109 A.D.2d 449 (N.Y. App. Div. 1985).

[56] *Id.* at 455. However, these situations are distinguishable from situations where improvements are made to part or all of a building. Improvements to a building have been held to be a service.

[57] Kaneko v. Hilo Coast Processing, 654 P.2d 343, 350 (Haw. 1982).

third, the seller-manufacturer would have an incentive to guard against such defects happening in the future.[58]

While courts have struggled with the concept of defining a building as a product, it is clear that at least some jurisdictions are willing to do so if the policy objectives of strict liability are met. Under the right circumstances, strict liability can be another weapon in the plaintiff's arsenal in an SBS case. When bringing an action, plaintiff's counsel should consider the array of claims that may be brought and make a determination as to whether strict liability may apply.

2. Difficulty in Proving Causation

In an SBS case it can be difficult to pinpoint when and why an illness was contracted, and the extent to which the illness is related to the workplace environment. "Scientific cause-and-effect relationships are generally hard to prove and precise diagnosis of certain diseases is possible only with an autopsy."[59]

Other difficulties in proving causation with occupational diseases arise because of their long latency period. It may take many years before the harm caused to the human body by such exposures becomes apparent, making it difficult to determine at what point in the victim's work history the illness was contracted. It also is difficult to discover what agent caused the illness and to identify a specific manufacturer.

In another case, employees working in a new, $53 million courthouse in Du Page, Illinois began complaining of headaches, fatigue, dizziness, rashes, itching and burning skin, nasal congestion, soreness and inflammation of the throat, shortness of breath, and other breathing problems.[60] For about a year after the complaints began, the employees received only skeptical responses from those looking into the situation.[61] Finally, the county hired a team from the Loyola University Medical Center's Occupational Health Service to study the problem.[62] The team randomly selected 108 persons of the 650 persons who worked in the courthouse.[63] Of the total inter-

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[58] *Id.*

[59] Gastel, *supra* note 4, at 7.

[60] Joseph Sjostrom, *Study Confirms Courthouse Illness*, CHI. TRIB., Jan. 12 1993, at D1.

[61] *Id.*

[62] *Id.*

[63] *Id.*

viewed, 86 percent reported symptoms associated with being in the building.[64] The final report concluded that the symptoms complained of were real, not imagined, and that the prevalence of symptoms was greatest in parts of the courthouse that were found in previous studies to have the least adequate ventilation.[65]

Performing indoor air quality investigations may not work out as well as in Du Page, however, and investigations may lead to inconclusive results. The investigation begins by interviewing the tenants' employees who are ill. The investigation consultant then assesses the specific health effects and determines any patterns of frequency, time of day, and location. After interviewing complainants, the investigator conducts a top-to-bottom building review, including ventilation system design, operation, maintenance, building procedures, building operations and processes, and building materials.[66]

Since SBS cases are fairly new, there is no definitive way to clearly establish when a building is "sick." In addition, hiring an investigation team to establish causation can be costly, and the employer, if not a potential party to a suit, is unlikely to hire the team. The essential element of causation is likely to play a key role in future SBS cases.

III. LITIGATING SICK BUILDING SYNDROME

Sick building syndrome is a broad term that includes a number of different types of pollution, structures, and health symptoms. When bringing an SBS action, the first obstacle is to identify the specific pollutant involved. In an effort to explore the scope of this arena, it may be helpful to briefly examine some of the recent SBS actions brought in the United States and apply them to the four known elements of SBS. It is also of particular interest to note that most of these cases to date have been settled prior to a higher court ruling.

One of the first indoor air pollution cases to receive widespread attention was *Buckley v. Kruger Bensen-Ziemer*.[67] Buckley, a computer programmer in California, filed suit against the architect, con-

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[64] *Id.*

[65] *Id.*

[66] Katz et al., *supra* note 14, at 58-59.

