

CTCW NEWS

FUTURE EVENTS:

-Spring Conference, Thursday & Friday, May 1 & 2, 1997, American Club, Kohler

-Defense on the Offense Summer Conference, Thur. & Fri., July 17 & 18, 1997, Pfister Hotel, Milwaukee

PRESIDENT'S COMMENT / Carmelo Puglisi

Computers and their software never cease to amaze me. Being an avid science fiction reader, the authors of that genre almost seem prophetic in the light of technological advances which have been made in recent years. Computer power is now 8,000 times less expensive than it was 30 years ago. According to one author, if we had similar progress in automotive technology, today you could buy a Lexus for about \$2.00. The Lexus would travel at the speed of sound and would get 600 miles on a thimble of gasoline. The computer and its software has had an impact in all areas of the practice of law from billing, to communication, to demonstrative evidence, to legal research, to word processing and a host of other areas. I believe that the largest impact of the electronic age is in the area of communication and as a result, the CTCW Board of Directors has established the Technology Committee which is chaired by Attorney Scott Moller of the Eckert & Stingl Law Firm in Rhinelander. The Technology Committee has created CTCW's home page which is in a "beta" or experimental stage at this time.

Our home page contains a number of "links" to other pages. According to Scott's primer for the Internet, "To use a link, simply point at it (with a cursor controlled by a mouse) and click (by pressing a button on the mouse) to select. This will cause you to follow the link to another page." At this time, our home page has the following features or "links":

Legislative Update: An update of CTCW monitored activities of the 1995-1996 Wisconsin Legislature.

Legislative Overview: An overview of the activities of the 1995-1996 Wisconsin Legislature.

CTCW Survey: Comparison of Pre-Session CTCW survey results to 1995-1996 legislative activity.

Upcoming CTCW Events: With locations, prices and CLE credits.

Need Help?: Read this basic primer on the Internet.

American Bar Association: Extensive links to legal resources.

The Defense Research Institute (DRI): Legal links, discussion form and more.

Find Law: Perform searches of all law reviews and journals.

Hieros Gamos: Links to virtually every law school, organization and vendor of legal products.

Legal List: Exhaustive list for over 10,000 Internet legal resources.

The State Bar of WI: Reach colleagues through discussion groups.

CNN Interactive: On-line news from a recognized world leader.

The Wall Street Journal: Authoritative news source, some features require payment.

TripQuest: This database of over 150,000 U.S. towns and cities will help you find your way.

USA Today: Almost everything that is in the printed version is here.

Shareware.Com: Downloadable shareware software.

Switchboard.Com: Searchable database of over 100 million phone numbers.

If you do not know the address of the home page you would like to view, the CTCW home page provides you with links to the following search engines (indexes):

Alta Vista: With over 30 million Web pages indexed and powerful search capabilities, Alta Vista is recognized by many as the king of the Internet search engines.

Excite: Very popular and easy to use search engine.

InfoSeek: Search and browse Web pages, Usenet newsgroups, FTP and Gopher sites, and sign up for personalized news.

OpenText: Unlike services like Excite, Lycos, and WebCrawler (which index only keywords) and Yahoo (which requires that pages be submitted manually), Open Text Index catalogs every word on every page it finds.

In the near future, the Technology Committee will be adding CTCW News which is the current issue of our newsletter and the CTCW News Archive which will contain all of the newsletters for the year. The Technology Committee also hopes to create a discussion forum. This discussion forum would operate as a bulletin board which would allow members to pose questions to CTCW members regarding unique issues in cases and receive answers or suggestions from CTCW members. We are in the process of getting our home page address changed, and once it has been changed, we will make it available to all CTCW members. I would like to thank all the members of the Technology Committee for the tremendous efforts in creating the CTCW home page.

I hope to have a presentation of our home page and how to use it at either the Spring or Summer conference. At future programs, we also hope to have presentations regarding computer legal research and the impact on the traditional law library. If there are any other computer technology presentations that you would like to see at one of our conferences, please contact Chris Nelson who is this years Program Chair.

Not only has the Board of Directors created the Technology Committee, but the Board of Directors has also voted to create a substantive Law Committee on Ethics and Professionalism. Part of our mission statement states that CTCW seeks "the improvement of professional standards." I believe that the creation of the Ethics and Professionalism Committee will help us continue to achieve this goal. We have already had a number of members volunteer for this committee and if there is anyone else interested in this committee, please contact Pat Brennan.

On another note, Mike Eckert (President-Elect), Jim Hough (Executive and Legislative Director), Susan Reigl (DRI State Representative), and I attended DRI's First Annual Membership Conference in Chicago. It was a wonderful success and an outstanding seminar. The highlight of the conference was listening to a debate on the issue of television in the courtroom. This issue was discussed by a national panel which included Christopher Darden and Ralph Nader. One of the lighter moments in the debate was when Chris Darden shared with the audience a personal story in which he was approached by an individual who had seen the trial on television. This individual expressed his sadness to Mr. Darden that the television series had been canceled because Mr. Darden was his favorite actor in the trial!

When I returned from the DRI Conference, I brought back with me a renewed sense of pride in CTCW. I attended a number of sessions regarding issues confronting state defense organizations, and I can tell you that CTCW is one of the leaders among state defense organizations, and this is a tribute to CTCW's members and your Board of Directors.

Finally, I would like to wish all CTCW members a Joyous Holiday Season and a Happy New Year.

Winter Conference Draws Strong Attendance

Over 70 CTCW and WCC attorney members turned out for the Winter Conference held at the Pfister Hotel in Milwaukee on Friday, December 13. The one-day event afforded attendees the opportunity to earn three required "ethics" credits as part of the program.

CTCW would like to thank Program Chair Christine Nelson for arranging an excellent agenda. We also applaud the efforts of the seven outstanding speakers who provided quality programming

They are:

Michael P. Crooks, Peterson, Johnson & Murray, Madison Office;
Matthew Flynn, Quarles & Brady, Milwaukee;
Lori Gendelman, Otjen, Van Ert, Stangle, Lieb & Weir, S.C., Milwaukee;
Jean DiMotto, Attorney at Law, Milwaukee;
Tim Vocke, Vocke Law Office, Rhinelander;
John Heugel, Liebman, Conway, Olejniczak & Jerry, S.C., Green Bay; and
Richard Cayo, Halling & Cayo, S.C., Milwaukee.

Reminder: CTCW Dues Deadline Jan. 31, 1997

We urge members who have not paid their dues for the coming year, to do so promptly. Your timely response is necessary so we can include your name in the CTCW 1997 Membership Directory which will be published early this Spring. If you have not done so, please send your check to the Madison office today.

AMICUS COMMITTEE ACTIVITY / Lisa K. Stark, Chair

The following is a summary of current CTCW amicus activities:

DECIDED

The District I Court of Appeals issued a decision on September 12, 1996 in the case of Milwaukee County v. LIRC, ___ Wis.2d ___, ___ N.W.2d ___ (Wis. App. 1996). At issue in the case was whether an employee is required to prove unusual stress in order to receive workers compensation benefits for a nervous disability that resulted from emotional distress. The Court of Appeals decided that unusual or extraordinary stress is required in order to receive such benefits, even if there are physical symptoms from a mental injury. The trial court order affirming the LIRC decision, which held otherwise, was reversed and the case was remanded to the trial court for further proceedings consistent with the Court of Appeals' decision. CTCW members J. Patrick Condon, and Joseph P. Danas, Jr., filed an Amicus brief on behalf of CTCW, the Wisconsin Insurance Alliance, and Wisconsin Manufacturers and Commerce, seeking reversal of the lower court and LIRC decisions.

CTCW member David G. Peterson filed an Amicus brief on behalf of CTCW in the case of Waud v. Staks, et al, Appeal No. 94-2703, with the Supreme Court in February of 1996. At issue in that case was

whether assignees of legal malpractice claims can pursue those claims against attorneys with whom they have never had an attorney/client relationship. The parties to this action settled this case, and the appeal was dismissed with prejudice on December 3, 1996, with no Supreme Court decision.

PENDING

An Amicus brief has been filed with the Wisconsin Supreme Court by CTCW member Susan R. Tyndall in the case of *Grube v. Daun, et al*, Case No. 95-2353. Two issues are to be considered by the Supreme Court on certification of this case from the Court of Appeals. The first is whether Chapter 144, Stats., includes a private cause of action for a property owner who is required by the DNR to remediate a contaminated spill when it is alleged the previous owner's negligence allowed the environmental contamination to occur. The second issue is whether ss. 144.76(2) and (3), Stats., are safety statutes, a violation of which constitutes negligence per se.

An Amicus brief has been filed on behalf of CTCW and the Wisconsin Insurance Alliance in the case of *Vance v. Sokup, et al.* (Court of Appeals, District I, Case No. 95-2851-LV.) The lower court held that an absolute pollution exclusion in a business key policy of insurance issued to a landlord did not preclude coverage for bodily injury claims resulting from the inhalation or ingestion of lead paint. CTCW members Robert F. Johnson and Heidi L. Vogt have filed a brief seeking reversal of the trial court decision.

The case of *Yauger v. Skiing Enterprises, Inc., et al*, (Appeal No. 94-83) is currently before the Supreme Court for review of a circuit court decision finding the Hidden Valley Ski Area was not liable for the death of plaintiff's daughter. The issue before the court is whether the provisions of an exculpatory clause contained within the season pass contract purchased by plaintiff are enforceable. CTCW member Gregory J. Strasser filed an amicus brief on behalf of CTCW.

Please contact Lisa Stark concerning cases in which CTCW may wish to become involved on an Amicus basis. The Amicus Committee and CTCW Board of Directors thank all attorneys involved in Amicus activities for their pro bono efforts on behalf of CTCW this past year.

News from the DRI / Susan Reigel

The DRI held its First Annual Meeting on October 9-13, 1996 at the Fairmont Hotel in Chicago. The meeting offered up to 23 ½ CLE credits. The event drew DRI and state/local defense organization members from around the country. They networked on such issues as liaisons between bench and bar, the changing nature of the relationship between in-house and outside counsel, communications via the Internet, publications and public relations, as well as a variety of economic issues. The seminar highlight was a national forum on cameras in the courtroom conducted by, among others, Christopher Darden, Ralph Nader and Nina Totenberg.

DRI has extended through February 28, 1997, a reduced-fee membership incentive that is connected with CTCW membership. Any current member of CTCW who is not now also a DRI member can join DRI for half-price. For the first year, these new members can take advantage of DRI's benefits for \$62.50, or for attorneys with less than five years in practice, only \$42.50. Attorneys in practice for fewer than five years will also receive a certificate for a complimentary DRI seminar, a value of almost \$500. For lawyers who are not members of CTCW and who now join, membership to CTCW is accompanied by a one-year free membership in DRI. In other words, the new CTCW member will pay no fee at all to belong to DRI. Again, for those lawyers who have practiced under five years, a free seminar certificate is included.

Please contact the DRI Membership Department at 312/944-0575 for membership applications.

Legislative Update / James E. Hough

State Legislative Results - The Year of the Incumbent

Prior to Election Day - November 5, 1996 - the Democrats controlled the Senate by a 17-16 margin and the Republicans controlled the Assembly 51-47 with 1 vacancy. When the dust cleared in the early morning hours of November 6, 1996, the Democrats retained control of the Senate 17-16 and the Republican's margin increased by 1 to 52 - 47 in the Assembly.

The houses of the Wisconsin Legislature spent the last two months organizing and plotting strategy in advance of what promises to be an extremely interesting 1997-98 legislative session. The biggest battle will begin when Governor Thompson submits his proposed \$30+ billion biennial budget for five months of legislative hearings, amendments, rhetoric and action by a legislature divided along party and philosophical lines.

Most issues dealt with by the legislature are nonpartisan and a split legislature will develop bipartisan solutions particularly where a clear public need exists. Many nonpartisan issues may have partisan solutions or may be great fodder for political rhetoric as the solutions become political.

In other, more partisan areas, we could see significant activity in one house, which gets ignored or "buried" in the other.

The 1995-96 Wisconsin Legislature enacted major pieces of legislation involving our tort reparations system including changes in joint and several liability, medical malpractice and access to medical records.

While perhaps not as dramatic, the 1997-98 legislature is expected to tackle issues relating to privilege of self critical analysis, environmental audit privilege and selected areas in products liability. CTCW will also be examining specific procedural issues of interest to defense trial counsel.

While the dramatics of the 1997-98 legislature are yet to be played out we offer our congratulations to the victors and a thank you to all who ran for office for the courage and commitment to enter the ring and offer service to our great state.

Listed below are the elected leaders of the Senate and Assembly respectively for the 1997 Session:

Senate Leadership:

President Senator Fred Risser
President Pro Tem Senator Gwen Moore
Majority Leader Senator Charles Chvala
Assistant Majority Leader Senator Rod Moen
Minority Leader Senator Mike Ellis
Assistant Minority Leader Senator Brian Rude

Assembly Leadership:

Speaker Representative Benjamin Brancel

Speaker Pro Tem Representative Stephen Freese
Majority Leader Representative Steven Foti
Assistant Majority Leader Representative Bonnie Ladwig
Minority Leader Representative Walter Kunicki
Assistant Minority Leader Representative Marlin Schneider

Hough Firm Expands Lobbying and Governmental Affairs Services

The firm of James E. Hough is expanding services in lobbying and regulatory affairs with the addition of Robert I. Fassbender and Patrick J. Osborne. The company's new name is Hough, Fassbender, Osborne & Associates, Inc.