[67] *See* Brum, *supra* note 6, at 32 and *Sick Buildings: A Potenrial Legal Nightmare?*, FIN. TIMES LTD., June 7, 1991.

tractor, subcontractors, and manufacturers of products and components used in the building where he worked, after suffering from physical ailments that he alleged were a result of the building's toxic substances. His symptoms, diagnosed as damage to his central nervous system and brain, had begun at the same time that other employees experienced lesser ills. The plaintiff claimed damages for negligence, strict liability, and intentional infliction of emotional distress. The suit was settled despite the opinion of the architect's attorney who believed that the "defense had a 'reasonably good chance' of proving the plaintiff's problems were drug related and not from indoor air pollution."[68]

Buckley is a good illustration of the difficulty of showing causation in an SBS case. Obviously important was the fact that plaintiff's fellow employees were having symptoms at the same time that he was, but their symptoms were less serious than his. This circumstance could raise doubt that his illness even came from the same source as the others.[69] Even if it did, the plaintiff must show that the symptoms were a result of the sick building.

Buckley also provides a good example of the symptoms and conditions which are prevalent in SBS cases. The four key elements include: (1) the occurrence of respiratory, dermatological, and neurological symptoms (including lethargy) greater than would be expected in a building with natural ventilation; (2) the symptoms coincide with the presence of the victim in the building; (3) no non-occupational circumstances which would explain the symptoms; and (4) no exposure to toxic chemicals which explain the symptoms.[70] As *Buckley* demonstrates, a link between the building and the illness can be more easily established when more than a single employee is suffering from the symptoms.[71] It is also beneficial in establishing this link if the symptoms or employee complaints are expressed over a period of time.

Another example of SBS occurred when the Department of Labor moved into a new office building in 1980.[72] For the following five years employees complained about poor janitorial services, extreme temperatures, inadequate ventilation, and carpet and hallway

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[68] *See* Blum, *supra* note 6, at 32.

[69] *See generally* Buckley v. Kruger Bensen-Ziemer, 143393 (Super. Ct., Santa Barbara Cty., Calif.)

[70] Sjostrom, *supra* note 65, at D1.

[71] *See* Blum, *supra* note 6.

[72] Giampetro-Meyer, *supra* note 1, at 4 n.19.

odors.[73] In 1985 the Department of Labor investigated the building and discovered that the heating, ventilation, and air conditioning systems were contaminated with bacteria.[74] It was believed that the bacteria originated from carpets being dampened by leaking toilets and urinals on the first and second floors.[75]

Identifying when a building is "sick" is important in an SBS action, but this does not always establish the proof of causation necessary to prevail in such a case.

IV. APPLICATION OF STRICT LIABILITY IN TORT

Policy considerations behind *Restatement (Second) Section 402A* allowed traditional negligence and contract actions in products liability suits to be brought under a strict liability in tort doctrine if the elements were met. Although causation still is an element that must be addressed, application of the doctrine allows the plaintiff to bring an action without the constraints of proving negligence or showing privity. It still is necessary, however, for the plaintiff to show that the product was in an unreasonably dangerous condition to the user-consumer or his property at the time it was sold.

A distinction also must often be made as to whether the claim should be brought against the manufacturer of the product which contaminated the building, or whether that product became a fixture within the building and the building itself became defective.[76] "Because the policies which underlie products liability law have little relation to the policies which underlie fixtures doctrine, the application of products liability doctrine should not be dependent upon the intricacies of real property law."[77] A plaintiff may be able to proceed on a theory of strict liability in tort despite the fact that the defective product has become part of the real estate; there is precedent for the application of strict liability in tort to landlords and builders of residential real estate.[78]

In *Call v. Prudential Insurance Company of America*,[79] widely considered the first "pure" SBS case to reach trial, the court ruled as a matter of law that the ventilation system in the affected building

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[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] Dworkin & Mallor, *supra* note 7, at 317.
[77] *Id.*
[78] *Id.*
[79] Call v. Prudential Ins. Co. of Am., (Calif. Super. Ct. settled Oct. 15, 1990).