Robert Fassbender has more than 15 years of experience lobbying, government relations and regulatory affairs. Fassbender earned a law degree in 1983 from the University of San Diego and a bachelor's degree in civil engineering from Michigan Technological University. He is a registered lobbyist in Wisconsin and a member of the Wisconsin State Bar, the American Bar Association and the State Bar of California. Formerly, he was a partner in Godfrey & Kahn's (G & K) Madison office, heading up their government relations practice. Prior to joining G & K, Fassbender was an in-house lobbyist with Wisconsin Manufacturers & Commerce. He has played a significant role in the development of Wisconsin legislation on recycling, clean air, reformulated gasoline and revisions to the Petroleum Environmental Cleanup Fund.

Patrick Osborne has 12 years of experience in government and regulatory affairs, including four years in the office of Governor Tommy G. Thompson, where he served as legislative liaison to the State Assembly and policy director. Most recently, he served as executive assistant for the newly established Wisconsin Department of Commerce. Prior to that, he served as deputy secretary of DILHR. Osborne has been actively involved in policy matters relating to natural resources, agriculture, building construction and environmental remediation.

The offices of Hough, Fassbender, Osborne and Associates, Inc. remain at 44 East Mifflin, Suite 104, Madison. There are no changes in CTCW's address or phone and fax numbers.

RECENT case update / Howard G. McMahon

Editors Note: The author of this column is Howard G. McMahon. He alternates with Randy S. Parlee in producing Recent Case Update. Howard McMahon is a 1986 Cum Laude graduate of Thomas M. Cooley Law School and an associate in the law firm of Wilcox, Wilcox & Enright, Eau Claire. Prior to that, he worked for Rural Mutual Insurance Company as an in-house claims attorney. Howard's practice concentrates primarily on personal injury defense and worker's compensation defense.

Damages - Dairy Calves - Replacement value - Schrubbe v. Peninsula Veterinary Service, Inc. (Case No. 952982, August 7, 1996) (District III)

The plaintiff sued his veterinarian for the death of several of his dairy calves. The plaintiff argued that he was financially unable to replace the calves when they died and therefore he should be entitled to recover for anticipated lost milk profits. The Court of Appeals affirmed the Trial Court's denial of this claim for damages.

The Trial Court declared that the appropriate measure of damages for the death of Schrubbe's dairy

calves was the market replacement value on the day of their death, less any salvage value. Schrubbe contends that because he was financially unable to replace the calves he was entitled to recover for anticipated lost milk profits the calves ultimately would have produced. The Court of Appeals indicated that the market value of the calves generally includes the fact that they will ultimately produce milk. The Court did indicate that if the loss occurs to milk producing cows, a plaintiff would be entitled to lost milk profits during a reasonable time to replace the animals.

Disability - Insurer's Bad Faith - Lump Sum Award - DeChant v. Monarch Life Insurance Company (Case No. 93-2220, August 21, 1996) (District II)

This was a bad faith claim where the Court of Appeals concluded that it was appropriate for the Trial Court to award a lump sum distribution of future disability payments instead of a judgment requiring that the defendant pay the plaintiff the monthly installments as the policy required. The Court of Appeals also affirmed the Court's decision to grant the absent witness instruction after defendant failed to call one of its field agents. Finally, the Court of Appeals affirmed a Trial Court ruling that allowed the plaintiff to describe how the automobile accident that disabled him also disabled his wife. The description of the wife's injuries helped reveal the overall severity of the accident.

Keric T. DeChant recovered disability benefits from Monarch Life Insurance Company after an accident in 1985. Due to the injuries from the accident he could not return to his job as a sales agent. He did secure a management position at an annual salary decrease of about \$50,000. In early 1990, after some investigation, Monarch determined that DeChant was only "residually disabled" and decreased the size of the payments. The jury concluded that DeChant was totally disabled and that Monarch acted in bad faith when it changed DeChant's status under the policy. In deciding that DeChant was entitled to a lump sum present value payment of the future disability payments owed under the policy, the Trial Court determined that Monarch's bad faith constituted a repudiation of the policy as a matter of law.

The Court of Appeals indicated that *Caporali v. Washington National Insurance Company* 102 Wis. 2d 669, 307 N.W.2d 218 (1981), authorized the Trial Court in bad faith cases to order present value lump sum payments. Court of Appeals cautioned that a Trial Court, in this situation, should carefully examine the relationship between the insured and the insurer to gauge whether the insured should have to deal with the insurer in the future.

Worker's Compensation LIRC Ruling - Denial of Default Order - Standard of Review - Verhaagh v. Labor & Industry Review Commission (Case No. 96-0470, August 28, 1996) (District III)

Kenneth Verhaagh appealed a Circuit Court judgment affirming a determination by LIRC that denied him a default order and found that his current medical problems were unrelated to his employment. The Court of Appeals concluded that the LIRC did not abuse its discretion by refusing to grant the default order and that there was substantial evidence sustaining LIRC's conclusion that the claimant's current medical problems were unrelated to his past employment.

Verhaagh argued that LIRC did not establish that the default was due to surprise, inadvertence or excusable neglect and, therefore, the default judgment should have been granted. The Court of Appeals indicated that the civil law standard that applies to courts in extending time to answer does not control an administrative agency's determination of whether to grant a default judgment. They reviewed the LIRC's actions as an exercise of discretion with the appropriate deference to such a decision. The LIRC does not apply the standard found in the civil procedure statutes in their determination of a default order. The agency examines the period of time that elapses before the Answer is filed and the extent to which an

applicant is prejudged by an employer's tardiness. Given the respondent's relatively short delay in filing the required Answer, the Court could not find any real prejudice to the claimant. In addition, the respondent asserted a bona fide defense to the claim and the Court of Appeals noted that the law does not look kindly on defaults.

Issue Preclusion - Negligence - Motor Vehicle Accident - Husband's Prior Suit - Jensen v. Milwaukee Mutual Insurance Company (Case No. 95-2042, September 4, 1996) (District II)

The plaintiff in this case, Betty Jensen, was a passenger in a car driven by her husband, Wally Jensen. The Jensen vehicle collided with a truck operated by Fortlage on May 16, 1991. Prior to this action, Wally brought a claim for damages against Fortlage and his insurer, Milwaukee Mutual. The jury absolved Fortlage of any negligence in that action. The plaintiff in this case did not join in that action as a party plaintiff, but she testified as a witness on Wally's behalf and was present in the Courtroom throughout the proceedings. The Court of Appeals upheld a Trial Court ruling that Betty's action was barred based on the results of the prior trial.

This decision presents good discussion of both "claim preclusion" and "issue preclusion". The term "claim preclusion" has replaced the traditional concept of "res judicata". Under claim preclusion, a final judgment is conclusive on all subsequent actions between the same parties (or their privies) as to all matters litigated or which might have been litigated in the former proceedings. "Issue preclusion" replaces the traditional concept of "collateral estoppel." Issue preclusion forecloses relitigation in a subsequent action of an issue of law or fact that has been actually litigated and decided in the prior action and reduced to judgment. Unlike claim preclusion, an identity of parties is not required in issue preclusion. However, there is an additional step in analyzing whether issue preclusion applies. Issue preclusion is a narrower doctrine than claim preclusion and requires a Court to conduct a "fundamental fairness" analysis before applying the doctrine.

The question in this case was one of issue preclusion, not claim preclusion. Therefore, the matter did not require an identity of parties. The Court of Appeals indicated that the decision of whether the Trial Court correctly dismissed Betty's Complaint on the grounds of issue preclusion presented a question of law which the Court of Appeals reviewed without deference to the Trial Court.

The Court of Appeals first noted that the defensive use of issue preclusion against a non-party to the prior action can be appropriate to those additional persons who had a "sufficient identity of interest" with the party to the prior actions such that their interests are deemed to have been litigated in the prior action. The absence of such an identity of interest would violate due process. The court then applied a fundamental fairness test to determine if Betty had a sufficient identity of interest with her husband so that the judgment against him could be used to dismiss her case.

The fundamental fairness test involves a consideration of some or all of the following factors:

- (1) could the party against whom preclusion is sought, as a matter of law, have obtained review of the judgment;
- (2) is the question one of law that involves two distinct claims or intervening contextual shifts in the law;
- (3) do significant differences in the quality or extensiveness of proceedings between the two courts warrant relitigation of the issue;

(4) have the burdens of persuasion shifted such that the party seeking preclusion had a lower burden of persuasion in the first trial than in the second; or

(5) are matters of public policy and individual circumstances involved that would render the application of collateral estoppel to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action?

The Court of Appeals found that only the first factor favored Betty and affirmed the dismissal against Milwaukee Mutual. It should be noted that the Court placed some emphasis on the fact that Betty was present throughout the prior trial and also used the same counsel who represented her husband in the prior action. The Court may be opening a door of escape for a passenger in a similar position who does not attend the whole trial of their spouse and who does not utilize the same trial counsel in their subsequent claim.

Worker's Compensation - Emotional Distress - Evidence - Unusual Stress - Milwaukee County v. Labor and Industry Review Commission (Case No: 95-0541, September 18, 1996) (District I)

This is a worker's compensation claim based on emotional distress caused by a confrontation with the claimant's supervision over the quality of her work. The Court of Appeals found that the LIRC erred in awarding the claimant benefits without evidence of "unusual stress".

Elizabeth Neil worked as a custodian for the Milwaukee County Medical Complex. In October of 1992, during a job performance interview with her supervisor, Neil became very upset and afraid and experienced a tightness across her chest. As she left her supervisors office she fainted and fell to the floor. She stayed in the hospital for four days and was treated for chest pain, chest pressure and high blood pressure. She continued to receive follow-up care from her family physician and was released to return to work on November 23, 1992.

She sought temporary total disability benefits from October 27, 1992 through November 23, 1992.

The Labor and Industry Review Commission concluded that the requirement that an injured worker present evidence that her injury resulted from unusual stress on the job applies only in cases in which the applicant is making a claim for non-traumatic mental stress. The Court of Appeals disagreed and determined that the unusual stress test was applicable in this case.

Discovery - Tax Returns - Lost Earnings - Negligence Suit - Konle v. Page (96-0397, October 9, 1996) (District II)

In this case, the plaintiff was making a lost earnings and loss of earning capacity claim yet refused to produce a complete income tax return for the years 1986 through 1994. He did provide a Schedule C showing his business income. However, he did not produce the balance of the returns. The court conducted an in camera review of Konle's complete returns and determined that the Schedule C was the only relevant document to Konle's damage claim. The Court of Appeals agreed with the trial court's ruling. The decision seems to be limited to income tax returns and other items that contained confidential and sensitive information. In such cases, it seems that the court must balance the liberal rules that apply to discovery and the protection of a plaintiff's privacy. The court felt that the in camera inspection by the Trial Court was the best and most appropriate means to accomplish this goal.

Default Judgment - Excusable Neglect - Timeliness of Motion to Reopen - Miro Tool & Mfg., Inc. v.

Midland Machinery, Inc. (95-2785, October 30, 1996) (District II)

This is an opinion that upheld a default judgment entered against Midland. The Court of Appeals was required to come to this result due to the language of Wis. Stats sec. 806.07 (2). It's clear they were not happy about it. Justice Anderson went so far as to write a lengthy concurring opinion lamenting the lack of common courtesy represented by the facts of this case.

Midland entered into a contract with Miro for certain fixtures and tooling. On January 26, 1994, Miro served a Summons and Complaint upon Midland seeking payment for the materials supplied. Negotiations were ongoing at that time and Midland personnel assumed that Miro's attorney would inform Midland's attorney that a lawsuit had been filed. That did not happen. On February 17, 1994 Miro sought and received a default judgment. They continued to negotiate with Midland's Attorney. Eleven days later, Midland's attorney finally learned of the lawsuit. He filed an Answer after receiving assurances from Miro that they would not move on the judgment. Midland did not move to open the default. Negotiations continued and several of the products were returned to Miro for testing to see if they were defective.

The negotiations failed to resolve the issue and on February 23, 1995, more than one year after the default judgment had been entered, Miro filed a garnishee Summons and Complaint. Midland filed a motion to reopen and vacate the default judgment. The Court of Appeals attempted to find some way to let Midland off the hook. However, they reluctantly concluded that the one year maximum time limit for bringing a motion to vacate a default judgment on grounds of mistake, surprise, inadvertence or excusable neglect cannot be enlarged for any reason.

Hospital - Emotional Injuries - Needlestick Injury - Babich v. Waukesha Memorial Hospital, Inc. (95-2516, November 6, 1996) (District II)

In this case, the plaintiff was stuck by a hypodermic needle that was mistakenly left in her bed linens while she was at the Waukesha Memorial Hospital. She alleged that she was scared that she was infected with the HIV virus and claimed emotional distress. Later, testing confirmed that she was not infected. The Court of Appeals affirmed the Trial Courts dismissal of the plaintiff's claims. The Court of Appeals chose to follow the line of cases that requires a plaintiff to present evidence that the needle came from a "contaminated source" in order to have a viable claim under this fact situation. The Court indicated that the "contaminated source standard" provides a useful tool with which Wisconsin Courts can draw the line between recoverable and non-recoverable claims in this situation.