should be considered a "product."[80] The judge ruled that if the jury were to find the heating, ventilation, and air conditioning (HVAC) system in the building to be defective, each party in the chain of design and construction would be open to strict, joint and several, liability for the defective system. Under this approach the building itself would be a product.[81]

Call was typical of the SBS cases which would follow it. "The plaintiffs were two firms and their employees who occupied one half of the floor and shared the HVAC system."[82] In 1985, after contractors began renovating the interior of an office suite, "employees experienced dizziness, nausea, nosebleeds, headaches, disorientation and respiratory problems allegedly due to toxic fumes [emanating] from the new carpets, furniture and paint on the other side.[83] Allegedly, the problem was intensified due to leaks in the ducts of the HVAC system.[84] Subsequently, the corporations brought suit for "business interruption losses and lack of productivity."[85] By ruling that the building was a "product," the court had decided that the policy considerations underlying the *Restatement (Second) Section 402A* were prevalent in the facts of the particular case.[86] Indeed, by evaluating the facts of the case, it is possible to see how it would be difficult, due to institutional reasons and for costs of litigation, for the plaintiffs to prove fault or negligence.[87]

As in traditional products liability actions, harm was caused to the employees and the corporation from use of the building. If the employees and the corporation had brought an action under negligence they would have to show that the builders failed to maintain a level of standard ordinary care in manufacturing the building. Since each of the products which comprised the building components and parts could have been installed properly, and since the HVAC system was working, requiring a showing of fault on one or more of the parties involved could have been an unreasonable burden on the plaintiffs.

Additionally, in focusing on the economic situation of the instant case, the court, for policy reasons, evidently felt it best that

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[80] *Sick Buildings: A Potential Legal Nightmare?*, FIN. TIMES LTD., June 7, 1991.
[81] *Id.*
[82] Berger, *supra* note 18, at 2.
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*

the costs be borne by those who built the building. Application of strict liability in that instance would send a strong signal to those who build buildings, causing them to use additional care in design and construction.[88]

In consideration of the earlier discussion of policy aspects underlying traditional product liability cases, application of the *Call* reasoning allows serious consideration to be given to the idea of expanding this tort doctrine to include dangerous and defective structures such as buildings. While *Call* was settled shortly after the trial began, the courts obviously have established no clear precedent in this area. Where a structure falls within the goals of Section 402A, however, one can imagine various buildings being included in the definition with large numbers of potential plaintiffs who would find it to their great advantage to bring an action under strict liability.

Application of the criteria of Section 402A to SBS cases likely will not fall within the purview of the strict liability doctrine in all cases because its own requirements lead to certain problems. One problem is that many toxic tort cases involve only present economic injury, emotional distress, and the probability of future injury. A number of jurisdictions, however, refuse to apply strict liability or implied warranty to remote defendants in the absence of physical injury or damage to the property.[89] Another problem is that it is difficult to prove that the contaminated product, whether it be a product within the building or the building itself, is defective.[90] While the public's concern and understanding of indoor air pollution is still relatively new, standards often have not been developed to measure the degree to which products can emanate certain toxic fumes; or the quality of air that must be maintained indoors; or the level at which HVAC systems must recirculate air. Although Congress has already initiated legislation in these areas, there is still much to be defined. Many of the answers necessary to define what is defective are unclear.

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[88] *See generally* Messier v. Association of Apartment Owners, 735 P.2d 939 (Haw. Ct. App. 1987).

[89] Dworkin & Mallor, *supra* note 7, at 317.

[90] *Id.*

CONCLUSION

Although it is still problematic whether courts will accept a cause of action based on strict liability in SBS cases, recent rulings have not left it out of the question. Courts will continue to wrestle with the application of policy considerations to these issues while research in the area of indoor air pollution will continue to expand and further connections between illnesses and buildings. While recovery under alternative theories may be barred due to their own limitations, courts may press further toward strict liability as a way to place responsibility on the manufacturers of these buildings.