Worker's Compensation - Permanent Disability - Unscheduled Injury - Lost Earning Capacity - Langhus v. Wisconsin Labor and Industry Review Commission (99-0622, November 20, 1996) (District IV)

Langhus was injured while getting out of a garbage truck. He twisted his left knee and subsequently had surgery. He returned part-time under a doctor's restriction but was unable to remain at work due to continuing pain in his knee. Approximately three months later, he injured his shoulder and re-injured his knee when he caught a man who collapsed in church. He remained unable to return to work due to the pain in his knee and shoulder. Subsequently, he had rotator cuff surgery. Later, his doctor noted that his gait had changed due to his knee problem and this resulted in back pain. He developed reflex sympathetic dystrophy in his right leg, which migrated to his back and other leg. His doctor testified that he was totally disabled for vocational purposes due to the knee injury and the RSD. His claim for permanent total disability was denied because the only injury that could be considered in determining his loss of earning capacity was his back injury. The records were devoid of any permanency rating with respect to the

applicant's back. The Court of Appeals affirmed that LIRC's ruling that it was the claimant's burden to present evidence separating his claimed disability between his scheduled knee injury and his unscheduled back claim in order to recover permanent total disability.

Homeowners Policy - Intentional Injury - Gunshot - Schwersenska v. American Family Home Mutual Insurance Company (95-3620, November 27, 1996) (District IV)

The plaintiff in this case was shot in the arm while pursuing the defendant's automobile. The defendant driver was insured by American Family. His friend and passenger shot at the plaintiff's vehicle while the plaintiff was chasing the defendants.

The Court of Appeals found that American Family's homeowners policy did not apply due to the intentional acts exclusion. Prior to the chase, the insured and his passenger had gone to the passenger's house to get the gun and went out looking for the people involved in the confrontation. The Court of Appeals reasoned that this action, coupled with the actual shooting, evidenced that the insured must be held to know the substantial risk of injury inherent in taking someone to confront an angry mob with a rifle and ammunition. Therefore, the Court of Appeals inferred the insured's intent to cause harm as a matter of law.

Other cases of interest:

Homeowners Policy - Residence of Minor - Ross v. Martini D (Case No. 96-0138, September 11, 1996) (District III)

Products Liability Fire-proofing Material - Evidence - Northridge Company, et al v. V.W.R. Grace & Co. (95-1193, 95-2035, September 18, 1996) (District I)

Duty to Defend - Failure to Bifurcate Trial - Delta Group, Inc. v. DBI, Inc. (Case No: 95-2044, October 2, 1996) (District II)

Police Officer - Immunity - Hospital Emergency Room Service - Sherry v. Salvo and Tomah Memorial Hospital (Case No: 96-0822, October 2, 1996) (District IV)

UIM Coverage - Accord and Satisfaction - Tower Insurance Company v. Carpenter vs. Szalacinski (Case No.: 95-2932, October 9, 1996) (District II)

Service of Amended Complaint - Timeliness - Archambault et al. v. A.C. Product Liability Trust (95-3266, October 16, 1996) (District III)

Negligence - Building Construction - Leaks - Common Liability - Teacher Retirement System of Texas et al v. Badger XVI Limited Partnership (95-1710, October 30, 1996) (District I)

Negligence - Medical Malpractice - Psychiatric Nurse - Economic Damages - Wright v. Mercy Hospital of Janesville (95-2289, November 20, 1996) (District IV)

Insurance - Automobile Insurance - UIM Coverage - Election of Remedies - Scheideler v. Smith & Associates, Inc. (96-0319, November 20, 1996) (District IV)

Evidence - Discovery Rule - Surveyor Negligence - Statute of Limitation - Tomczak v. Bailey and

American Surveying Co., Inc. (95-2733, November 20, 1996) (District II)

Civil Practice - Attorneys' Fees - Insurer's Denial of Coverage - Economy Preferred Insurance Co. v. Solner (95-1763, November 20, 1996) (District IV)

Insurance - Environmental - Gasoline Spill - Remediation Costs - Robert E. Lee Associates, Inc. v. Peters et al (96-0172, November 27, 1996) (District III)

Negligence - Automobile Accident - Apportionment of Causal Liability - Staehler v. Beauthin (95-3295, December 4, 1996) (District II)

CTCW SUBSTANTIVE LAW COMMITTEE REPORTS:

CTCW News - Winter 1997

A new Substantive Law Committee "Ethics and Professionalism" is in the process of being formed. The new committee will be chaired by Bernard T. McCartan of American Family Mutual Insurance Company, Madison. CTCW members are invited to participate in the work of this important committee as it seeks the improvement of standards in the legal profession. Call Bernie at 608/249-2111 or Pat Brennan, Substantive Law Committee Chair at 414/271-7722 if you wish to participate.

REPORT: "Sick Building Syndrome"

by Steven M. Streck, Axley Brynelson, Madison

This report is submitted on behalf of the Insurance Coverage Committee

When its construction was complete in 1987, Florida's \$37 million Polk County courthouse was an architectural showcase. However, in July 1992 the building was evacuated after more than 460 of its 580 employees developed illnesses ranging from coughs to irreversible lung disease. Complaints of poor indoor air quality required extensive renovations including removal and replacement of 800,000 bricks to facilitate the installation of a new vapor barrier, replacement of sixty-nine air handling units, and replacement of carpeting, ceiling tiles, wallpaper and interior walls. As of July 1994, Polk County spent or allocated \$30 million for renovations. Of that amount, it recovered a \$7 million settlement from the contractors and construction professionals.

1 Polk County's experience is not unique. In 1990, several employees of the Environmental Protection Agency initiated a \$35 million lawsuit against the owner and managing agent of its agency's headquarters in Washington, D.C. In 1992, employees abandoned Florida's \$11 million Martin County courthouse and to date construction claims alone exceed \$15 million. And in 1995, claims by employees of Chicago's DuPage County courthouse alleging illnesses due to poor indoor air quality were resolved in favor of the defendant construction team.

2 Indoor air pollution is ranked by the Environmental Protection Agency among the top five environmental risks to human health.

3 In the opinion of some World Health Organization experts, up to thirty percent of new or remodeled commercial buildings may have unusually high rates of health and comfort complaints from occupants

that are related to indoor air quality.

4 In 1991, the Occupational Safety and Health Administration estimated that Sick Building Syndrome ("SBS") affected up to 70,000 workers in 1,200,000 commercial building across the United States.

5 After more than a decade of litigation arising from exposure to airborne toxins, it is now widely recognized that contamination of indoor air and exposure to indoor air pollutants is a significant threat to public health. This article will first explore the history of SBS including its origins, sources and health risks. Second, it will address the primary SBS theories of liability. Finally, this article will discuss insurance coverage for SBS claims and judicial interpretation of commercial general liability policies containing pollution exclusion clauses.

I. HISTORY OF SBS

The energy crisis of 1974 and the drastic increase in the cost of oil most recently focused concern on conserving energy in residential and commercial buildings.

6 The desire to increase energy efficiency by decreasing heating and cooling costs led to changes in the construction and architectural design of buildings.

7 These changes included tighter building envelopes; fewer and inoperable windows; decreased use of operable windows in older construction; use of sealant foams and vapor barriers; and reductions in the amount of outdoor air used for ventilation. These changes, combined with improperly designed heating, ventilation and air conditioning (HVAC) systems, renovations of existing buildings without corresponding changes to the HVAC systems, and inadequate building maintenance

8 produce tight buildings which retain moisture and other contaminants, provide a more favorable environment for microbial growth, increase the amount of contaminants released indoors, and decrease the amount of fresh outdoor air circulated indoors to dilute the contaminants.

9 The term Sick Building Syndrome is used to describe situations in which a large percentage of a building's occupants

experience acute health and comfort effects that appear to be linked to the time spent in the building.

10 Expect SBS when at least twenty percent of a building's occupants complain of similar symptoms with an unknown cause for at least two weeks, and where the symptoms subside when the person leaves the building.

11 Symptoms typically include one or more of the following: general complaints of headaches; fatigue; stuffy or runny nose; nausea; dizziness; cough; dry or burning mucous membranes in the nose, eyes and throat; dry skin; hoarse voice; and eye irritation.

12 In contrast, the term building-related illness ("BRI") is used when building occupants develop diagnosable illnesses that can be traced directly to airborne building contaminants, such as bacteria in the ventilation system.

13 BRI's include sensory irritation, respiratory allergies, nosocomial infections, fever, hypersensitivity pneumonitis, and Legionnaires' disease.

14 BRI's are more severe than SBS's and can result in serious illness or death.

15 BRI symptoms typically remain after one leaves the building while SBS symptoms begin when the occupants enter the building and dissipate when they leave.

16 II. THEORIES OF SBS

Once a building is diagnosed as "sick," any resulting claim will undoubtedly focus on the respective duties and liabilities of the entire building team.

17 Because the causes of SBS are often difficult to determine,

18 SBS may provide a basis for litigation against building owners, construction managers, contractors, engineers, architects, HVAC installers, manufacturers, materials supplies and others who have worked on the building.

19 Potential plaintiffs include occupants and building owners who are seeking compensation for their illnesses, lost work time, and economic loss.

Potential causes of action in SBS cases include assault and battery, fraudulent concealment, misrepresentation, nuisance and workers compensation claims. However, most SBS claims are pursued under breach of contract, breach of implied warranty, strict liability and negligence theories.

20 Building owners may bring an action for breach of the construction contract, typically claiming the existence of a construction defect or a more general breach of the contract causing SBS to the building's occupants. In some SBS cases it may be proper to pursue a theory of breach of an implied warranty. Several implied warranties may be implicated in a SBS case: (1) an implied warranty of merchantability; (2) an implied warranty of fitness for a particular purpose; and (3) an implied warranty of habitability. Under these theories, a builder's or vendor's duty is to build or market structures that are merchantable and reasonably fit for their intended purpose.

21 As with breach of contract claims, privity of contract is required to assert an implied warranty claim. Also, Wisconsin does not recognize an implied warranty of habitability in home sales or construction contracts.

22 Despite the limited potential of implied warranties in Wisconsin, most jurisdictions have adopted the implied warranty of habitability in sales of new homes.

23 Due to the limitations inherent in proceeding on a contract or warranty theory, most plaintiffs assert tort claims based on either strict liability or negligence. The advantage of a strict liability claim is that the plaintiff need not prove the defendant's negligence. Strict liability in tort was developed with the intention of holding the defendant strictly liable for a defect which renders the "product" unreasonably dangerous.

24 Several "products" may be implicated in a SBS claim such as a defective HVAC, buildings materials, or even the building as a whole.²⁵ A number of courts have held that a building may constitute a product for strict liability purposes, but some have limited the theory to mass-produced structures such as mobile homes and homes constructed as part of a housing development.

26 For example, in *Blaqq v. Fred Hunt Co. Inc.*,

27 the Supreme Court of Arkansas held that a mass-produced house was a "product" for strict liability purposes, reasoning that there was no meaningful distinction between the mass production of homes and the mass production of automobiles. The homeowner's strict liability claim was brought for defects in the house after it was discovered that formaldehyde fumes were being emitted from the carpet and padding. In *Call v. Prudential Ins. Co. of Am.*,

28 widely considered the first "pure" SBS case to reach trial, the court ruled as a matter of law that the HVAC system in the affected building should be considered a "product." The judge ruled that, if the jury found the HVAC system defective, each party in the chain of design and construction would be open to strict, joint and several liability.

Negligence is a common theory to pursue in an SBS claim because of its applicability to a wide range of defendants and to a variety of circumstances. The personal injury aspect of negligence cases remains the toughest hurdle for most SBS plaintiffs.

29 The negligence claim hinges upon the existence of potential or actual physical illness to the building occupant,

30 although other types of injuries may exist. The best defense under a negligence theory is that the claimed injuries are not casually related. Thus, a vigorous defense typically focuses on causation. The primary issue in many SBS negligence claims is whether a particular contaminant at a certain exposure level and duration causes the plaintiff's symptoms.

31 This key question will inevitably turn on expert testimony.

32 III. INSURANCE COVERAGE

Depending on the theory of the claim, nature of the damages, and type of pollutant involved, there may be coverage under various types of insurance policies for SBS claims. Policies that may afford coverage include workers compensation, homeowners, property, and design professional liability policies. However, most coverage claims involving SBS and other indoor air quality problems involve commercial general liability policies. CGL policies are intended to provide liability coverage for insureds against third-party claims for damages that are based on the insured's alleged negligence.

33 Exposure to specific hazards, such as asbestos, formaldehyde, or pesticides, has long been the subject of CGL coverage litigation. Coverage for exposure to less toxic airborne contaminants involves the same analysis and considerations.

Since approximately 1970, most CGL policies have incorporated pollution exclusions. The exclusion given the most widespread use from 1970 to 1986 was the sudden and accidental pollution exclusion, which excluded bodily injury and property damage caused by the discharge, dispersal, release, or escape of various types of substances unless the discharge, etc., was sudden and accidental. In 1986, the so called "absolute pollution exclusion" clause was added to most CGL policies which eliminated the sudden and accidental exception to the exclusion, defined the term "pollutant," and broadened the scope of the exclusion.

34 Courts have uniformly held that CGL policies without pollution exclusions cover damages arising from asbestos exposure.

35 Yet there is little case law on the applicability of absolute pollution exclusions in SBS cases. Whether courts will conclude an absolute pollution exclusion bars coverage for SBS depends on the language and terminology of the exclusion, the definition of key terms such as "pollutant," "release" and "atmosphere" in the policy, and the nature of the contaminant. Determining whether coverage is available for SBS under a specific policy is a question state law, and judicial interpretation of pollution exclusion clauses is anything but consistent among jurisdictions.

The Wisconsin Court of Appeals recently addressed an absolute pollution exclusion in *Donaldson v. Urban Land Interests, Inc.*

36 The Donaldson plaintiffs alleged they suffered injuries consistent with SBS caused by the poor air quality in their place of employment. An industrial hygiene survey found inadequate circulation in the clerical area where the plaintiffs worked. The court of appeals affirmed the trial court's grant of summary judgment to the insurer, holding the pollution exclusion applicable because: (1) exhaled carbon dioxide was a pollutant under the terms of the policy; and (2) the exhaled carbon dioxide was discharged, dispersed, etc., within the meaning of the policy. The court reasoned that exhaled carbon monoxide is a pollutant because it is a gaseous substance which, at certain levels, can become an irritant or contaminant. The court dismissed the defendant's argument that the pollution exclusion should not apply because carbon dioxide is a naturally created substance which, absent concentrated levels, is harmless. The court also held there was a "release" of the pollutant because it was in its potentially harmful state immediately upon being expelled directly into the atmosphere of the work environment by the human act of breathing. The court distinguished cases where the pollutant is converted from one substance to another, where it is formed over time, and where it is trapped in a confined area.

The Donaldson court appeared to resolve the inconsistency in two Wisconsin Court of Appeals decisions involving pollution exclusions. In *United States Fire Ins. Co. v. Ace Baking Co.*,

37 the court held the exclusion barred coverage. However, in *Leverance v. United States Fidelity & Guar.*,

38 the court held the exclusion did not bar coverage. In *Ace Baking*, ice cream cones were stored in the same warehouse as the fabric softener Bounce. After a customer complaint, an investigation revealed the fragrance additive, linalool, from the fabric softener caused the ice cream cones to become unusable. Unlike the Donaldson policy, the term "pollutant" was not defined in the *Ace Baking* policy. The court of appeals held that, if the substance which contaminated the ice cream was "foreign" to the cones, the substance qualified as a pollutant. In *Leverance*, the occupants of prefabricated homes alleged that their homes retained excessive moisture within the exterior walls. The retained moisture allegedly promoted the growth of mold, mildew, fungus, spores and other toxins which posed a continuing health risk and adversely affected the value of the units. The court held the exclusion did not bar coverage because the growth of the microorganisms was the result of water vapor trapped in the walls. Thus, the contaminants were not "released" within the meaning of the policy, but rather were formed over time as a result of environmental conditions.

Despite Donaldson's attempt to articulate a consistent policy for interpreting pollution exclusions in Wisconsin, Judge Anderson's dissent in Donaldson makes a cogent argument for the inapplicability of the exclusion under some circumstances. He argues that the language of the clause is ambiguous, and thus

the exclusion must be strictly construed. His principle disagreement is with the majority's attempt to distinguish *Leverance*. Similar to *Leverance*, the concentrations of carbon dioxide in *Donaldson* formed over time due to the environmental conditions created by the failure to introduce fresh air onto the building. He also points out the inconsistency in the majority's reasoning that, on the one hand, carbon dioxide is potentially harmful as soon as it is expelled, and its earlier conclusion that in its ordinary state, carbon dioxide is a harmless substance.

Several courts in other jurisdictions have found the absolute pollution exclusion applicable to indoor air pollution. In *Essex Insurance Co. v. Tri-Town Corp.*,

39 the insurance company sought a declaratory judgment that the absolute pollution exclusion barred coverage for injuries sustained when an ice resurfacing machine emitted carbon monoxide, causing injuries to several patrons on the ice skating rink. The court held that once the carbon monoxide was released into the atmosphere of the rink, the incident fell within the scope of the exclusion. The Minnesota Court of Appeals came to the same conclusion in *League of Minn. Cities Ins. Trust v. Coon Rapids*,

40 a case involving the buildup of nitrogen dioxide from an ice resurfacing machine.

Using the *Essex* reasoning, a Florida district court in *West Amn. Ins. Co. v. Band & Desenberg*,

41 recently found an absolute pollution exclusion applicable to indoor pollution where the plaintiffs specifically alleged SBS. Employees claimed that contaminants in the building's air caused them to suffer from SBS. The employees also alleged that their injuries resulted from a poorly designed air conditioning system. The court held the dispersal of contaminants from the attic space of the building into the indoor air supply constituted a release of contaminants into the environment of the building.

When a pollution exclusion contains language limiting liability for a discharge into the "atmosphere", some courts are reluctant to apply the clause to indoor air contamination. In *Gamble Farms, Inc. v. Selective Ins. Co.*,

42 the issue was whether the pollution exclusion in a CGL policy applied to carbon monoxide released from a water heater into the insured's restaurant. The court held that the term "atmosphere" did not include air within the insured's building. Similarly, in *Board of Regents v. Royal Ins. Co.*,

43 the court held that the release of asbestos fibers from the insured's fireproofing product into the building was not a release into the "atmosphere" within the meaning of the pollution exclusion, limiting the term "atmosphere" to contamination of the surrounding natural environment. The court reasoned that words in an insurance policy are deliberately chosen to make distinctions, such as "air," which would be applicable to indoor air contamination, and "atmosphere."

V. CONCLUSION

After *Donaldson*, the scope of absolute pollution exclusion clauses in Wisconsin is anything but clear. The Wisconsin Supreme Court is currently deciding whether to review *Donaldson*. The Supreme Court may grant review due to the number of environmental coverage cases it currently has pending, the number of apparently inconsistent court of appeals cases, and the policy arguments in the *Donaldson* dissent. For example, the Wisconsin Court of Appeals, District I, heard oral argument on December 4, 1996, in *Vance v. Sukup*, 44 Wisconsin's first case dealing with the absolute pollution exclusion's applicability to lead

paint exposure. The issues on appeal include: (1) whether lead paint is a "pollutant" within the meaning of the policy; and (2) whether the lead paint was discharged, released, etc., when the infant plaintiff was injured by chewing on an intact painted surface. If the Supreme Court does grant review in *Donaldson*, it may hold that carbon dioxide was not "released within the meaning of the policy, adopting the reasoning in the *Donaldson* dissent that a reasonable insured would not expect the clause to preclude liability for the accumulation of carbon dioxide in an office because provisions were not made to introduce fresh air into the office. It could also find coverage because the carbon dioxide was not a "pollutant" within the meaning of the exclusion. Regardless of the outcome, the court will hopefully provide clarity and consistency to the interpretation of absolute pollution exclusions in Wisconsin.

There is no doubt the number of SBS cases will increase in the coming years.

45 Courts will continue to struggle with these and other issues as indoor air quality litigation expands in the next decade.

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2. Robert E. Geisler, *The Fungusamongus: Sick Building Survival Guide*, 8 *ST. THOMAS L. REV.* 511, 512-513 (1996).
3. Office of Air and Radiation, U.S. Env'tl. Protection Agency & U.S. Consumer Prod. Safety Comm's, *The Inside Story: A Guide to Indoor Air Quality 4* (1995) [hereinafter *The Inside Story*].
4. *Id.* at 29.
5. O.S.H.A., *Request for Information Spurs Debate Over Form of Future Regulation*, 21 *O.S.H. Rep.* (BNA) 1097 (Jan. 1, 1992).
6. Office of Air and Radiation, U.S. Env'tl. Protection Agency, *Introduction to Indoor Air Quality: A Self-Paced Learning Module 2* (1991) [hereinafter *EPA module*].
7. *Id.* See also David Reisman, *Strict Liability and Sick Building Syndrome: Defining a Building as a Product Under Restatement (Second) of Torts, Section 402A*, 10 *J. NAT. RESOURCES & ENVTL L.* 35, 36 (1995).
8. *EPA Module*, supra note 6, at 3.
9. *Id.*
10. Office of Air and Radiation, U.S. Env'tl. Protection Agency, *Pub. No. ANR-445-W, Indoor Air Facts No. 4 (revised): Sick Building Syndrome 1* (1991) [hereinafter *Sick Building Syndrome*].
11. Stephen A. Loewy et al., *Indoor Pollution in Commercial Buildings: Legal Requirements and Emerging Trends*, 3 *U. BALT. J. ENVTL. L.* 29, 39 (1993) (citing Insurance Information Institute, *Insurance Review* 33 (1990)).
12. See, e.g., Reisman, supra note 7, at 36; *The Inside Story*, supra note 3, at 29; *Sick Building Syndrome*, supra note 10, at 1; Gene J. Heady, *Comment, Stuck Inside These Four Walls: Recognition of*

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13. Sick Building Syndrome, *supra* note 10, at 1.

14. Heady, *supra* note 12, at 1052.

15. *Id.*

16. Andrew Hopon, Jr., & Joseph C. Gergits, Indoor Environment: Regulatory Developments and Emerging Standards of Care, 62 DEF. COUNS. J. 47, 55 (1995).

17. Heady, *supra* note 12, at 1063.

18. For a discussion of the contributing factors that cause SBS, see Office of Air and Radiation, U.S. Env'tl. Protection Agency and U.S. Consumer Prod. Safety Comm's, *The Inside Story: A Guide to Indoor Air Quality* 27 (1988).

19. Heady, *supra* note 12, at 1062; Berger, *supra* note 12, at 1.

20. Heady, *supra* note 12, at 1064.

21. Terry Morehead Dworkin & Jane P. Mallor, Liability for Formaldehyde-Contaminated Housing Materials: Toxic Torts in the Home, 21 AM. BUS. L.J. 307, 323 (1983).

22. *Maltbey v. Nu Way Builders, Inc.*, No. 84-921 (Wis. Ct. App. Mar. 26, 1985).

23. See Dworkin & Mallor, *supra* note 22, at 23 (citing *Berman v. Watergate West, Inc.*, 391 A.2d 1351, 1357-58 (D.C. App. 1978); Comment, Home Sales: A Crack in the Caveat Emptor Shield, 29 MERCER L. REV. 323, 330 n.43 (1977)).

24. Heady, *supra* note 12, at 1070.

25. See Reisman, *supra* note 7, at 39-46.

26. *Id.* at 41-42.

27. 612 S.W.2d 321 (Ark. 1981).

28. Calif. Super. Ct. settled Oct. 15, 1990.

29. Geisler, *supra* note 2, at 528. The complexity and high costs of establishing causation through expert medical, scientific and engineering testimony leads to a great number of SBS claims pursued as class actions. Heady, *supra* note 12, at 1080.

30. See Thomas F. Icard, Jr., & Wm. Cary Wright, Sick Building Syndrome and Building-Related Illness Claims: Defining the Practical and Legal Issues, *Construction Law.*, Oct. 14, 1994, at 31-32.

31. Geisler, *supra* note 2, at 528.
32. *Id.* at 529.
33. *Wis. Pub. Serv. Corp v. Heritage Mut. Ins. Co.*, 548 N.W.2d 544, 548 (Wis. Ct. App. 1996)
34. Hendrick & Wiesel, *The New Commercial General Liability Forms: An Introduction and Critique*, 36 *FED'N INS. & CORP. COUNS. Q.* 319, 346-47 (1986). See Timothy A. Colvig, *What Every Owner/Contractor Should Know About Hazardous Waste and Toxic Torts*, 330 *PLI/Real* 329, 389-90 (1989) for exact wording of 1986 model form.
35. *Icard & Wright*, *supra* note 30, at 33 (citing *United States Fidelity & Guar. Co. v. Wilkin Insulation Co.*, 578 N.E.2d 926 (Ill. 1991) (insurer had duty to defend under pre-1973 standard CGL policy); *Continental Cas. Co. v. Rapid-American Corp.*, 609 N.E.2d 506 (N.Y. 1993) (insurer had duty to defend under standard CGL Policy)).
36. No. 95-3015 (Ct. App. Oct. 9, 1996), petition for review filed (Nov. 8, 1996).
37. 164 *Wis. 2d* 499, 476 N.W.2d 280 (Ct. App. 1991).
38. 158 *Wis. 2d* 64, 462 N.W.2d 218 (Ct. App. 1990).
39. 863 *F. Supp.* 38 (D.Mass. 1994).
40. 446 N.W.2d 419 (Minn. Ct. App. 1989).
41. 925 *F. Supp.* 758 (M.D. Fla. 1996).
42. 656 *A.2d* 142 (Pa. Super. Ct. 1994).
43. 517 N.W.2d 888 (Minn. 1994).
44. Case No. 95-2851.
45. Frank B. Cross, *Legal Responses to Indoor Air Pollution* 169 (1990).